The Puzzling First Amendment Overbreadth Doctrine

Alfred Hill

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THE PUZZLING FIRST AMENDMENT
OVERBREADTH DOCTRINE

Alfred Hill

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When you come to a fork in the road, take it.

—Yogi Berra (attributed)

INTRODUCTION

In general, persons complaining that a statute is unconstitutional are required to show that it is unconstitutional as applied to them; possible unconstitutionality as to others is deemed irrelevant. This will be referred to as the as-applied mode of constitutional adjudication. An exception has developed when claims of overbreadth are made with regard to statutes impairing freedom of expression. This exception, which will be referred to as the First Amendment Overbreadth (“FAO”) Doctrine, permits attack on such a statute by persons who have no ground for constitutional complaint in their own right upon a showing that the statute invades the constitutionally protected conduct of others. If such overbreadth is found and is substantial, the statute can no longer be enforced as written. If not amended, it must be stripped of its unconstitutional features by judicial construction before prosecutions under it can be sustained. The purpose, according to the Supreme Court,

2. See, e.g., Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (applying the overbreadth doctrine to invalidate a resolution banning all "First Amendment activities" at Los Angeles International Airport); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972) (holding that Georgia's "fighting words" statute was unconstitutionally overbroad); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (dealing with a statute aimed at subversive activity).
3. FAO cases typically involve criminal prosecutions or anticipatory actions to fend off such prosecutions, but they can also arise in a civil context. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601 (1973) (involving restrictions on state employees). In discussing FAO cases, the criminal context is usually assumed to avoid more cumbersome locations.

Similarly, this Article makes references to statutes that are constitutional as to the claimant and unconstitutional as to others. But the same problem arises when some applications of the statute to the claimant are constitutional while other applications to the same person are unconstitutional. Again, to avoid more cumbersome locations, the first-person/third-person terminology is employed throughout.

4. See New York v. Ferber, 458 U.S. 747, 769 (1982); Broadrick, 413 U.S. at 615. Compare the plurality opinion of Justices John Paul Stevens and Ruth Bader Ginsburg in Morse v. Republican Party, 116 S. Ct. 1186 (1996), which considered the First Amendment validity of the Voting Rights Act of 1965, but only with respect to how it may abridge associational rights. See id. at 1210 n.38. Justices Antonin Scalia and Clarence Thomas commented, in their dissent, that the other Justices' refusal to consider the overbreadth implications of the case was "astounding." Id. at 1216-17.
is to curb the chilling effect of statutory overbreadth on protected speech.5

The FAO Doctrine is applicable in every court in the land, starting at the trial level. It has been the subject of an enormous amount of litigation.6 Yet, despite the fact that over thirty years have passed since its first modern formulation in Dombrowski v. Pfister,7 the FAO Doctrine remains shrouded in mystery.

Thus, the Court keeps repeating that the FAO Doctrine is “strong medicine” to be imposed “sparingly and only as a last resort.”8 But the FAO Doctrine is not imposed only as a last resort. Indeed, the contrary is the case, for reasons inherent in the Doctrine itself. Further, FAO “medicine” is relatively mild. It does little to curb chilling—not that an effective “medicine” designed to that end would have to be “strong.”

The tenuous nature of the Court’s hold on the FAO Doctrine can be gauged from the fact that the Court has made contradictory statements about the remedial consequences of overbreadth, in apparent unawareness of any inconsistency. Indeed, not long ago, while purporting to state existing law and without protest by any of the Justices, the Court rationalized the FAO Doctrine in a way that essentially repudiated its basic premise9—as the Author will attempt to show.

Part I of this Article deals with the remedial implications of an adjudication of FAO overbreadth, discusses the problem of invalidation generally, and culminates in an inquiry into whether the FAO Doctrine substantially eliminates chilling, and, if not, what can be done to achieve that goal. Part II deals with the “last resort” issue, the burdensomeness issue and a related matter.

Part III deals with a thesis propounded by my colleague Henry Monaghan, to the effect that the FAO Doctrine, properly understood, is no more than the according of a traditional remedy for protection against punishment under a void statute.10 This thesis has won substantial

5. See Dombrowski, 380 U.S. at 487 (“If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation.”).

6. The impact of the FAO Doctrine can be gauged from the fact that Lexis lists over 3,000 cases after conducting the following search: overbreadth and (speech or expression or first w/l amendment).


9. See Board of Trustees v. Fox, 492 U.S. 469, 485 (1989) (addressing the complaint that a university resolution prohibiting some commercial activities in dormitories was overbroad).

academic support. However, it will be shown that the thesis is not an alternative rationale for what courts do in an FAO case, but something very different; in effect, the thesis strips the FAO Doctrine of its counter-chilling function and transforms the FAO remedy accordingly. The problem is of immediate importance because Monaghan's thesis may have been the basis of the Supreme Court decision in Board of Trustees v. Fox,11 which repudiates the basic premises of the FAO Doctrine. This decision is taken up at the end of the Article, not because it is considered last in importance, but because analysis of the FAO Doctrine in the previous pages may be conducive to understanding the decision and its ramifications.

As observed earlier, the FAO Doctrine is concerned only with over-breadth that is substantial, the reason being that in the absence of substantiability there is no significant chilling. In the following discussion the substantiability of the overbreadth in question will be assumed.12

I. REMEDIAL IMPLICATIONS OF THE FAO DOCTRINE

The FAO Doctrine, which has been described at the outset,13 is deceptively simple. Its puzzling features begin to emerge when consideration is given to its remedial implications. But first, a point of terminology will be noted. Practice under the general rule, which requires a

11. 492 U.S. 469 (1989); see also supra text accompanying note 9.
12. In Thornhill v. Alabama, 310 U.S. 88 (1940), the Court gave utterance for the first time to the principle that, in cases involving speech, persons not constitutionally protected themselves can challenge a statute solely on the basis of an unconstitutional burden on the speech of third persons. See id. at 96-98.

Before and after Thornhill, the Court frequently used the term "overbreadth" interchangeably with like terms (over-inclusiveness, less (or least) restrictive means, insufficiently narrow tailoring) in passing on the substantive issue of constitutionality vel non. For extensive discussions of such cases, see Lawrence A. Alexander, Is There an Overbreadth Doctrine?, 22 San Diego L. Rev. 541 (1985); Martin H. Redish, The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine, 78 NW. U. L. Rev. 1031, 1044-45 (1983); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970). These cases are of obvious pertinence in the FAO context, for FAO relief is unavailable unless the statute is unconstitutional as to third persons. But their pertinence is essentially limited to that issue. They tell us little, if anything, concerning the peculiar incidents of the FAO Doctrine itself. At least, they are generally unhelpful with regard to the issues discussed in this Article, as outlined above.

This is not to say that the FAO Doctrine is unique in allowing a claimant whose own conduct is not constitutionally protected to assert the rights of persons whose conduct is so protected. For other exceptions to the rule that claimants may assert only their own constitutional rights, see Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 152-53, 169-95 (4th ed. 1996) (hereinafter Hart & Wechsler).
13. See supra text accompanying notes 1-5.
showing that the statute is unconstitutional as applied to the conduct of the claimants themselves, will be referred to as adjudication in the as-applied mode. Practice under the FAO Doctrine, under which claimants can prevail by showing the unconstitutionality of the statute as applied to third persons, will be referred to as adjudication in the FAO mode.

A. Remand or Invalidation

The Supreme Court has given disparate answers on what follows upon a holding of overbreadth. In some cases the Court has said that the consequence of such a holding is that enforcement of the statute must be suspended until overbreadth is eliminated, after which prior violators whose conduct is not constitutionally protected can be prosecuted (unless they can credibly claim unfair surprise from application of the statutory language as judicially modified).14 In Osborne v. Ohio,15 seemingly unaware of these earlier cases, the Court declared that if a statute is invalidated for overbreadth, "there [can] be no conviction... even of those whose... conduct is unprotected by the First Amendment."16 A similar view is apparent in some other recent opinions.17

It is a basic principle of constitutional adjudication that a statute should not be held unconstitutional unless the court has first determined that the statute cannot be saved by a validating construction.18 This is

16. Id. at 121.
18. See, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). There is much confusion concerning the judicial function with regard to statutory construction. It is often said that if a statute can be construed in a way that will save it and in a way that will destroy it, the court should adopt the saving construction. See, e.g., Anniston Mfg. Co. v. Davis, 301 U.S. 337, 351-52 (1937) (addressing the constitutionality of three provisions of the Revenue Act of 1936). Similarly, it has been said, perhaps even more often, that a court should adopt a saving construction if "fairly possible." See United States v. Locke, 471 U.S. 84, 92 (1985). Such statements should not be taken to mean that the court must look solely to the words themselves, as if they existed in a legal vacuum. Very commonly, the court does not rest on the statutory language; what the court calls a saving construction amounts essentially to a rewriting of the statute to accord with what the court deems to be the legislature's probable intent should the statutory language prove to be constitutionally defective.
true in FAO cases as well. But a finding of overbreadth is the first step in this process, for a court cannot proceed meaningfully with the construction issue unless it determines in what respects, if any, the statute

Thus, in Anniston, a federal statute spelled out with great specificity the nature of the proof incumbent on a claimant entitled to a refund from the government. See Anniston, 301 U.S. at 341. In response to the argument that it would be impossible to supply the requisite proof in some situations, the Court read into the statute an exception for such cases, stating that it declined to attribute to Congress "an intent to defray the Fifth Amendment." Id. at 351.

Similarly illustrative is Panama Railroad Co. v. Johnson, 264 U.S. 375 (1924), where a federal statute conferring certain rights on maritime workers if they sued at common law was held to confer the same rights (except entitlement to jury trial) if they sued in admiralty. See id. at 389-90. The statute clearly provided otherwise, but the Court was of the view that a literal reading would present "a grave question . . . respecting [the statute's] constitutional validity." Id. at 390. For cases on the state level, see People v. Fitzgerald, 573 P.2d 100, 103-04 (Colo. 1978) (en banc) (overcoming an overbreadth challenge by construing a statute outlawing the making of "unreasonable noise" to apply only when there is a "clear and present danger of violence or where the communication is not intended as such but is merely a guise to disturb persons") (quoting In re Brown, 510 P.2d 1017, 1021 (Cal. 1973))); and Insurance Co. of North America v. Russell, 271 S.E.2d 178, 181 (Ga. 1980) (holding a statute unconstitutional because of discrimination between widows and widowers and construing it to treat them equally as the "best [way] to facilitate legislative intent where the expressed intent . . . [could not] be carried out").

The rendition of a saving construction in lieu of statutory invalidation is not a mere matter of judicial preference. The saving construction can best be understood as submission to the principle of legislative supremacy. As the Supreme Court has said, in saving a statute the court is fulfilling its "duty" to the legislature. See Boos v. Barry, 485 U.S. 312, 330-31 (1988); United States v. Harris, 347 U.S. 612, 618 (1954); see also Leeman v. State, 357 So. 2d 703, 705 (Fla. 1978) (regarding the duty of state courts towards state legislatures). This involves effectuating the intent of the legislature to the extent compatible with the judicial function. If, say, an obscenity statute is found to reach too far in its definition of obscenity, it can fairly be inferred that the legislature would have "wanted" to punish at least the hardcore pornographer. Indeed, in such a case the Court declared a contrary supposition as to the legislature's intent to be "frivolous" and saved the statute by striking out an invalidating term. See Brockett, 472 U.S. at 505-07.

On the state level, this is illustrated by cases where the courts have written into state obscenity statutes the latest doctrinal wrinkles announced by the Supreme Court. See, e.g., New York v. Ferber, 458 U.S. 747, 755-56 n.7 (1982) (listing cases in which state courts have "judicially incorporated the Miller test for obscenity").

Often enough a court will say, as the Supreme Court did in Apheber v. Secretary of State, 378 U.S. 500 (1964), that it will not engage in "rewriting" a statute to save it. See id. at 515. While courts are hardly steadfast in this regard, there may be good reasons for declining to "rewrite." Thus, a court is not warranted in doing so if a particular saving construction is one that the legislature would not have "wanted," or if there is no reasonable basis for inferring what the legislature would have "wanted," or, even assuming the legislative intent to be clear, the court lacks competence to do the job, as where special expertise or fact-finding capacity is needed in the particular case. In any event, the court should act judiciously concerning the degree to which it takes on the job of correcting legislative error. Doing too much is incompatible with the limited role of the judiciary in American constitutional systems. Wholesale rewriting is problematic, even if it can be surmised that the legislature would have wanted the court to tear up the old statute and write a new one.

Finally, it should be evident that since federal courts cannot render authoritative constructions of state statutes, special problems arise when a state statute is before a federal court. See United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).
needs to be saved;\(^{19}\) and the court must then decide, if saving is needed, whether a particular construction is constitutionally adequate. A determination of overbreadth *vel non* is necessarily in the foreground.\(^{20}\) The court that makes the finding of overbreadth may or may not be the court that decides the issue of construction. Preliminary focus on the role of the particular court may be useful in connection with many of the problems discussed in this Article.

When the Supreme Court reviews a state court judgment pertaining to a state statute, the Supreme Court cannot render an authoritative construction of the statute and probably lacks authority even to try.\(^{21}\) Accordingly, the traditional practice of the Court upon finding constitutional taint in a state statute is to remand the case to the state court for proceedings not inconsistent with the holding.\(^{22}\) This has been its practice in FAO cases as well.\(^{23}\)

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19. It may seem at first blush that an overbroad statute can be saved simply by a construction in which the valid part applicable to the claimant is separable from the remainder. This is not true. In the as-applied mode, the only question is whether that portion of the statute applicable to the claimant is valid. The question of separability does not arise except as a matter of construction, which, with regard to a state statute, does not present a federal question. *See infra* notes 85-86 and accompanying text. Whereas the as-applied mode inquiry is directed to what is right with the statute, the FAO mode inquiry is directed to what is wrong with the statute. Overbreadth must be eliminated. Only then does it become relevant, as a matter of construction, whether the valid part applicable to the claimant is separable from the part or parts that were eliminated. *See infra* notes 85-86 and accompanying text.

20. There has been much discussion of the relationship between overbreadth and vagueness in the FAO context. *See, e.g., Laurence H. Tribe, American Constitutional Law* 1030-37 (2d ed. 1988). Here it may be remarked that if a vague statute exerts a chilling effect on speech, it may become a basis for invoking the FAO Doctrine. The subject is further discussed in Alfred Hill, *Constitutional Vagueness Doctrine: A Revolution Unremarked and Unstable* (forthcoming) (on file with the Hofstra Law Review).

21. On review of a state court judgment in a pre-FAO case, *Dorcy v. Kansas*, 264 U.S. 286, 291 (1924) (Brandeis, J.), the Court asserted its power to decide an unsettled question of state law but said that it was not "obliged" to do so. In fact, the Court did not do so in the particular case, nor did it cite other cases where it had.

It is questionable whether *Dorcy*’s assertion of power to decide such a state question on review of a state court judgment comports with limitations on the Supreme Court’s statutory jurisdiction, as expounded in *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

22. *See Richmond v. Lewis*, 506 U.S. 40, 52 (1992) (remanding a case after holding that an aggravating factors statute, as applied to death penalty cases, was unconstitutionally vague).


The Court should not refrain from a remand on the ground that, in *its* view, the statute is not likely to be saved; this is something the Court cannot predict. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216-17 (1975), the state courts had upheld an ordinance against a claim of unconstitutionality. The Supreme Court invalidated the ordinance for overbreadth and reversed without a remand. *See id.* Its explanation was that the possibility of a limiting construction was
Federal habeas corpus proceedings instituted by state prisoners are characterized by what is, in effect, a remand procedure essentially similar to that employed by the Supreme Court in FAO cases. It is doubtful that, having determined the existence of overbreadth, the habeas judge can deal with the problem more broadly than is necessary for dealing with the immediate habeas petition, but this issue has not surfaced.

At the trial court level there is neither a remand nor suspension of enforcement. Consider an overbreadth attack in a unitary jurisdiction (state court/state statute; federal court/federal statute). The court cannot say, in effect, "We find the statute overbroad and order its enforcement suspended pending such time as we decide whether or not the statute can be saved by a limiting construction." This would be consistent with the goals of the FAO Doctrine but would be contrary to the traditional rule that a statute cannot be invalidated unless it has first been determined that the statute cannot be saved. Upon a finding of overbreadth, a court of the unitary jurisdiction must either save the statute or invalidate it, and this seems to be the universal practice.

The situation is the same when a federal district court considers an action for anticipatory relief against operation of a state statute on the ground of overbreadth. The federal court can only guess at the construction that would be given to the statute by the state courts, and its task is further complicated for reasons that will not be pursued here. Still, the overbroad statute is invalidated only after a determination is made that the statute cannot be saved. Either way, the federal court is obliged to

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remote—largely for the surprising reasons that (1) the state courts had already upheld the statute against constitutional attack, and (2) the city had offered "several distinct justifications for the ordinance in its broadest terms." Id. at 217. But this happened before the Supreme Court announced the unconstitutionality of the ordinance and was hardly a basis for predicting what the state courts would have done (or what the city would have argued) if confronted with the unconstitutionality of the ordinance as written.

24. As a prerequisite for relief, the prisoner is bound to have raised the constitutional issue in the state courts. See 1 JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.3 (1988). Where the habeas court finds error, the prisoner is set free if he cannot be punished. See id. § 8.5. But if the prisoner remains subject to punishment without impairment of constitutional rights (e.g., after a new trial), the court orders a conditional release—the condition being that the state conduct such further proceedings as will afford vindication of the constitutional claim upheld in the habeas proceeding. See id.

25. See supra text accompanying note 8.


27. See United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); supra note 18; infra note 70.
make a final disposition of the case; suspension of enforcement is not an option. 26

A federal court of appeals reviews the judgments of only inferior federal courts and corrects their errors, if any; the Supreme Court plays a comparable role when it reviews federal judgments. 29 State appellate tribunals perform the same function with regard to state judgments. 30

B. The Effect of Invalidation

Consider the case of a statutory provision that outlaws advocating the violent overthrow of the government. Since advocacy, without more, is constitutionally protected, 31 the provision is invalid, and nobody is punishable under it. But a statute may contain valid as well as invalid provisions. That, by definition, is the kind of statute involved in an FAO case, where the Court acts at the behest of a violator whose own conduct is not constitutionally protected. 32 What the courts refer to as invalidation in such a case follows upon a holding that other parts of the statute are unconstitutional as written, and that the statute is not amenable to a

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28. Presumably, an overbreadth challenge to a federal statute can be made in a state court. But any attempt to block federal enforcement would encounter serious obstacles. See HART & WECHSLER, supra note 12, at 467-68. Another possible scenario would be one in which a federal statute is asserted to override an otherwise applicable state statute, and the federal statute is attacked for overbreadth. In principle, if overbreadth is established, the attack should succeed. The Author is unaware of any cases dealing with these problems.

29. See id. (discussing federal and Supreme Court jurisdiction).

30. See id. at 450-52.


32. This is how the Court has repeatedly formulated the Doctrine. See cases cited supra note 21. The point is emphasized in Board of Trustees v. Fox, 492 U.S. 469 (1989), which is discussed infra at text accompanying notes 94-105.

The formulation is inadequate in that it does not set limits on the reach of the Doctrine. Invalidation of an entire statute, or suspension of its operation, may sometimes be excessive. Suppose that a city's traffic code contains a provision on resisting arrest that places punitive restrictions on motorists attempting to justify their conduct to an arresting officer. No matter how outrageous such a provision is, it makes no sense to condemn the entire traffic code when a saving construction is not feasible. A less drastic solution is called for in such a case. This general problem has not been considered by the Supreme Court.

The formulation of the Doctrine is also defective in confining the Doctrine's operation to cases where there is a claimant who has violated a valid part of a statute. When a statute contains multiple parts that are all unconstitutional, the as-applied mode of adjudication applies, so that claimants have standing to assert only that their own constitutional rights were violated. Even when they are successful, the parts of the statute not bearing on their conduct are left standing. It would be anomalous to act against chilling when the statute is unconstitutional only in part but never when it is unconstitutional in all of its parts. Unfortunately, Board of Trustees v. Fox points in this direction.
saving construction. A holding that part of a statute is unconstitutional does not result in nullification of its valid parts.33

In principle, therefore, one who has violated the valid part of a statute remains subject to its sanctions. But it seems generally to be assumed that the successful FAO claimant goes free, since the Court often uses language—carelessly, it seems to this writer—suggesting that an overbroad statute has indeed been nullified in its entirety.34 The argument here is only that successful FAO claimants ought not to go free for no better reason other than the Court has used broad language of invalidation. Such persons are typically hardcore violators, since these are typically the ones who are prosecuted. They receive a windfall, and the state is burdened in its efforts to eradicate such egregious abuses as child pornography. These costs would be supportable if letting successful FAO claimants go would somehow serve the purposes of the FAO Doctrine. The consequences of a successful outcome in an FAO case can be

33. Even when a Court has purportedly invalidated a statute in its entirety, that does not result in nullification of parts of a statute whose constitutionality was not in issue and passed upon. See Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam).

34. When a statute is unconstitutional as written (or construed), the prevailing practice is to declare that the statute is unconstitutional on its face. Starting with United States v. Salerno, 481 U.S. 739, 745 (1987), the Court has taken to saying that a statute should not be facially invalidated unless it is invalid in its entirety. But distinct parts of a statute may be unconstitutional as written or construed; and before and sometimes even after Salerno, the Court has declared that such parts were facially unconstitutional. Still, use of the Salerno formulation persists. This development is discussed in Alfred Hill, Facial and As-Applied Invalidation of Statutes (forthcoming) (on file with the Hofstra Law Review).

This development is mentioned because the Court frequently speaks in terms of facial invalidation in FAO cases. See Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) ("A statute may be invalidated on its face . . . only if the overbreadth is 'substantial.'"); City of Houston v. Hill, 482 U.S. 451, 461 (1987) ("We . . . invalidated the ordinance in Lewis v. City of New Orleans, 415 U.S. 130 (1974) as facially overbroad."); New York v. Ferber, 458 U.S. 747, 769 (1982) ("[O]verbreadth . . . [must] be 'substantial' before the statute involved will be invalidated on its face."); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[The Court] cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe."); see also Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of certiorari) ("We have applied to statutes restricting speech a so-called 'overbreadth' doctrine, rendering such a statute invalid in all its applications (i.e., facially invalid) if it is invalid in any in any of any.").

In Dombrowski v. Pfister, 380 U.S. 479 (1965), where the FAO Doctrine received its first modern treatment, the Court prescribed facial scrutiny of the challenged statute. Evidently, the Court was concerned that scrutiny should not be confined to the provisions that applied to the claimant personally, as would be the case under the general rule that only first-person rights can be vindicated. See id. at 490-91. It is a far cry from this to facial invalidation, if facial invalidation is taken to mean that the entire statute is nullified. The question, however, has never been addressed by the Court.
anything the Court wants them to be.\textsuperscript{35}
One argument for freeing the successful claimant is that it would
tend to deter legislatures from writing overbroad statutes. Thus, the Court
has justified granting immunity to violators on the ground that the
legislature needs to be punished for enacting an unconstitutional statute
in the first place. According to the Court, the legislature should not be
allowed to get off without “paying” for its “mistakes.”\textsuperscript{36}
This notion is not a familiar one. To be sure, the judiciary
sometimes punishes the executive, as in the case of the exclusionary
rule.\textsuperscript{37} But a punitive measure aimed, as the exclusionary rule has been
rationalized, at deterring misconduct by the police is not quite the same
as a punitive measure designed to make the legislature more sensitive to
constitutional imperatives. Punishing the legislature for careless drafting
in this respect is likely to be as effective as punishing inferior courts (if
that were feasible) for allowing constitutional error to creep into their
opinions. No doubt legislators sometimes vote for a statute in the
expectation that the courts will invalidate it, but this must be relatively
rare. Meting out wholesale punishment to achieve deterrence in these few
situations seems injudicious.\textsuperscript{38} What is needed is guidance, not punish-
ment.
A more plausible basis for allowing past violators to go free is that
they would otherwise have no incentive to seek FAO relief. It is not clear
that sufficient incentive would be lacking.\textsuperscript{39} However, the purposes of
the FAO Doctrine would be advanced if at least a particular class of
violators were given immunity from punishment, as will be argued
below.

\textsuperscript{35} The significance of invalidation is elusive even apart from the point made in this Article.
\textit{See} Hill, supra note 34.
\textsuperscript{36} \textit{See} Osborne v. Ohio, 495 U.S. 103, 121 (1990); Massachusetts v. Oakes, 491 U.S. 576,
\textsuperscript{37} \textit{See}, e.g., Stone v. Powell, 442 U.S. 465, 492 (1976) ("Evidence obtained by police officers in
violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future
violations will decrease.").
\textsuperscript{38} The problem is discussed more fully by Professor Richard H. Fallon, Jr. in \textit{Making Sense
of Overbreadth}, 100 YALE L.J. 853, 888 & n.221, 889 (1991). Fallon believes legislatures would be
deterred. \textit{See id.} at 888 n.221, 898-903.
\textsuperscript{39} The typical claimant contends that his or her conduct is constitutionally protected. Adding
an FAO ground poses no meaningful burden and adds another issue. Multiple issues are conducive
to delay as cases wend their way up and down the appellate ladder, and with delay there is the
possibility that the prosecutor (perhaps a new one) will agree to a lesser charge or even drop the
case.
C. The Problem of Chilling

A striking feature of the present state of the law is that the chilling effect of an overbroad statute is not alleviated significantly with regard to conduct antedating an invalidation or saving construction. Violators cannot place reliance on the possibility of invalidation, since, for all they know, the statute may receive a saving construction instead. For chilling to be alleviated, there must be protection for the violator whether the statute is invalidated or saved.

The Supreme Court’s position that a saving construction opens the door to punishment of past violators is based on uncritical application of the rule regarding the curative effect of such a construction. This rule seems to be an aspect of the traditional principle that accords retroactive effect to judicial decisions. No doubt there are weighty reasons for this principle, but it should not be blindly followed when to do so would defeat appropriate measures of constitutional implementation. If the impetus to avoid the chilling effect of an overbroad statute is strong enough to support departure from the principle that only first-person constitutional rights may be vindicated, then it is strong enough, arguably, to warrant pro tanto departure from the retroactivity principle, in the interest of tailoring an FAO remedy that does not trench unnecessarily on important governmental interests. The Supreme Court has not considered such a possibility.

It does not follow that realizing the counterchilling purpose of the FAO Doctrine requires that all violators go free. At least in theory, one can distinguish between hardcore and softcore violators, with the former defined, for present purposes, as persons who cannot credibly assert that they believe their activity to be constitutionally protected. Such persons do not need protection from chilling and giving it to them needlessly burdens the state in its efforts to eradicate proscribable

40. See Osborne, 495 U.S. at 115-17.
41. In the criminal law context, the hardship of the principle is mitigated by the rule that retroactivity must not occasion unfair surprise. See Rabe v. Washington, 405 U.S. 313, 315 (1972). The principle has been eroded on the civil side. See, e.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 105-09 (1971) (holding that a Louisiana statute of limitations could not be applied retroactively).
42. Like some other terms in this Article, see supra note 3 and accompanying text, these are used for convenience. The concern here is not solely with obscenity statutes. In the case of any statute invalidly burdening speech, persons whose conduct is not constitutionally protected, but not hardcore in character, can by analogy be called softcore violators.
evils.\textsuperscript{43} Whether softcore violators are deserving of exoneration is beside the point; as a practical matter, unless they receive exoneration, the shadow of chilling cannot be significantly lifted from persons who might otherwise choose to avoid risk altogether by yielding to a statutory ban on constitutionally protected conduct.\textsuperscript{44} An advantage of such an approach, apart from its utility in curtailing chilling, is that it would impose a minimal burden on law enforcement since softcore violators are not often proceeded against, so far as one can tell from the reported cases.

The suggestion for modification of the FAO Doctrine can be simply put: (1) a saving construction would be retroactive only with regard to the hardcore violator; and (2) an “invalidation” would be effective only with regard to the softcore violator.

It must be added that the Supreme Court has expressed sharp hostility to this approach insofar as it relates to the saving construction. In Osborne, the claimant had contended that when a statute is overbroad, antecedent conduct should not be punishable, despite a saving construction.\textsuperscript{45} The Court replied that if such a remedial consequence inhered in the FAO Doctrine, this “would very likely invite reconsideration or redefinition of the doctrine in a way that would not serve First Amendment interests.”\textsuperscript{46} But the claimant was clearly a hardcore violator who had been convicted of child pornography.\textsuperscript{47} The Court did not consider the possibility of different treatment for softcore violators.\textsuperscript{48}

As matters stand, the FAO Doctrine significantly fails to eliminate the chilling effect of overbreadth on protected speech.\textsuperscript{49} It does not

\textsuperscript{43} It has been suggested in dictum that hardcore violators should be disqualified from seeking FAO relief altogether. See Brown v. Louisiana, 383 U.S. 131, 147-48 (1966) (Brennan, J., concurring in the judgment); Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965). The point was made in a narrow context in Dombrowski and more broadly in Brown. But the Court has never followed through in this matter, which is fortunate. For hardcore violators are the ones most commonly proceeded against; an overbroad statute could remain on the books for years before it is challenged by a softcore violator having the requisite standing.

\textsuperscript{44} Alternative approaches to the problem of a suitable FAO remedy are discussed from a different point of view in Fallon, supra note 38, at 890-92.

\textsuperscript{45} See Osborne, 495 U.S. at 121-22.

\textsuperscript{46} Id. at 122; see also Monaghan, supra note 10, at 14-23 (noting the earlier criticism of commentators who had argued broadly against allowance of the saving construction in an FAO context).

\textsuperscript{47} See Osborne, 495 U.S. at 106-07.

\textsuperscript{48} See id.

\textsuperscript{49} It has been observed that people are typically unaware of what statutes actually provide, and that they know even less of what are to them inaccessible judicial opinions that may be the definitive sources of what the statutes really mean. Is it therefore realistic to talk about the chilling
follow that the Doctrine serves no useful purpose. The Doctrine significantly accelerates the elimination of overbreadth, and that is no small thing.

II. THE "LAST RESORT" FALLACY AND OTHER MISCONCEPTIONS

The Supreme Court has repeatedly characterized the FAO Doctrine as "strong medicine," to be imposed "sparingly and only as a last resort." Presumably, this apprehension of burden underlies the Court's frequent strictures that FAO relief should be denied if the challenged statute is susceptible of a saving construction in a single action. But the "strong medicine" characterization is greatly exaggerated, and the "susceptibility" basis for denying FAO relief is mystifying. Further, there is no hesitancy in the imposition of such relief.

A. The "Last Resort" Fallacy

There is no evidence that the Supreme Court is heeding its own counsel of imposing FAO relief "sparingly and only as a last resort," or that the inferior courts, federal and state, are doing so. It is submitted that

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the reason is the incompatibility of such restraint with implementation of the FAO Doctrine.

The problem of past violations aside, the crux of the Doctrine is accelerating the elimination of overbreadth, whether by "invalidation" or by a saving construction. If the statute is not judicially salvageable in whole or in part, the task of repairing the damage, assuming it can be repaired, falls upon the legislature. But this is something that must happen sooner or later to that particular statute—usually later under the as-applied mode and sooner under the FAO mode.

Even if perturbed by the hardship consequent upon acceleration of this process, it does not appear that the Court sees the solution as an adoption of an approach to the asserted unconstitutionality affecting third persons that is more latitudinarian than the approach taken in the case of parties asserting their own rights to constitutional protection; there is nothing in the Court's opinions to indicate that the Court has adopted such a double standard. It is probable that all the Court has in mind is that a statute should not be "invalidated" if it can be saved. But acceleration of the saving construction is not attainable unless the deciding court, upon a showing of substantial overbreadth, is obliged to choose between saving the statute or "invalidating" it.\(^{52}\) To say that FAO relief may be imposed only as a last resort is to emasculate the FAO Doctrine insofar as it works to curb overbreadth through the saving construction—it is to say, in effect, that despite an ample showing of overbreadth, only as a last resort may a court be forbidden recourse to the as-applied mode. In this mode, overbreadth affecting only third persons is irrelevant, so that the problem of a saving construction does not even come up.

B. The "Susceptibility" Test

In Dombrowski v. Pfister, the Court for the first time declared that FAO relief should be denied if the statute attacked for overbreadth is one that is susceptible to a saving construction in a single action.\(^{53}\) In that situation, as the Court saw it, the as-applied mode serves to eliminate overbreadth without the need for "hammering out" the valid contours of the statute in successive prosecutions.\(^{54}\) Accordingly, there is simply no need to proceed in the FAO mode in such a case. The "susceptibility"

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52. See supra text accompanying notes 25-30.
53. See Dombrowski, 380 U.S. at 489-91.
54. See id. at 487.
point has frequently been reiterated by the Court.\(^{55}\) Yet, except for the single case mentioned below,\(^{56}\) FAO relief has never been denied on the "susceptibility" ground by the Supreme Court, or any other court as far as the Author is aware.\(^{57}\) Reasons are not hard to find.

Assume that the state's highest court has rejected an FAO claim, and that its judgment is under review by the Supreme Court. Assume further that the statute is one that can easily be given a saving construction in a single action. Withholding FAO relief on this basis would be senseless and futile since the state courts, if they acted in good faith, believe the statute to be constitutional. Without guidance from the Supreme Court, why should it be assumed that the state court will reverse itself in some future action? Denial of FAO relief in these circumstances would be perverse in its perpetuation of the chilling effect of the statute. In no such case has FAO relief been denied. On the other hand, if the state court has sustained an FAO claim, there is no point to an unguided directive that tells it, in effect, to think about the problem some more. If the state court has not, directly or by necessary implication, passed upon an FAO claim, there is no FAO issue before the Supreme Court. In short, the "susceptibility" test seems to make no sense when the Supreme Court sits in review of a state judgment.

Even more clearly, the test makes no sense in the courts of a unitary jurisdiction. If an overbreadth case comes to the court in the as-applied mode, and the statute can be given an adequate limiting construction within the confines of the as-applied mode, that should be done. If it cannot be done, that becomes the basis for proceeding in the FAO mode. The denial of FAO relief cannot be justified on the theory that the statute might yet be saved in some later action.\(^{58}\)

There are additional considerations when a federal court deals with an anticipatory attack on a state statute. If the courts of the state have previously upheld the statute against constitutional attack in another case,

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55. See supra text accompanying note 51.
56. See infra text accompanying note 60.
57. When a federal court grants FAO relief after declaring that the statute is not readily susceptible of a saving construction, this may reflect only the court’s view that the statute cannot be saved, readily or otherwise. This is illustrated in American Booksellers Ass'n v. Virginia, 802 F.2d 691, 696 (4th Cir. 1986). The subsequent proceedings in this case are discussed in Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988).
58. This would be tantamount to abstention, which may be justified when the controlling issue of law is subject to an authoritative ruling by the courts of another jurisdiction, see infra text accompanying notes 63-64, and which in any event is strongly disfavored in FAO actions, see infra text accompanying note 62.
relegating the federal claimant to the state courts on the "susceptibility" ground would be perverse, as previously argued in the discussion relating to the Supreme Court. On the other hand, if the state courts have not passed on the constitutional issue, it is at least arguable, absent obstacles to such a course, that it is appropriate to let the state courts proceed to that issue first. Such a course was prescribed in Young v. American Mini Theatres. But this is comparable to the use of the Pullman abstention, which the Court has said, before and since, that it strongly disfavors in FAO cases.

In fact, such a course is more far-reaching than the Pullman abstention; for, under Railroad Commission v. Pullman Co., federal relief is not withheld but postponed; the federal claimant is consigned to the state courts only when the statute is unclear and when it seems possible that the state courts might construe it in a way that would render unnecessary the decision of a constitutional question. Thus, Pullman is consistent with the basic rule that a federal court having jurisdiction

59. See supra text accompanying notes 57-58.
60. 427 U.S. 50, 61 (1976); see also Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987) (containing dictum that impliedly approves such a procedure).
61. See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941). Under the Pullman abstention, the federal court refrains from deciding the federal constitutional question pending resolution in the state court of an issue of state law that might moot the constitutional issue.
63. 312 U.S. 496 (1941).
64. In Pullman, the state statute was, in fact, unclear. See id. at 499. Subsequent cases have emphasized that the Pullman abstention is appropriate only when the statute is unclear. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) (stating that to rule otherwise would "negate the . . . enlargement of the jurisdiction of the federal district courts").

Since the purpose is to avoid unnecessary decisions on constitutional questions, the Pullman abstention makes equal sense when the statute is clear since the state might give the statute a limiting construction in order to avoid its complete nullification. A rational Pullman doctrine would require abstention except when a speedier disposition is desirable, as in cases of civil liberties and civil rights, and in cases involving financial burden that would be excessive under the circumstances. Cf. Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960) (Douglas, J., dissenting) (invoking a claimant with a $6,800 judgment for personal property loss under a floater insurance policy and the dissenting opinion decrying the "practice of making litigants travel a long, expensive road in order to obtain justice"). This litigation was terminated upon a second trip to the Supreme Court. See Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

In principle, the "importance of speed" in the particular case, Bellotti v. Baird, 428 U.S. 132, 151 (1976), may counsel against use of an available state certification procedure for the same reasons that it may counsel against the Pullman abstention, although a state procedure that allows direct access to the highest court of the state may tip the balance in favor of certification. See id.; HART & WECHSLER, supra note 12, at 1245-46.
under the governing law is bound to exercise that jurisdiction when duly invoked, despite the presence of troublesome issues governed by state law. There is no evidence that the Supreme Court has thought through the implications of abstention on the basis of a “susceptibility” test.

In sum, that test is without any pertinence except in the limited type of case last discussed, and there its role is dubious.

C. How Strong Is the FAO Doctrine’s “Strong Medicine?”

When the Supreme Court first characterized FAO relief as “strong medicine,” it was because, as the Court said, “enforcement of [the] statute . . . is totally forbidden” until the elimination of overbreadth. But suspension of enforcement is something that happens only when the Supreme Court (or an intermediate appellate court) remands following a determination of overbreadth. The trial courts are then required to dispose of the overbreadth issue with finality in the very same case—the same disposition that, absent error, they would have achieved in the first instance. Any delays as such are incidental to other kinds of constitutional adjudication as well. Injunctions against enforcement are not peculiar to FAO cases.

To be sure, if the outcome is invalidation of the statute, that is indeed burdensome since legislation is needed to fill the gap resulting from the voiding of the statute, and that may take some time. But this is always the effect of statutory invalidation. What is distinctive about an FAO case is that invalidation may come sooner than if only the as-applied mode were available for the constitutional challenge. But this in itself is not a legitimate ground for complaint of hardship. The as-applied mode, under which only first-person claims are acted upon, is founded not upon any concern for the convenience of the legislature, but rather upon concern for the proper institutional role of the judicial branch.

65. This is, of course, exemplified by the diversity jurisdiction.
68. See HART & WECHSLER, supra note 12, at 854-57.
69. See supra text accompanying notes 32-34.
70. There is an aspect of the FAO Doctrine’s operation that can be burdensome, but this may be curable. When an anticipatory action is brought in a federal district court against operation of a state statute, the court may decide against a saving construction in the mistaken assumption that this is what the state courts would have done. This should not cause lasting damage since the federal court can modify its coercive decree to take account of the later action in the state courts. Further, even temporary burdensomeness, occasioned by such a mistake as to state law, can be avoided by adoption, with appropriate modification, of the procedure employed in Virginia v. American
III. MONAGHAN'S THESIS AND THE OPINION IN FOX

Board of Trustees v. Fox,71 the case mentioned in the Introduction, threatens a restrictive application of the FAO Doctrine. This follows largely from the Court's statement in Fox that the FAO Doctrine is a "necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional."72 The statement was made conclusorily and without attribution, but it is a paraphrase of language in a 1970 Note in the Harvard Law Review.73 The Note did not argue that this characterization is the only valid aspect of the FAO Doctrine.74

In 1981 my colleague Henry Monaghan did take such a view and developed his position at some length.75 Monaghan's thesis has been influential, with endorsements by two leading constitutional law treatises.76 It has been much referred to, but rarely questioned, by commentators.77 However, what is most important is that it appears to

Booksellers Ass'n, 484 U.S. 383 (1988). Development of this point here would take us too far afield.
72. Id. at 485.
73. See Note, supra note 12, at 848 ("As a theoretical matter the claimant is asserting his own right not to be burdened by an unconstitutional rule of law . . . "). The passage quoted appears in a discussion of whether the FAO Doctrine can be rationalized as simply an aspect of as-applied adjudication. See id.
74. In a later passage, the Note states: "Once the chilling effect of overbreadth on privileged primary activity is taken seriously, the inadequacy of as applied review becomes evident." Id. at 858.
75. See Monaghan, supra note 10, at 4 (quoting language from the Note, supra note 12).
77. Monaghan's views are endorsed by several authors. See William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 244 & n.105 (1988); William Trosch, Comment, The Third Generation of Loitering Laws Goes to Court: Do Laws That Criminalize "Loitering with Intent to Sell Drugs" Pass Constitutional Muster?, 71 N.C. L. REV. 513, 535-39 (1993); see also George P. Choudas, Comment, Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of Its Gender-Based Victims, 44 EMORY L.J. 1069, 1158 (1995) ("[Monaghan']s comprehensive treatment of overbreadth theory [is] popularly considered among the most authoritative.").

In addition, Monaghan's views have received limited endorsement by other authors. See Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L. REV. 235, 262-64 (1994); Fallon, supra note 38, at 862, 874-75, 889. See infra note 93 for a discussion of the views of Dorf and Fallon.

As of this writing, these five articles are among 130 listed by Lexis as citing Monaghan's Overbreadth, supra note 10. Of the other 125 articles, only two are critical, and in both the criticism is summary in character. Professor Martin Redish says only that Monaghan's thesis is "conclusory and unresponsive." Redish, supra note 12, at 1040. Professor Lawrence Sager states that Monaghan's thesis is questionable because it is limited to the First Amendment and also because of incompatibility with the substantiality requirement. See Lawrence Gene Sager, Foreword: State Courts and the
have surfaced in Fox. The significance of what the Court said in Fox is probably best understood if attention is first directed to Monaghan's analysis of the problem.

A. Monaghan's Thesis

According to Monaghan, the FAO Doctrine, when properly understood, has made no change in our constitutional jurisprudence. He believes that the Doctrine is simply the application, in the First Amendment context, of a more general rule: "the conventional principle that any litigant may insist on not being burdened by a constitutionally invalid rule." As he sees it, if the statute impairs the constitutionally protected conduct of others, it is unconstitutional in its entirety—unless that part of it applicable to the defendant is separable and valid standing alone.

Monaghan does not distinguish between state and federal statutes. He recognizes that, in the as-applied mode, the Court considers the issue of unconstitutionality only in relation to the conduct of the claimant. But he contends that the Supreme Court's holdings in the as-applied mode make constitutional sense only if seen as resting on a "presumption" that the valid and invalid terms of the statute are separable. For this proposition Monaghan cites Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co., which involved the review of a state court judgment. The pertinent language of the Court is set out below, and the Author does not see in it any talk of a presumption. Nor is such talk

Strategic Space Between the Norms and Rules of Constitutional Law, 63 Tex. L. Rev., 959, 967 & n.22 (1985). For a discussion on the substantiality requirement, see infra text accompanying notes 88-89.

78. See Board of Trustees v. Fox, 492 U.S. 469, 484-85 (1989).
79. Monaghan, supra note 10, at 37.
80. See id. at 14-23.
81. See id. at 4-5.
82. 226 U.S. 217 (1912).
83. The railroad had argued that, assuming the statute was constitutional as applied to the actual conduct in the case, it was unconstitutional in other regards, and therefore should not be applied to it. Rejecting this argument, the Supreme Court said:

[T]his court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now.

Id. at 219-20. Comparable language may be found in Hatch v. Reardon, 204 U.S. 152, 160-61 (1907).

If Monaghan's theory of a presumption is correct, the question arises why it should not be equally applicable in a case involving freedom of expression, with the result that a statute impairing
to be found in other cases so far as the Author is aware. 84

To be sure, one who violates a statute is entitled to exoneration upon showing that (1) the statute is unconstitutional as to others, and (2) the terms of the statute are not separable. But even if rejection of such a defense is erroneous under the governing law, it does not follow that the claimant has been denied a right derived from the Constitution. Assume the argument is made in a state court that a statute of the state violates the federal constitution in its application to third persons, and also that its provisions are nonseparable. The claim of nonseparability does not arise under the Constitution, but rather under the law of the state. This is obvious when the statute contains an express separability clause. 85 In the absence of such a clause, the claim rests upon construction of the statute. If the state legislature intended nonseparability, and the state court concludes otherwise, the court may have failed in its duty to the legislature but has done nothing that offends the federal constitution.

The same analysis should control when a claim is made, in a federal court, that the provisions of a federal statute are nonseparable. If the claim is not frivolous and timely raised, the federal court is bound to consider it, but only in deference to congressional paramouncty on this point. A claim that the federal court failed in its duty to Congress is hardly enough to support an argument that the claimant's constitutional rights were violated thereby; otherwise every adverse ruling on the construction of a federal statute could be transmuted into a claim of deprivation of a constitutional right. Similarly, state judicial "error" in

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84. Monaghan refers to Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160 (1894), where, in dictum, the Court spoke approvingly of a state court declaration that "[t]he constitutional validity of law is to be tested not by what has been done under it, but by what may, by its authority, be done." Id. at 169-70 (quoting Stuart v. Palmer, 74 N.Y. 183, 188 (1878)). The statement supports Monaghan's thesis, but is inconsistent with the as-applied mode of constitutional adjudication. He cites but one case where the Court acted compatibly with this quoted dictum, Wuchter v. Pizzuti, 276 U.S. 13 (1928), which invalidated a service of process statute. He then observes, however, that Wuchter "is vulnerable to criticism for ignoring the 'Yazoo presumption.'" Monaghan, supra note 10, at 12 n.49. Otherwise, the cases he cites do not support his position. A case somewhat similar to Wuchter is Shaffer v. Heimer, 433 U.S. 186 (1977).

construing a state statute is not a ground for claiming violation even of the state constitution. To assume that a statute that is unenforceable by reason of nonseparability is necessarily unconstitutional is simply fallacious.86

Judicial arbitrariness in construing a state statute to be separable may seem at first blush to be a violation of substantive due process. But relief on this basis is problematic.87 In any event, Monaghan’s argument is not predicated on arbitrariness, which he does not so much as mention—indeed, which would limit the operation of his thesis to the very

86. Monaghan’s position is the more perplexing because he understands that, in the case of a state statute, the question of separability is “controlled by state law.” Monaghan, supra note 10, at 34. That being so, if a state statute is constitutional insofar as applied to the claimant, and if the state courts have rejected an argument of nonseparability, in what sense has the claimant been convicted under an invalid (or unconstitutional) statute, even for state purposes let alone federal purposes? State courts do not proclaim that they are dispensing punishments on the basis of concededly invalid statutes. They invoke the sanction of state law for what they do, and the law of a state is what the courts of the state declare it to be. If a state court rejects a claim of nonseparability, it states that it is doing so as a matter of construction of the pertinent statute or on some other state law ground, such as failure to raise the issue in a timely manner. See Tribe, supra note 20, § 3-24, at 162-64. When a federal statute is involved, rejection of a claim of nonseparability is likewise dispositive.

87. If state judicial arbitrariness in the construction of a state statute were a violation of substantive due process, then so too would be all state decisions involving the common law. Every conceivable state court ruling on a question of state law would be reviewable by the Supreme Court on a claim of error so gross as to verge into arbitrariness. Claims of procedural unfairness are another matter; they raise the issue of procedural due process and are of course reviewable. But if there were a rule that all nonprocedural determinations by state courts on state law matters are reviewable for arbitrariness, and if the Supreme Court took such a rule seriously, the result would be to crowd out a major part of the Court’s other business. The Author is unaware of any Supreme Court decision supporting such use of the Due Process Clause.

Further, if there were such a doctrine, it would receive little application as a practical matter. For if it were at all possible to attribute the action of the state court to stupefying incompetence, as distinct from, say, knavery, there can be little doubt that the Supreme Court would incline towards the former rationalization and declare the issue to be one of state law.

But an exception must be noted, arising when the jurisdiction of the Supreme Court is invoked for review of state court judgments. For example, if a claim is made that a state statute violates the Contract Clause, a state court ruling that a contract never came into existence to begin with would normally be considered an independent state ground precluding Supreme Court review of the question arising under the Contract Clause. But if the state court is allowed the last word on this preliminary issue, the effect would be a Contract Clause having no more force than the state courts are willing to allow it. Hence, the rule has developed that, to preclude Supreme Court review of the constitutional question, the state ground must be “adequate,” which this Author understands to mean that the state court’s decision of the preliminary issue of state law must not be arbitrary or otherwise clearly inconsistent with the state law materials available to it at the time of its decision. See Alfred Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943 (1965).

A wholly different problem would be presented if a state court arbitrarily refused to entertain a claim of nonseparability. Assuming such a claim may appropriately be asserted under the law of the state, this could constitute procedural unfairness in violation of the Due Process Clause.
few cases in which error of this magnitude could be demonstrated.

Also puzzling is Monaghan’s argument for rejecting the substantiality requirement (under which an overbreadth challenge fails for want of significant chilling). He contends, in effect, that rejection of an overbreadth attack on this basis is tantamount to denial of an opportunity to show that the statute applied to the claimant is unconstitutional in that its valid provisions are not separable from its invalid provisions. But a claimant has always been entitled to advance a defense based on nonseparability; indeed, such cases have been quite common. The claimant has always been free to invoke review by the Supreme Court if such a defense has been rejected, although, in the case of a state statute, success would turn upon convincing the Court that the nonseparability point as such presents a federal question. So far as the Author is aware, the FAO cases that have been considered by the Court have never involved a claim of nonseparability, and Monaghan does not contend otherwise. This kind of claim is not being rejected when the claimant seeks relief solely on the ground of overbreadth inimical to third persons and relief is denied for lack of substantiality.

Finally, even if Monaghan’s thesis was valid, there would be little scope for its operation. After all, the terms of criminal statutes are typically construed as separable; a holding of nonseparability is the relatively rare exception. If a state statute is involved and a state court holds the part pertaining to the claimant to be separable while upholding the rest of the statute, or pretermitted that issue, under Monaghan’s view the remainder of the statute, even if the Supreme Court would have found it overbroad, remains on the books no matter how severe the chill that is cast upon protected speech.

There would be a similar outcome when what is involved is a federal statute. Thus, Monaghan errs in his belief that he is offering a superior rationalization for the results reached by the Supreme Court under the FAO Doctrine. His thesis is essentially

88. See Monaghan, supra note 10, at 33-35.
89. Typically, a case in which a court talks about separability vel non is one in which the statute has been invalidated in its application to others, or that issue has been pretermitted. See the listings under Statutes section 64(6) in the successive Decennial Digests published by the West Publishing Company.
90. See Dorf, supra note 77, at 295-304 (state practice); id. at 288-93 (federal practice).
91. See Monaghan, supra note 10, at 36-39.
92. In cases involving state statutes, a holding of separability by a state court would ordinarily constitute an independent state ground, precluding Supreme Court review of the constitutional issue. See Hill, supra note 87, at 948. In the case of a federal statute, a sustainable holding of separability by a federal court would preclude any ruling on the constitutional issue as unnecessary and therefore to be avoided. See supra note 18.
a prescription for elimination of the FAO Doctrine. A basic problem with Monaghan’s thesis is that it sees the FAO Doctrine as one concerned exclusively with the rights of the claimant. The peril of such an approach is illustrated by the case now to be discussed.

B. Board of Trustees v. Fox

In Board of Trustees v. Fox, the Court held that, in an FAO case, a first-person claim may be joined with a third-person claim. Then, without reference to Monaghan or other sources, the Court went on to say:

It is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff’s own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied . . . . Thus, for reasons relating both to the proper functioning

93. Professor Fallon agrees with Monaghan on some essentials. He believes that Monaghan’s thesis embraces what he, Fallon, calls the FAO Doctrine’s “rule-of-law core”: to wit, “a statute that prescribes any constitutionally protected conduct is unconstitutional in its totality unless severable.” Fallon, supra note 38, at 874-75, 889. But he also makes the point that this “rule-of-law core” is a “narrow” one, id. at 889, concluding that most of the FAO decisions have been intended by the Court as prophylaxis, see id. at 875, 889. In this connection, he recognizes that if Monaghan’s position constituted the governing rule, a statute would survive a holding of separability despite the chilling effect of its unconstitutional elements. See id. at 889.

It is difficult to understand Fallon’s “rule-of-law” argument except as one pertaining to punishment despite nonseparability. But as has been argued above, error in rejecting a claim of nonseparability does not constitute impairment of a constitutional right. See supra text accompanying notes 85-86. It would be another matter if the court proclaims that the terms of the statute are not separable but sends the claimant to jail anyway; that would indeed be contrary to the rule of law, but such cases do not arise.

So far as concerns Monaghan’s argument, Professor Dorf agrees essentially with Professor Fallon. See Dorf, supra note 77, at 261-64.

Professor Tribe’s endorsement of Monaghan’s position is summary in character and apparently unqualified. He provides an additional argument: “When the Supreme Court declares a statute void on its face for overbreadth, such a holding implies . . . that a saving construction is unavailable . . . .” Tribe, supra note 20, § 12-32, at 1036-37. This may be true in the case of a federal statute, assuming that the issue of a saving construction has been duly raised. It is patently untrue in litigation over a state statute, where the Supreme Court has no basis for predicting whether or not a state court would render an adequate saving construction. See Note, supra note 12, at 894-95.

94. See Board of Trustees v. Fox, 492 U.S. 469, 484 (1989).
of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.\textsuperscript{95}

While the foregoing statement purported to be in accord with existing law, nothing like it had ever before appeared in an opinion of the Court. What the statement comes down to is that, insofar as operation of the FAO Doctrine tends to eliminate the chilling effect of overbreadth on third persons, this is incidental and dubious as an end in itself; for to countenance it as an end in itself would encourage "gratuitous wholesale attacks upon state and federal laws."\textsuperscript{96} But what the Court chose to call "gratuitous wholesale attacks" are precisely what the FAO Doctrine, as consistently defined and applied in the past, is designed to promote in order to prevent the chilling of the protected speech of third persons.\textsuperscript{97}

Also puzzling is the Court's stated reluctance to "proceed to an overbreadth issue unnecessarily."\textsuperscript{98} If economy of judicial effort is a controlling consideration in this context, the Court would have done well to strangle the FAO Doctrine at its birth. After all, under the as-applied mode previously applicable, if the claimant failed in a first-person attack on the statute, a court was bound to go no further.

The Court's statement that the "overbreadth doctrine is a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional" accords with Monaghan's own view of the matter.\textsuperscript{99} The implication of the quoted language is that such means did not exist prior to development of the FAO Doctrine, which is demonstrably and unsurprisingly false;\textsuperscript{100} or else that the FAO Doctrine is no more than declaratory of the law as it stood before, which would signify that, as Monaghan contends, the Court has erred in denying FAO relief in cases where there was no substantial chilling and in cases of

\textsuperscript{95} Id. at 484-85 (emphasis added). Earlier, in New York v. Ferber, 458 U.S. 747 (1982), the Court, in the course of observing that one whose conduct is unprotected may prevail by showing that the pertinent statute is "invalid on its face," stated also that "[o]verbreadth challenges are only one type of facial attack," with a "see generally" citation of Monaghan's Overbreadth. Id. at 768 n.21. However, the rest of the opinion is the antithesis of Monaghan's viewpoint, for it speaks of the FAO Doctrine as essentially a standing rule designed to curtail the chilling effect of overbroad statutes; the holding in the case was that the FAO Doctrine should not apply because the chilling effect of the statute involved was insubstantial. See id. at 769-74.

\textsuperscript{96} Fox, 492 U.S. at 485.

\textsuperscript{97} It is not as if the court could proceed without a showing of justiciability—which requires that by reason of the statute the claimant suffers punishment or has reason to fear imminent punishment. See Tribe, supra note 20, at 68-69.

\textsuperscript{98} Fox, 492 U.S. at 484-85.

\textsuperscript{99} Id. at 485; see also supra text accompanying notes 88-89.

\textsuperscript{100} See supra text accompanying notes 88-89.
commercial speech;\textsuperscript{101} or else the Court simply forgot its innumerable decisions in the as-applied mode, under which unprivileged conduct remains punishable whether or not the pertinent statute is unconstitutional with regard to third persons.

Under Fox, if claimants succeed without the benefit of the FAO Doctrine because their own constitutional rights have been impaired, the overbroad statute is left standing.\textsuperscript{102} The Court sees this as a virtue because judicial economy has been served. Whether a court should pursue overbreadth analysis and decree accordingly is perhaps not an easy question when claimants have successfully asserted rights personal to themselves.\textsuperscript{103} But it is a question worth exploring. Fox, in effect, proclaims that there is nothing to explore since the FAO Doctrine exists only to serve the interests of claimants.\textsuperscript{104} It may be added that the Court cited no cases in support of the assertion that its “usual practice” has been to decide overbreadth claims only after first-person claims have been rejected, and the Author has found none.\textsuperscript{105}

\textsuperscript{101} See Monaghan, supra note 10, at 23, 33-36.

\textsuperscript{102} See Fox, 492 U.S. at 485-86.

\textsuperscript{103} In at least partial support of Fox it can be argued that the Court has always envisioned the FAO Doctrine as one initiated by an unprotected claimant. But it does not follow that FAO relief must be denied if the claimant can prevail in his or her own right. Prior to Fox, the problem had never before been considered by the Court.

As a general rule, when a controversy can be disposed of on two independent grounds, a court has discretion to adopt either or both. A basic exception to the rule derives from the policy, earlier mentioned, of avoiding unnecessary constitutional decisions—but this is obviously inapplicable in an FAO context. There is no anomaly in granting relief on both claims or on the third-person claim alone.

A problem arises if success in the two claims does not yield an identical result—if success in the third-person claim yields the claimant, at most, freedom from punishment until the overbreadth has been eliminated (if that can be done). For if success in the first-person claim produces exoneration, the question arises whether there is any point in proceeding to the third-person claim with its lesser remedy. But this question is pertinent only if the claimant is the sole intended beneficiary of the FAO Doctrine. It lacks pertinence if the FAO Doctrine is intended, even in part, to protect third persons. If the latter, there is no superfluity in framing the decree accordingly.

A complication that will not be pursued here is what happens if one who might have asserted a third-person claim asserts only a first-person claim—which is unlikely to happen in any event. See supra note 39.

\textsuperscript{104} See Fox, 492 U.S. at 485.

\textsuperscript{105} The dissenting opinion in Fox stated that “at times we have suggested that as-applied challenges should be decided before overbreadth challenges.” Id. at 487 n.2 (Blackmun, J., dissenting) (citing only Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985)). But Brockett is inapposite. There, a federal court had invalidated an overbroad state statute upon concluding that it could not be saved, and the Supreme Court reversed. See Brockett, 472 U.S. at 507. After observing that the challenged statute was unconstitutional in its application to the claimants, the Court stated that FAO relief is inappropriate

where the parties challenging the statute are those who desire to engage in protected
CONCLUSION

The FAO Doctrine significantly fails to eliminate the chilling effect of overbreadth statutes prior to the time overbreadth has been eliminated. This is remediable. As matters stand, the FAO Doctrine operates prospectively only. On the other hand, the FAO Doctrine does not work in a burdensome manner, the Court’s assumption to the contrary notwithstanding.

The Court’s confusion about the remedial consequences following upon a holding of overbreadth stems from its failure to perceive some fundamental differences between FAO adjudication and as-applied adjudication. These differences are largely illuminated, and the confusion is largely dispelled by focus on the FAO role of the inferior courts, federal and state.

Monaghan’s thesis would eviscerate the FAO Doctrine altogether. Intimations of that thesis in Board of Trustees v. Fox do not bode well, but it is plain that the Court was unaware that its dictum made a sharp break with the FAO Doctrine as previously understood.

speech that the overbroad statute purports to punish, or who seek to publish both protected and unprotected material. There is then 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.

Id. at 504.

In effect, the Court said that FAO relief is unnecessary and superfluous when there is overlap between first-person claims and any claims that might have been made with regard to third-person overbreadth—as was the situation in Brockett, where the only infirmity the Court saw in the statute was its use of the term “lust” in the definition of obscenity. See id. at 501.

Thus, the Brockett rationale was quite different from that of Fox. The implication of Fox is that whether or not there is overlap is immaterial; for reasons of judicial economy, the courts should do no more than is needed to protect the claimant. See Fox, 492 U.S. at 485. Brockett, however, recognizes the need to protect “others not before the court.” Brockett, 472 U.S. at 503.

The Fox dissenters also cited two cases that did not follow what the majority had called the “usual practice.” Fox, 492 U.S. at 487 n.2.

Two years after Fox, the case was cited, with full quotation of the passage in the text accompanying note 95, supra, in Renne v. Geary, 501 U.S. 312, 324 (1991), where the Court only spoke of a possible advantage in taking up a first-person claim before proceeding to an FAO claim. Thus, the Court had no occasion to consider the implications of the Fox rationale.