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SOME REALISM ABOUT FACIAL INVALIDATION OF STATUTES

Alfred Hill

I. INTRODUCTION

In Roe v. Wade,1 the United States Supreme Court invalidated the Texas abortion statute in its entirety even though the statute was not invalid in all its applications. The dissenters contended that, in the circumstances, the statute should have been invalidated only as applied.2 A question to be considered here is whether an as-applied disposition would have been disadvantageous to other women seeking abortions. That this indeed would have been the result is widely believed. It will be argued that this view is unfounded.

This Article will further consider whether, as has been claimed,3 Roe is representative of an increasing practice on the part of the Supreme Court to invalidate in their entirety statutes having both valid and invalid components (hereinafter called hybrid statutes). Some Supreme Court justices have vigorously opposed such a development, and there has been much confusion on the subject.4 It is submitted that, when one looks behind the rhetoric and examines the actual holdings, it becomes apparent that nothing is really happening. The traditional rule of facial

1 See id. at 177-78 (Rehnquist, J., dissenting); see also infra text accompanying notes 80-81.
invalidation remains undisturbed. Under this rule, only the invalid components of a hybrid statute have been subject to facial invalidation. If the Court is now invalidating such statutes in their entirety, the question is whether such a practice is meaningful. It will be argued that persons whose conduct is constitutionally protected do not need it, and that persons whose conduct is not so protected gain nothing from it.

These issues require consideration of some basic principles of constitutional adjudication that seem to have been forgotten in the current debate. In large part, examination of these principles will be the burden of this Article.

Third-party standing is similar to the supposed cases of total invalidation insofar as, in both situations, the question is whether persons who are not themselves constitutionally protected may profit from the constitutional rights of others. It will be shown that third-party standing is distinctive in that it is predicated on a need to prevent constitutional detriment to others.

Finally, consideration will be given to the views of academic commentators. The writings here examined reveal a widespread assumption that a statute containing valid and invalid components is invalid in its entirety. This is contrary to repeated declarations by the Court and is inconsistent with the Court’s practice. The commentators have attempted to rationalize these differences, but unsuccessfully, as this Author will attempt to show.

Part II of the Article consists of an analysis of the general principles that have traditionally guided the Court in facial invalidation. Part III will contend that the Court has not departed from these principles. Part IV will examine third-party standing. Part V will examine the theories of academic commentators.

II. TRADITIONAL PRINCIPLES OF FACIAL INVALIDATION

A. Terminology

A person charged with violation of a statute has had the choice of one or both of two substantive defenses: (1) that the statute is unconstitutional as written; and (2) that the conduct involved is not constitutionally punishable. Thus, it could be contended that a statute outlawing obscenity is so worded as to embrace protected expression. It could also be contended that, even if the statute is properly worded, the expression sought to be punished is, in fact, constitutionally protected or
otherwise beyond the reach of the statute.\textsuperscript{5} The claim that the statute is unconstitutional as written has been termed an attack on the face of the statute.\textsuperscript{6} The claim that, irrespective of whether the statute is defective as written, the conduct involved is not punishable, has been termed an attack on the constitutionality of the statute as applied.\textsuperscript{7}

Traditionally, the term “as applied” has been used in an additional sense, unrelated to whether the statutory violation was punishable. All holdings of facial invalidation were understood to apply only to the successful litigant; as a technical matter, the statute was deemed not invalid as applied to others, although that might have been the practical effect.\textsuperscript{8}

\textsuperscript{5} Thus, the statute may be without force because the legislature lacks authority to adopt it. Cases of this character have not surfaced in the area under discussion.


\textsuperscript{7} See Thornburgh v. Abbott, 490 U.S. 401, 403-04 (1989) (assessing constitutionality of regulation, both facially and as applied, regarding publications received by prison inmates). Though facial invalidation involves striking down the statute as written, this does not, or should not, mean that the statute is examined in a vacuum, divorced from consideration of facts pertinent to its meaning or constitutional effect. In \textit{Lochner v. New York}, 198 U.S. 45 (1905), the Court invalidated a statute establishing maximum hours for bakers on the basis of the Court’s unsupported conclusion that such a measure was unrelated to health. \textit{See id.} at 64. Three years later, in \textit{Muller v. Oregon}, 208 U.S. 412 (1908), the Court unanimously upheld a statute limiting the working hours of women. \textit{See id.} at 422-23. In determining that this statute bore substantially on the health of women, the Court acknowledged benefit from a “very copious collection” of data in a “brief filed by Mr. Louis D. Brandeis.” \textit{Id.} at 419 & n.1. This, of course, is what we call judicial notice, and it is practiced on every judicial level. See, e.g., Fed. R. Evid. 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”).

Facts may be introduced for the purpose of showing that a statute is invalid as written, or for the purpose of showing that it is invalid as applied, or for both purposes. These distinctions are sometimes overlooked, as happened in Bowen v. Kendrick, 487 U.S. 589 (1988). There, the plaintiffs attacked a federal statute on its face, and as applied, on the ground that it tended to create excessive entanglement of government with religion, in violation of the Establishment Clause. \textit{See id.} at 593. The plaintiff offered evidence of governmental grants under the statute as evidence of such a tendency, and the Court held that this evidence was pertinent only to the as-applied aspect of the case. \textit{See id.} at 620-21. But suppose that statutes identical to the one before the Court had been in effect in a number of states, and that similar evidence had been adduced to show the operation of those statutes. The Court would have been willfully blind if it had refused to consider the bearing of this kind of evidence on the facial validity of the statute before it. That the same evidence also bore on the as-applied aspect of the case did not make it irrelevant to whether the statute was valid as written.

\textsuperscript{8} See \textit{infra} text accompanying notes 47-49.
B. Facial Invalidation of Part of a Statute

The Court has observed that "[a] statute may be [facially] invalid as applied to one state of facts and yet valid as applied to another." The Court has long invalidated parts of a statute, and, as a matter of course, has said that the particular part was being facially invalidated.

C. Raines: The General Rule

In United States v. Raines, the United States sought to enjoin state election officials from discriminating against voters on the basis of race. The Court rejected an argument that the statute should be invalidated on the ground that it was worded so broadly as to outlaw discrimination by private persons as well as government personnel. The defendant officers were said to have standing to complain of the statute only insofar as it bore on their own conduct. The reason the Court gave was as follows:

This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule ... broader than is required by the precise facts to which it is to be applied." Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

9. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921); see also Snyder v. Massachusetts, 291 U.S. 97, 115-16 (1934) (stating that the rule of Dahnke-Walker as applied to legislation "is even more plainly true of the action of judicial or administrative officers dealing only with the instance"); DuPont v. Comm'r, 289 U.S. 685, 688 (1933) (citing Dahnke-Walker to justify disparate decisions on similar sets of facts).


13. Id. at 21 (citations omitted); see also Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). In Broadrick, the Court stated:
In Raines, the challenge was to a single statutory provision that was susceptible to both valid and (assumedly) invalid applications; by its terms the statute applied to discriminatory conduct by any person. The reasoning of the Court applies equally when the valid and invalid features of a statute are embodied in separate provisions. References hereafter to valid and invalid provisions of a statute should be understood to embrace also a single provision susceptible to both valid and invalid applications.

D. Salerno

When facial invalidation is appropriate, the governing rule was stated as follows in United States v. Salerno:

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . .

This passage, which has been quoted many times since, makes eminent sense. Claimants contending that a statute is facially invalid are, in effect, contending that the statute cannot constitutionally be applied to them, no matter what they did. Also, it should be noted that, while the quoted passage refers only to statutes, there is no plausible reason why

15. See, e.g., id. at 23 (finding that it would be only in “that rarest of cases” where “Congress would not have desired its legislation to stand at all unless it could validly stand in its every application”); Adair, 208 U.S. at 180 (noting that an unconstitutional provision of a statute was “severable from its other parts”); see also Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1334 (2000) [hereinafter Fallon, Facial Challenges]; Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 387 n.129 (1998).
17. Id. at 745. While no authorities were cited for this point, the Court had earlier employed similar language. See, e.g., Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982).
the no-valid-application rule should not also govern when part of a statute is under constitutional attack.\(^9\)

**E. The Anomaly of Facial Invalidation**

Since facial invalidation turns on whether any valid applications of the statute are possible, how often can a court be confident that its guess is right, and what happens if it is wrong? Thus, in a recent study of statutory vagueness, this Author concluded that a statute vague in all possible applications is a rarity.\(^{20}\) On the other hand, clarity in the law may be deceptive. Even the simple type of anti-abortion statute involved in *Roe v. Wade* was susceptible to valid applications.\(^{21}\) Furthermore, there are undoubtedly a substantial number of cases in which a court simply overlooks the *Raines* limitation and declares a statute or statutory provision to be facially void despite the possibility of valid applications. What is the effect of such holdings, whether attributable to a wrong guess or inattention to the governing rule?\(^{22}\)

**F. The Self-Correcting Mechanism of the Law**

Shortly after invalidation of the Texas abortion statute in *Roe v. Wade*, a Connecticut statute that was substantially similar was applied to punish the performance of an abortion by a person who was not a physician.\(^{23}\) Observing that the Supreme Court had stated in *Roe* that the Texas statute was being invalidated in its entirety,\(^{24}\) the highest court of

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19. This point has been made in Fallon, *Facial Challenges, supra* note 15, at 1334-35; Isserles, *supra* note 15, at 369 n.34, 387 n.129. However, Isserles also says that *Salerno* requires of the claimant "a Herculean ... demonstration that each and every application of the statute would be unconstitutional." *Id.* at 383. A sensible judge would not put the claimant to such a task, and would be skeptical of any purported "demonstration" as proof. *See id.* If a claimant makes a no-valid-application assertion that is not patently implausible, the defendant can be asked to rebut it by showing that a single valid application is possible. *See id.*


21. *See discussion infra Part II.G.*

22. Is this problem avoidable? A drastic solution would be to eliminate facial invalidation altogether, and allow constitutional attack only by claimants who can show that their conduct is not punishable. In effect, what the statute says would become immaterial in such cases. Among other things this would eliminate the need for notice of what the law condemns. The result might be called a totalitarian ideal: Whatever is not permitted is forbidden.

23. *See State v. Menillo, 362 A.2d 962, 962-63 (Conn.) (per curiam), vacated by 423 U.S. 9 (1975) (per curiam).*

24. What the Supreme Court said on this point is discussed *infra* text accompanying notes 79-87.
the state held that Roe required invalidation of the Connecticut statute. In Connecticut v. Menillo, the Supreme Court reversed the Connecticut decision in a per curiam opinion. The Court said:

In Roe we held that Tex. Penal Code, Art. 1196, which permitted termination of pregnancy at any stage only to save the life of the expectant mother, unconstitutionally restricted a woman’s right to an abortion. We went on to state that as a result of the unconstitutionality of Art. 1196 . . . the Texas abortion statutes had to fall “as a unit,” and it is that statement which the Connecticut Supreme Court and courts in some other States have read to require the invalidation of their own statutes even as applied to abortions performed by nonphysicians. In context, however, our statement had no such effect. Jane Roe had sought to have an abortion “performed by a competent, licensed physician, under safe, clinical conditions,” and our opinion recognized only her right to an abortion under those circumstances. That the Texas statutes fell as a unit meant only that they could not be enforced, with or without Art. 1196, in contravention of a woman’s right to a clinical abortion by medically competent personnel. We did not hold the Texas statutes unenforceable against a nonphysician abortionist, for the case did not present the issue.

It is easy to guess why the Court decided the case summarily, without opportunity for argument. No rule is better settled than that the force of a decision, whether as stare decisis or precedent, operates only with respect to matters in issue and actually decided. The force of a judgment, in terms of issue preclusion, is similarly limited. Besides, a judgment qua judgment is normally operative only as between the immediate parties. These rules dispose of the problem of excessively broad facial invalidations, apart from the effect of an unduly broad judgment on the invalidated statute itself.

G. The Effect of the Unduly Broad Judgment on the Invalidated Statute

There is a common perception that unqualified judicial invalidation of a statute terminates the life of that statute, with the result that the jurisdiction may pursue its legitimate interests only by adoption of

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25. See Menillo, 362 A.2d at 963.
27. Id. at 10 (emphasis added) (citations omitted).
29. See id.
30. See id. § 27 cmt. a.
another statute. This indeed may be the rule of a particular jurisdiction, but it is not a rule required by the Constitution of the United States.

Suppose that after the decision in Connecticut v. Menillo, the state of Texas, invoking the very statute held by the Supreme Court to be unconstitutional in toto in Roe v. Wade, prosecutes an abortionist who is not a physician. To objection that the statute is no longer in effect, the Texas Supreme Court rules that, as a matter of Texas law, the statute is still in force as applied to nonphysician abortionists. On what possible ground can this defendant succeed in the Supreme Court? The law of a state is what its courts declare it to be. And the judgment in Roe v. Wade has no effect qua judgment in a prosecution against a different defendant.

Or, suppose that the United States Supreme Court invalidates a state statute on the ground that the state legislature exceeded its power under the state constitution. The highest court of the state subsequently holds that the Supreme Court erred, and that the statute is still in effect. As to whether the earlier federal judgment terminated the existence of the state statute, consider what the Supreme Court has said respecting a federal statute:

We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. . . . If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.

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33. It may be assumed that the case arose in a federal district court, so that remand to the state courts is not an option.

H. The Exceptions

To the foregoing general principles, the Court has recognized two exceptions. One of these consists of the *jus tertii* cases, and the other is the First Amendment overbreadth doctrine. These exceptions are discussed below.

III. THE CHALLENGE TO TRADITIONAL DOCTRINE: FACIAL INVALIDATION AS TOTAL INVALIDATION

A. In General

The view has taken hold that the Court does not confine itself to facial invalidation in accordance with the traditional limitations heretofore described. Some Justices and academic commentators have contended that, apart from the two exceptions just noted, the Court in fact does invalidate a statute in its entirety even though valid as well as invalid applications are possible. Indeed, to most such persons, a declaration of facial invalidity has come to signify total invalidation.

This understanding derives in part from their understanding of *United States v. Salerno*, where the Court said that a statute is not facially invalid unless invalid in all possible applications. As previously noted, this makes eminent sense, since litigants urging facial invalidation are claiming that the statutory language cannot validly be applied to them no matter what they did. But the provision thus challenged may constitute only part of a statute (or a particular application), as distinct from the statute as a whole. The *Salerno* formulation is obviously pertinent in both instances. Prior to *Salerno*, the Court struck down parts of statutes, and was explicit in calling this facial invalidation.

35. See discussion infra Part IV.
36. See infra notes 121-28 and accompanying text.
37. See discussion infra Part V.
38. As noted earlier, traditionally facial invalidation meant no more than invalidation of statutory language as applied to the claimant (or, more precisely, to the circumstances of the claimant). With this traditional terminology apparently forgotten, the term “facial invalidation” has come to be used only with regard to invalidation of a statute in its entirety, despite the presence of valid components. The term “as applied” is now used in regard to invalidation of a statute only in its application to the claimant. Current usage is illustrated by Justice Scalia’s recent suggestion that “facial invalidation” be abandoned altogether. See City of Chicago v. Morales, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting). He would confine invalidation of a statute to “its particular application to the party in suit.” Id. To avoid confusion on this point, this Article will continue to employ traditional usage. Facial invalidation, in the sense newly conferred upon it, will be referred to as “total invalidation.”
There is no warrant for reading *Salerno* as a ruling that facial invalidation has different meanings or consequences depending on whether the provision struck down is an entire statute or part of a statute.

Reliance is also placed on decisions said to show that the Court is indeed striking down *in toto* statutes having both valid and invalid provisions. One class of these cases is about to be discussed, and it will be argued that they have been misconstrued. In the other cases, the Court unqualifiedly invalidates statutes even when the possibility of valid applications, although apparent to the particular reader, is not mentioned by the Court, presumably because the Court reads the statute differently, or thinks the point irrelevant, or does not think about the point at all. In any event, what is common to these cases is that whether the statute should be invalidated as to possibly valid applications appears never to be in issue.

The proponents of facial invalidation as total invalidation see it as desirable in that it saves nonparties in the position of the plaintiff from the need to engage in “case-by-case” pursuit of their rights, a need which is assumed would exist if the statute were invalidated only as applied. This is patently untrue. Suppose that, in *Roe v. Wade*, the Court had declared expressly that the Texas abortion statute was being invalidated only as applied to Roe. On the basis of *stare decisis*, other women would have gained from the decision as much as Roe did. Invalidation of the statute *in toto*, which is what the Court purported to do, did not gain them more. As nonparties, they got nothing from the judgment. Their only benefit from the decision was its effect as *stare decisis*.

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40. See supra notes 10-11 and accompanying text.
41. See supra notes 9-11 and accompanying text.
42. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 219 (1977) (Stevens, J., concurring in the judgment) (“I therefore agree with the Court that on the record before us . . . the Delaware statute is unconstitutional on its face. How the Court’s opinion may be applied in other contexts is not entirely clear to me.”); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (noting that the Texas statute under consideration is unconstitutional because it “sweeps too broadly” and “makes no distinction” between abortions at different times during pregnancy or for different reasons); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (“A State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. . . . without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot.”); see also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 282 n.214 (1994).
44. A decision that may otherwise be a mere precedent has *stare decisis* effect insofar as it is binding upon inferior courts in the judicial hierarchy. Thus, decisions of the Supreme Court are *stare decisis* as to every court in the land. See BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).
Of course, if the government should renew enforcement efforts without regard to the effect of an invalidating decision, resolution of the issue of *stare decisis* on a case-by-case basis would be necessary. Typically, the government does not attempt to flout the invalidating decision; instead, it seeks enforcement of the statute as to matters it claims are outside the scope of the decision. An obvious example is the prosecution of the nonphysician abortionist. As a practical matter, it is in cases like these that the burden of case-by-case testing of the statute arises, and this is unavoidable.

Assuming total invalidation to have any meaningful effect, it is only in regard to persons whose conduct is not constitutionally protected, since the provisions applicable to them would have been invalidated along with the rest of the statute. How the public interest would be served by placing such persons beyond the reach of the law is a question not considered by the judicial or academic proponents of total invalidation. But the question is moot anyway, for the reason that judicial decisions and judgments are without binding effect as to issues not actually passed upon. If such provisions were passed upon, the case would be different from the type under consideration, for if they were invalidated this was not the consequence of total invalidation as such, and if they were validated this would not be a case of total invalidation.

Thus, facial invalidation as total invalidation adds nothing to the rights of persons whose conduct is constitutionally protected, and is without legal effect as to persons whose conduct is not constitutionally protected.

These conclusions follow from the principles of constitutional adjudication discussed in Part II of this Article. Of course, these principles, having been devised by the Court, can be modified by the Court. The question is whether they have been modified by the decisions about to be discussed. These decisions, upon which the proponents of facial (total) invalidation particularly rely, are distinctive in that the Court is aware that it is dealing with a hybrid statute. It is submitted that they mark no change in the law.

**B. The Critical Cases**

We come now to the cases said to show total invalidation of a statute containing both valid and invalid parts. One class of these cases may be disposed of at the outset. In these cases, the Court does indeed

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46. *See supra* notes 28-30 and accompanying text.
unqualifiedly invalidate statutes, although the possibility of valid applications is not mentioned by the Court.\(^{47}\) As has been seen, except as to matters actually decided, a broad invalidation that seemingly encompasses such matters is without effect as \textit{stare decisis}, and the judgment is similarly without effect.\(^{48}\) Those who rely on these decisions show no awareness of these limitations.\(^{49}\)

The only cases that are relevant are those in which the Court \textit{confronts} the issue of whether a hybrid statute should be invalidated in its entirety. Proponents of such invalidation have cited a number of cases thought to have been decided on this basis,\(^{50}\) but it is submitted that these cases show no departure from traditional principles. They will now be discussed \textit{seriatim}.

1. \textit{Casey: Prophylactic Rules}

From time to time, the Supreme Court has promulgated prophylactic rules.\(^{51}\) Thus, a penal statute is void if it creates a potential for discriminatory or arbitrary conduct by police officers.\(^{52}\) That a particular arrest was free from such taint is immaterial. No arrest can be justified under the statute. Another example of prophylaxis is the requirement of content-neutrality in statutes imposing limitations on speech.\(^{53}\) Again, it is immaterial that in the particular case the speech was outside the protection of the First Amendment. Such decisions are not inconsistent with the \textit{Salerno} principle that facial invalidation is appropriate only when no valid applications of the statute are possible.\(^{54}\) From its nature, a prophylactic rule admits of no exceptions: A statutory provision violative of such a rule is necessarily invalid in all possible applications.\(^{55}\)

A prophylactic rule was involved in \textit{Planned Parenthood v. Casey,}\(^{56}\) the case most heavily relied on by those who maintain that the Supreme Court is invalidating hybrid statutes in their entirety.\(^{57}\) There, the pertinent statute required a woman to notify her husband before

\(^{47}\) See sources cited supra note 42 and accompanying text.

\(^{48}\) See supra text accompanying notes 28-30.

\(^{49}\) See infra note 69 and accompanying text.

\(^{50}\) See infra note 70 and accompanying text.

\(^{51}\) See BLACK'S LAW DICTIONARY, supra note 44, at 1234.


\(^{54}\) See supra note 17 and accompanying text.

\(^{55}\) See Dorf, supra note 42, at 277-78.


\(^{57}\) See, e.g., Dorf, supra note 42, at 275-76; Fallon, \textit{Facial Challenges}, supra note 15, at 1355-56.
undergoing an abortion. The plurality opinion mentioned the findings in the courts below that the great majority of women do notify their husbands, but that notification in all cases, especially when there is already marital discord, would often result in severe physical and psychological abuse of the wife. On this basis, the plurality justices invalidated the notification requirement as "likely to prevent a significant number of women from obtaining an abortion." This was seemingly contrary to the no-valid-application rule of Salerno, since it was clear that in a large number of cases the requirement would work no harm. But the holding is distinguishable from Salerno. For, in striking down the requirement, the plurality in effect ruled that, as a constitutional matter, avoiding undue burden on a woman's abortion decision required adoption of a prophylactic rule on the subject. If the Court had followed Salerno, it would have invalidated the statute only as to women apprehensive that notifying their husbands would subject them to severe physical and psychological abuse, and would have left the statute standing as to all other women. Two classes of women would have been created, with many of them uncertain as to which class they belonged to and afraid to find out. It was apparent that a substantial number of wives might forego abortions altogether if notification of the husband were required.

The meaning of Casey perhaps becomes clearer if we consider the earlier decision in Ohio v. Akron Center for Reproductive Health. In this abortion case, the Court upheld a parent-notification requirement that was accompanied by a judicial bypass procedure setting time limits in order to ensure prompt judicial action. The claimants argued that in some situations there could be excessive delay despite compliance with the time limits. But the Court found, justifiably in the circumstances, this, of course, is also suggestive of constitutional vagueness. Probably a number of prophylactic rules can be rationalized as rules against vagueness. Certainly this is true of the rule that the law governing police enforcement activity must not create a potential for arbitrary and discriminatory practices. See Hill, Police Discretion, supra note 20, at 1302-07. But prophylaxis has a distinctive connotation. A statute may be invalidated for sound reasons of prophylaxis even though it is not in the least vague. See, e.g., Wuchter v. Pizzuti, 276 U.S. 13, 18-19 (1928).
that such situations would rarely, if ever, arise, and refused to invalidate the parent-notification provision on the basis of a "worst-case analysis that may never occur." Akron stands for the sensible proposition that a prophylactic rule need not be perfect.

Confusion over the meaning of Casey has resulted in large part from the following statement in the opinion: "[I]n a large fraction of the cases in which [the husband-notification requirement] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." Wrenching this statement from its context, judges and scholars have taken it to mean generally that a statute invalid in a "large fraction" of applications is subject to invalidation in its entirety. On this basis, Casey has been interpreted as a repudiation of Salerno. It is submitted

business days needed for the bypass procedure would encompass 3 Saturdays, 3 Sundays, and 2 legal holidays." Id. at 513.

66. Id. at 514.

67. Validation of the parent-notification provision did not preclude relief in the rare case where it could be shown that the time limitations were inadequate. See id. In such a situation, it could be argued that the provision was unconstitutional as applied in the circumstances of the case.


69. Judges have generally understood Casey to be inconsistent with Salerno, and have been confused as to whether it overrules Salerno, or announces a competing rule applicable in some cases but not others. The confusion has been especially pronounced in abortion cases. For example, the Court of Appeals for the Fifth Circuit recently noted that its own "jurisprudence on this question is not a model of clarity," Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999), with one panel holding that Casey did not overrule Salerno and another panel seemingly holding the contrary. See id.

The impact of Casey also has been felt outside the abortion area. A state statute establishing a central register for reports of child abuse was invalidated because the court, citing Casey, concluded that the statute would operate unconstitutionally in a "large fraction" of cases. See State v. Jackson, 496 S.E.2d 912, 916 (Ga. 1998). The Eleventh Circuit, in several cases involving First Amendment challenges to state statutes, has first considered whether it was Salerno or Casey that should be applied, and then disposed of the case on other grounds. See, e.g., United States v. Frandsen, 212 F.3d 1231, 1235-36, 1235 n.3 (11th Cir. 2000); Fla. League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 459 (11th Cir. 1996).


71. Judicial and academic comment is notable for its inattention to why persons not within the "fraction" should be placed beyond the reach of the law. Abortion statutes do present a special problem, but it is not one pertaining to so-called facial invalidation. Rather, the problem is one calling for exemption from the normal rule that a litigant may not assert the constitutional rights of others. See discussion infra Part IV. The women affected by such statutes are often poor, sometimes frightened, and always subject to severe time constraints. What they need is a regime under which others may assert their rights. And that they have had since almost immediately after the decision in Roe v. Wade. See, e.g., Singleton v. Wulff, 428 U.S. 106, 112-15 (1976) (plurality opinion); Doe v. Bolton, 410 U.S. 179, 188 (1973).

72. See, e.g., Ford, supra note 70, at 1445-46.
that such an interpretation of *Casey* is unwarranted. It is unreasonable to read this language as making so basic a change in the law. Taken in context, the language has a much narrower meaning. Like other rules, a prophylactic rule has its reasons. If only an insignificant number of wives were adversely affected by the husband-notification requirement, there would have been no need for a prophylactic rule. This, indeed, is the rationale of *Akron*. In context, the determination in *Casey* that a “large fraction” of women were adversely affected was the justification for adoption of a prophylactic rule. But only the plurality opinion of Justices O’Connor, Kennedy, and Souter took this position. Justices Stevens and Blackmun, finding no vagueness, were in favor of invalidation on the ground that the statutory language created a potential

73. See Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 519-20 (1990) (plurality opinion) (noting that the Ohio parental notification statute “does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion” and that the state could validly assume that “in most instances” the family will support her).

74. See Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992). A number of other cases relied on by academic commentators have similarly involved prophylaxis. *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), involved a federal statute regulating lottery advertising by broadcasters. See id. at 421. The Court likened the statute to one setting a time, place, or manner restriction on speech, or one curbing solicitation by lawyers. See id. at 430-31. Such measures were said to be “prophylactic” by nature, not avoidable by a showing that conduct was unobjectionable in the particular case. See id. at 431. *Wuchter v. Pizzuti*, 276 U.S. 13 (1928), involved a New Jersey statute providing that, in a negligence action against an out-of-state motorist, service could be made on the secretary of state. See id. at 15, 17-18. Although in this instance there was actual notice to the defendant, the Court invalidated the statute for failure to contain a provision “making it reasonably probable” that notice would be communicated. See id. at 15-16, 18-19. Lack of such a provision, said the Court, “leaves open . . . a clear opportunity for the commission of fraud.” Id. at 19. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), insofar as here relevant, illustrates the rule that, if a statute affecting expression is not content-neutral, it must be narrowly tailored to meet a compelling state interest. See id. at 395. In effect, prophylaxis was needed because of a failure to narrow the statute sufficiently. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), a facial attack was made on a federal statute for violating the Establishment Clause. See id. at 593. In defense, the government argued that the statute was valid in at least some applications. See id. at 627 n.1 (Blackmun, J., dissenting). But the Court rejected this approach, instead measuring the statute against the three factors announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *Bowen*, 487 U.S. at 602. In *Lemon*, the Court had said its concern was with “the potential for impermissible fostering of religion.” *Lemon*, 403 U.S. at 619. Such a concern is, by its nature, prophylactic. Cf. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 521 (1990) (Stevens, J., concurring in part and concurring in the judgment) (noting that the Ohio parental notification statute provides the judicial bypass option for those “exceptional situations in which [parental] notice will cause a realistic risk of . . . harm”); see also Fallon, *Facial Challenges, supra* note 15, at 1336 (citing *City of Chicago v. Morales*, 527 U.S. 41 (1999), as facially invalidating a statute for vagueness even though it was not vague in all applications).

75. See *Casey*, 505 U.S. at 895.
for discriminatory and arbitrary enforcement activity by the State.\textsuperscript{76} The O'Connor plurality took this view as well.\textsuperscript{77}

Finally, although the \textit{Casey} decision has been characterized as one of total invalidation, it should be emphasized that the Court invalidated only that part of the statute requiring husband notification, leaving the rest of the statute standing.\textsuperscript{78} Both with regard to the statute as a whole or a controverted part, total invalidation is improper—and, indeed, without effect—as to such applications of the statutory language that the Court did not pass upon.

2. \textit{Roe v. Wade}

In this case, the Court made clear that late-term abortions could be banned if not undertaken to preserve the life or health of the mother.\textsuperscript{79} Moreover, the record did not disclose the claimant's stage of pregnancy when she initiated her suit for judicial relief.\textsuperscript{80} Justice Rehnquist argued in his dissent that, in these circumstances, the Court was not justified in striking down the statute in its entirety rather than as applied.\textsuperscript{81} Thus, the issue of total invalidation in such circumstances was squarely before the Court.

The Court's reply to Justice Rehnquist, if it was indeed intended as a reply, was unresponsive. First, it should be noted that the anti-abortion provisions appeared in the Texas penal code.\textsuperscript{82} Articles 1191-1194 of the code outlawed abortions and dealt with attempts and related matters.\textsuperscript{83} Article 1196 provided, in effect, that nothing in the previous articles applied when an abortion was performed under "medical advice for the purpose of saving the life of the mother."\textsuperscript{84} The statute was invalidated in its entirety, the Court declaring as follows:

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception [sic] of Art. 1196 cannot be struck down separately, for then the State would

\begin{itemize}
  \item \textsuperscript{76} See id. at 916-17 (Stevens, J., concurring in part and dissenting in part); id. at 933-34 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part).
  \item \textsuperscript{77} See id. at 877 (joint opinion of O'Connor, Kennedy & Souter, JJ.).
  \item \textsuperscript{78} See id. at 844, 879, 898, 901 (holding that, of the five provisions of the Pennsylvania abortion statute at issue, only the "husband notification requirement" and a related subsection of the reporting requirements were unconstitutional).
  \item \textsuperscript{80} See id. at 171 (Rehnquist, J., dissenting).
  \item \textsuperscript{81} See id. at 177-78 (Rehnquist, J., dissenting).
  \item \textsuperscript{82} See TEX. PENAL CODE ANN. arts. 1191-96 (Vernon 1948); \textit{see also Roe v. Wade}, 410 U.S. at 117 n.1.
  \item \textsuperscript{83} See TEX. PENAL CODE arts. 1191-94.
  \item \textsuperscript{84} Id. art. 1196.
be left with a statute proscribing all abortion procedures no matter how medically urgent the case.\textsuperscript{85}

Thus, the Court was saying that no part of \textit{this} statute could survive invalidation of one of its provisions because of the way the statute was written. Nothing the Court said can be understood as intimating that a statute is invalid in all applications solely because it is invalid in some. Any doubt about this aspect of \textit{Roe v. Wade} is dispelled by its decision shortly afterward in \textit{Connecticut v. Menillo},\textsuperscript{86} where the Court insisted that its earlier “opinion recognized only [Roe’s] right to an abortion,” and “did not hold the Texas statutes unenforceable against a nonphysician abortionist.”\textsuperscript{87}

3. \textit{Aptheker v. Secretary of State}

\textit{Aptheker v. Secretary of State}\textsuperscript{88} involved a statute denying passports to members of the Communist Party and communist front organizations.\textsuperscript{90} The Court invalidated the statute on the ground that it applied to persons whether or not they were shown to have knowledge that the organizations to which they belonged were attempting “to establish a Communist totalitarian dictatorship \ldots throughout the world.”\textsuperscript{90} The constitutional interest vindicated here was the right to travel, protected by the Fifth Amendment.\textsuperscript{91} However, the only two claimants in the case were concededly “top-ranking leaders” of the Communist Party, and the government argued that the statute should be applied at least as to them.\textsuperscript{92} This argument was rejected, the Court observing, in effect, that invalidation of a statute in its entirety had been the practice in cases involving freedom of expression, and holding that the same rule should be applied in the instant case “since freedom of travel is a constitutional liberty closely related to rights of free speech and association.”\textsuperscript{93} Thus, \textit{Aptheker} is an offshoot of the First Amendment overbreadth doctrine. It has no general application.

\begin{itemize}
\item \textsuperscript{85} \textit{Roe v. Wade}, 410 U.S. at 166.
\item \textsuperscript{86} 423 U.S. 9 (1975) (per curiam).
\item \textsuperscript{87} See id. at 10; see also supra note 27 and accompanying text.
\item \textsuperscript{88} 378 U.S. 500 (1964).
\item \textsuperscript{89} See id. at 501-02, 502 n.2.
\item \textsuperscript{90} Id. at 510.
\item \textsuperscript{91} See id. at 507-08.
\item \textsuperscript{92} See id. at 515.
\item \textsuperscript{93} Id. at 517.
\end{itemize}
4. Romer v. Evans

In Romer v. Evans, the Court invalidated, as violative of the Equal Protection Clause, an amendment to the Colorado constitution forbidding, at all levels of state government, statutory provisions singling persons out for protection on the basis of sexual preference. Dissenting in Romer, Justice Scalia observed that, in Bowers v. Hardwick, the Court had upheld a state statute punishing homosexual conduct. It follows, he said, that a state is free to impose lesser penalties on practicing homosexuals. If, he argued, in this instance the greater did not include the lesser—if, for example, the state was free to discriminate against practicing homosexuals in regard to, say, housing—then the provision under attack was not unconstitutional in all applications, and Salerno stood as a bar to facial invalidation.

It is not clear that this conclusion followed from Bowers. It has long been taken for granted that citizens of a state may seek greater protection under the state's laws than they receive from the Federal Constitution. Presumably, a state is free to refuse to expand the rights of its citizens in this manner. It hardly follows that, consistently with the Equal Protection Clause, the state can say, in effect, to a class of persons, "Don't waste your time seeking such rights because you—and you alone—can't have them." Arguably, the issue in Bowers was sufficiently distinct to render that decision inapposite. Such reasoning was at least implicit in the Romer majority opinion.

In sum, the proponents of an expanded view of facial invalidation have not proffered a single decision showing a determination of the Court to invalidate a statute in its valid components, unless Romer is such a case. But Romer is far from a clear holding on this point, and it is hardly a basis for attributing to the Court a basically new direction in regard to the effect of facial invalidation on persons whose conduct is punishable.

95. See id. at 623-24.
97. See id. at 640 (Scalia, J., dissenting) (citing Bowers, 478 U.S. at 188-89).
98. See Romer, 517 U.S. at 641 (Scalia, J., dissenting). On the other hand, if the state imposed penalties on nonpracticing homosexuals (which he thought to be an insignificant class), he stated that such persons were entitled to seek relief on an as-applied basis. See id. at 643 (Scalia, J., dissenting).
99. See id. at 641-43 (Scalia, J., dissenting).
100. See, e.g., Doe v. Burnham, 6 F.3d 476, 480 (7th Cir. 1993) (noting that "a state may provide greater protections under its laws than the Constitution requires").
C. Punishing the Legislature

Total invalidation of a hybrid statute means that even its valid provisions are struck down. As previously observed, just how the public interest would be served by placing beyond the reach of the law persons whose conduct is not constitutionally protected is a question not considered by the proponents of total invalidation, who see total invalidation as an unmitigated good in its supposed benefit to persons in a position similar to that of the constitutionally protected plaintiff. 101

This Author can think of no reason why the Court should exempt unprotected persons from the reach of the law other than as a slap on the legislative wrist. And occasionally, in a different context, the Court has indeed taken the position that the legislature should not escape unscathed after adopting an unconstitutional statute. 102 The legislature, the Court has said, should not get off without "paying" for its mistakes. 103 The point was made summarily, if not casually. No consideration seems to have been given to the pertinence of the principle of separation of powers.

Consider that legislators are sworn to uphold the Constitution, 104 and that there is no a priori reason to believe that their understanding of its requirements is inferior to that of judges. If the judiciary may punish the legislature for the latter's perceived inattention to constitutional requirements, it is not clear why the legislature may not punish the judiciary for the same perceived offense. 105 Thus, one "wrong" decision

101. See supra note 43 and accompanying text.
102. See, e.g., Osborne v. Ohio, 495 U.S. 103, 121 (1990) ("Legislators who know they can cure their own mistakes ... without significant cost may not be as careful to avoid drafting overbroad statutes as they might otherwise be."); Massachusetts v. Oakes, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in part and dissenting in part, joined on this point by four additional justices) ("If the promulgation of overbroad laws ... was cost free ... then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place."); cf. Reno v. ACLU, 521 U.S. 844, 884-85 & nn.49-50 (1997) (stating that the Court "will not rewrite a ... law to conform it to constitutional requirements" because that would essentially "substitute the judicial for the legislative department" and "derogate Congress' incentive to draft a narrowly tailored law in the first place") (citations omitted)).


103. See Osborne, 495 U.S. at 121. The term "punishment" is stark. It is sugar-coated by calling it a "disincentive," see Fallon, Facial Challenges, supra note 15, at 1352, or a "deterrent," see Stone v. Powell, 428 U.S. 465, 471 (1976).

104. See U.S. CONST. art. VI, cl. 3.

105. To be sure, the judiciary sometimes punishes—or, as it says, deters—the executive, as in the case of the exclusionary rule. See Stone, 428 U.S. at 492 (noting that the "immediate effect of [the exclusionary rule] will be to discourage law enforcement officials from violating the Fourth
could result in a temporary withdrawal of janitorial services; another, thought to be especially egregious, could result in the eviction of the Justices from their courthouse.

Finally, as this Author has argued before, account should be taken of the sheer futility of attempting to keep the legislature in line by insisting that it "pay" for its mistakes. Punishing the legislature for careless drafting is likely to be no more effective than punishing inferior courts (if that were feasible) for allowing constitutional error to creep into their opinions. Further, if punishment of one governmental branch by another is consistent with the principle of separation of powers, the executive, no less than the legislature, might properly punish the judiciary, and of course vice versa.

IV. THIRD-PARTY STANDING

In two classes of cases, the Court allows a person standing to assert the constitutional rights of others. These are the *jus tertii* cases and the First Amendment overbreadth cases. If the plaintiff is a person within the constitutional reach of the pertinent statute, invalidation of the statute may be total, in the sense that the statute is voided even in its application to the plaintiff. This sometimes happens in the *jus tertii* cases. It is a defining characteristic of the First Amendment cases.

Under the *jus tertii* doctrine, the claimant is permitted to assert the constitutional rights of others in circumstances where relief for the claimant is necessary to prevent frustration or dilution of the rights of those others. Thus, an organization ordered to produce its membership list has standing to assert the privacy rights of its members, and a commercial seller of beer has standing to challenge a statute

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discriminating against young male purchasers. As these cases illustrate, the relationship between the entities involved is characteristically a reciprocal one. In any event, there is always some kind of relationship; the claimant is never a complete stranger.

In *Barrows v. Jackson*, the leading case in this class, a white vendor had sold land to an African-American in breach of a covenant not to sell to "persons not wholly of the white or Caucasian race." When sued for damages by another party to the covenant, the vendor defended on the ground that enforcement of the covenant would constitute unconstitutional discrimination. But the person discriminated against would have been the vendee. The Court justified the standing of the vendor to assert the constitutional rights of the vendee by stating that in this "unique situation . . . it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." In other *jus tertii* cases, the Court has granted third-party standing when otherwise there would be "some genuine obstacle" to vindication of the constitutional rights of third persons, or such rights would be "diluted or adversely affected." Thus, subject to some recent and dubious exceptions discussed below, the Court has given constitutional reasons to justify third-party standing in *jus tertii* cases.

In *Craig v. Boren*, the beer seller benefited from total invalidation. The statute outlawing his conduct was invalid only because it entailed unconstitutional discrimination against youthful purchasers. *Barrows v. Jackson* was not this type of case.

The First Amendment overbreadth doctrine, which is applicable when a statute impairs freedom of expression, permits a violator whose own speech is unprotected to attack the statute for violating the

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111. *See* id. at 195 (noting that a prohibition on the buyer’s right to buy would result in a violation of the seller’s right to sell); *cf.* Patterson, 357 U.S. at 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.").
112. 346 U.S. 249 (1953).
113. *Id.* at 251 (quoting petitioner’s complaint).
114. *See* id. at 254.
115. *Id.* at 257. But the Court also said that it was "only a rule of practice" that stood in the way of according standing to the plaintiff. *Id.*
118. *See infra* notes 123-24 and accompanying text.
120. *See* id. at 210.
constitutional rights of others.\textsuperscript{121} The reason given by the Court in these cases is that to leave the statute standing would chill the utterance of protected speech.\textsuperscript{122} The basis for the doctrine becomes stronger when it is considered that, as the Author concluded in a recent study, persons who engage in unprotected conduct are the ones typically charged under such statutes; invalid statutory provisions would thus remain on the books for a long time if they could be challenged only by persons able to establish traditional standing.\textsuperscript{123} The Court has held that third-party standing is not to be accorded unless the chilling effect of the statute is substantial.\textsuperscript{124} This is comparable to the \textit{jus tertii} rule that the plaintiff is granted standing to assert the constitutional rights of others only when needed to prevent impairment of those rights.\textsuperscript{125}

It has been suggested that if a statute has a chilling effect on constitutionally protected activity, that is itself a basis for invalidating the statute in its entirety.\textsuperscript{126} This is unwarranted. After all, chilling can be eliminated by striking down the part of the statute that produces the chilling. What is needed is a plaintiff to institute the action. When the Court creates third-party standing, it is because traditional plaintiffs are unavailable.\textsuperscript{127} When the statute is voided, they become beneficiaries because the statute is voided \textit{in toto}.\textsuperscript{128}

In some recent \textit{jus tertii} cases, third-party standing was granted even in the absence of constitutional detriment to the persons whose rights the plaintiff was relying upon.\textsuperscript{129} It is doubtful that these decisions

\textsuperscript{121} This exception is discussed in Hill, \textit{First Amendment}, supra note 106, at 1064, and Isserles, supra note 15, at 369 & n.37. \textit{See also} Bd. of Airport Comm’rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).

\textsuperscript{122} \textit{See Jews for Jesus}, 482 U.S. at 574-75; Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

\textsuperscript{123} \textit{See Hill, First Amendment}, supra note 106, at 1074-75, 1075 n.43.

\textsuperscript{124} \textit{See} Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. . . . employed by the Court sparingly and only as a last resort.").

\textsuperscript{125} \textit{See} supra notes 108-10 and accompanying text.

\textsuperscript{126} \textit{See} Fallon, \textit{Facial Challenges}, supra note 15, at 1352.

\textsuperscript{127} \textit{See}, e.g., Barrows v. Jackson, 346 U.S. 249, 257 (1953).

\textsuperscript{128} This Author has previously contended that, in some situations, invalidation of the statute as to the claimant may not really be necessary as an inducement to sue. \textit{See Hill, First Amendment}, supra note 106, at 1071-73. But the Supreme Court’s invalidations in the \textit{First Amendment} cases seem to be total. \textit{See id.} at 1072 & n.34.

\textsuperscript{129} \textit{See U.S. Dep’t of Labor v. Triplett}, 494 U.S. 715 (1990); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989). In \textit{Triplett}, the claimants were lawyers who argued that federal regulations restricting fee arrangements with miners suffering black lung disease violated the due process rights of the miners. \textit{See Triplett}, 494 U.S. at 720. There was no showing that denial of third-party standing would have been prejudicial to the miners; indeed, the Court, on consideration of the merits, found “affirmative indication[s] that attorneys willing to take black lung cases were in adequate supply.” \textit{Id.} at 724. Standing was granted to the plaintiff lawyers on the basis of their own
pay adequate heed to constitutional limitations on the scope of the federal judicial power. Finally, the constitutional issues governing

interests in the fee arrangements as well as their clients' "due process right to obtain legal representation." *Id.* at 720-21. The Court relied on a single authority, *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954-58 (1984). See *Triplett*, 494 U.S. at 720. But the Court misread *Munson* because, in that case, it had noted the problem of allowing third-party standing absent constitutional detriment to others, and granted relief on the sole ground that, in its view, the case was essentially one of First Amendment overbreadth. See *Munson*, 476 U.S. at 957-58 (noting that "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society"). A short time before, in *Caplin & Drysdale*, the Court had allowed third-party standing in a case, brought by a law firm, challenging a drug forfeiture statute as depriving its convicted drug dealer client of his Sixth Amendment right to counsel. *See* *Caplin & Drysdale*, 491 U.S. at 623 n.3 (holding that the law firm, as well as the client, had suffered the requisite "injury-in-fact," although only the client's injury rose to the level of a constitutional infringement).

It may be noted that several earlier cases taking a somewhat similar approach to the standing issue are reported in Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 287-93, 297-300 (1984). He contends that these cases recognize that Party A has a right to "interact" with Party B on the basis of the constitutional rights of Party C. *See id.* at 299. Party A's right to "interact" is said by Monaghan to be a "liberty" interest protected by the Due Process Clause, *see id.* at 305, but the basis on which this interest may be pursued in reliance on the constitutional rights of others is not explained, and there is no semblance of such analysis in any of the cases he cites. Monaghan says further that *Barrows v. Jackson*, 346 U.S. 249 (1953), marked "a fundamental conceptual shift." *Id.* at 288. It is submitted that *Barrows* did more than that: It placed *jus tertii* doctrine upon a much-needed constitutional foundation that comes to terms with the problems of justiciability raised by third-party standing. *See infra* note 139. The rule represented by the earlier cases, whatever that may be, is obsolete.

130. In *Caplin & Drysdale*, the Court stated:

When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article II's case-or-controversy requirement; and second, do prudential considerations which we have identified in our prior cases point to permitting the litigant to advance the claim?

*Caplin & Drysdale*, 491 U.S. at 623 n.3 (emphasis added). Similar statements were made in other *jus tertii* cases, such as *Singleton v. Wulff*, 428 U.S. 106, 112 (1976), and, if sound in that context, should be sound in other cases of third-party standing as well.

Is it true that Article III requirements are satisfied once injury-in-fact is shown? If a person who has made such a showing then requests rendition of an advisory opinion, the Court will decline on the ground that such an opinion is not justiciable. *See*, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 9-10 (1973); *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Similarly, there is no controversy before the Court, and accordingly a lack of justiciability, when the plaintiff names a defendant against whom no legal rights are asserted. *See United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam) (dismissing lawsuit because "[i]t does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to the adjudication of constitutional questions by this Court" (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339 (1892))). Does the proceeding become a controversy when the plaintiff asserts the rights of an absent person? Typically, or at least commonly, the owners of the rights being asserted in *jus tertii* cases are not parties. *See*, e.g., *Craig v. Boren*, 429 U.S. 190, 193-94 (1976); *Barrows*, 346 U.S. at 254-55. As nonparties, they would not be bound by the decision. *See supra* notes 28-30 and accompanying text. As to them the decision would be a nullity, and this can variously be rationalized as resting on a
third-party standing are also pertinent to the very different question of judicial power to invalidate hybrid statutes in their entirety. The persons who are subject to the valid provisions of such hybrid statutes are, more or less invariably, nonparties whose legal interests are not justiciable (if the foregoing analysis is sound). In this instance, there can be no argument that judicial determination of those interests is proper on the ground that it serves to prevent impairment of the constitutional rights of others. In any event, the latest Supreme Court \textit{jus tertii} decision

want of jurisdiction, or the rendering of an advisory opinion, or otherwise an exercise meaningless by reason of nonjusticiability. Decision on such an issue does not come within the federal judicial power because it is made at the instance of a third party, unless such third party has the authority to bind the owner of the right. See \textit{Restatement}, supra note 28, § 34(3) (1982). But standing of this character is determined not by whether the third person will benefit from the decision, but rather whether the third person can fairly represent the absent owner, as in suits \textit{in loco parentis} or class actions. See, \textit{e.g.}, \textit{id}., §§ 35, 40. Absent that kind of standing, how can a court, consistently with Article III, resolve a controversy on the basis of rights belonging to a nonparty?

The Court has, of course, been doing just that, but only when necessary to prevent impairment of the constitutional rights of third persons (apart from the deviations described \textit{supra} note 125, which it is hard to believe will survive as new doctrine). If this represents judicial lawmaking in the prudential mode, the justification given by the Court has been decidedly nonprudential. The Court has consistently said that it is implementing constitutional rights. See \textit{Craig}, 429 U.S. at 210 (holding that the challenged Oklahoma statute "constitutes a denial of the equal protection of the laws"); \textit{Barrows}, 346 U.S. at 254 (holding that denial of the right to "purchase, own, and enjoy property on the same terms as Caucasians" would deprive "non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment"); \textit{see also supra} note 125 and accompanying text. While the Court has discretion on how to proceed with implementation, it has no discretion to withhold implementation.

An anomaly must be noticed. No matter how a decision is rationalized, it cannot defeat the rights of persons neither present nor adequately represented. The decision in favor of a party, when justified as protection for the constitutional rights of a nonparty, would be difficult to sustain if the nonparty could not derive personal benefit from the decision. Yet it should be obvious that the nonparty would not be bound if the decision were adverse to his or her interest. In short, the question of whether such an issue is justiciable will not go away.

So we are left with the problem of federal judicial competence. If it is thought that Article III cannot be construed as embracing third-party standing in the circumstances indicated, the Court's practice can be rationalized as an accommodation between the requirements of Article III and other requirements of the Constitution. In any event, if third-party standing cannot be justified constitutionally, it cannot be justified at all.

If, in a \textit{jus tertii} case, the owner of the constitutional right is actually a party, a decision regarding that right becomes justiciable. See, \textit{e.g.}, \textit{NAACP v. Alabama ex rel. Patterson}, 357 U.S. 449, 462-63 (noting that forced disclosure of the NAACP membership list "is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate"). But the question remains whether plaintiffs not asserting rights personal to themselves can prevail in light of the \textit{Raines} principle, which the Court has said to be of constitutional dimension. See \textit{supra} Part II.C. Departure from \textit{Raines} should not be allowed without constitutional justification, which traditional \textit{jus tertii} doctrine has, of course, supplied.
emphasized the constitutional entitlement of the persons whose rights were being asserted.\textsuperscript{131}

The Court’s justification for third-party standing suggests the basis for expanding the practice. In the course of a study of vagueness doctrine, this Author concluded that vague statutes almost always give adequate notice in some applications, and, further, that persons on notice are typically hardcore violators and the ones most often proceeded against.\textsuperscript{132} The result is that vague statutes remain on the books for a long time, with a chilling effect on others, who only infrequently can make a showing of traditional standing to complain of these statutes.\textsuperscript{133} The rights thus chilled may not be conferred by the First Amendment, but uncertainty regarding the reach of the law is no small matter.

Another situation calling for expansion of invalidation in full is suggested by \textit{Harper v. Virginia Board of Elections}.\textsuperscript{134} This case involved a challenge to Virginia’s poll tax.\textsuperscript{135} The plaintiffs contended that they were impoverished and that the statute impaired their voting rights.\textsuperscript{136} The Court invalidated the statute, on the ground that it denied equal protection of the laws to poor voters. The Court invalidated the statute as written—in other words, facially.\textsuperscript{137} Under traditional doctrine, even if a court expressly said that the invalidation was facial, the statute would be invalid only as to the plaintiffs, and under \textit{stare decisis} as to others similarly situated.\textsuperscript{138} It would not be void as to voters who were not poor. Yet, leaving the Virginia statute standing as to such people would have introduced intolerable vagueness, affecting both the rich and the poor in the absence of any line separating the two. This could be avoided by judicial language making it clear that the statute was being invalidated in all possible applications. Such language, even when embodied in the judgment, would not “kill” the statute, but its \textit{stare decisis} effect would be clear. All courts would be bound to deny enforcement of this statute or any statute like it.

\textsuperscript{131} See \textit{Powers v. Ohio}, 499 U.S. 400, 414 (1991) (stating that efforts by such persons to vindicate those rights themselves would be “daunting”).

\textsuperscript{132} See \textit{Hill, Police Discretion}, supra note 20, at 1317-18 (comparing vagueness doctrine with First Amendment overbreadth); \textit{cf. Ford}, supra note 70, at 1451-52 (discussing reasons for applying overbreadth doctrine in abortion cases).

\textsuperscript{133} \textit{Hill, Police Discretion}, supra note 20, at 1317-18.

\textsuperscript{134} 383 U.S. 663 (1966).

\textsuperscript{135} See \textit{id.} at 664.

\textsuperscript{136} See \textit{id.} at 664 n.1.

\textsuperscript{137} See \textit{id.} at 666, 668-69.

\textsuperscript{138} See discussion \textit{supra} Part II.F.
At least superficially, the posited example bears no likeness to either the *jus tertii* or First Amendment overbreadth doctrines. It does not involve a constitutionally unprotected person relying on the constitutional rights of others. Rather, it suggests that a court should invalidate a statute in its entirety if leaving part of the statute standing would create constitutional problems. Thus, in this instance, too, action would be taken to prevent constitutional detriment to persons not before the court. And this is the basic thrust of the *jus tertii* and First Amendment overbreadth cases.

V. ACADEMIC COMMENTATORS

The writers discussed in Part V have all been referred to in previous parts, where relevant. Here, the discussion will be about prominent features of their work that have not previously been addressed. As will be shown, all of them believe that, without more, a statute comprised of valid and invalid components is invalid in its entirety. But they also recognize that, under the principle of *United States v. Raines*, the Court, at least typically, enforces the valid components of such statutes. The work of these writers consists in large part of attempts to rationalize this discrepancy. The dominant figure in this group is Henry Monaghan, upon whose views the others have built.

A. Henry P. Monaghan

It is Monaghan, who in an influential article, has advanced the thesis that a hybrid statute is unconstitutional in its entirety.\(^{139}\) The valid parts of such a statute, he maintains, can be saved only if separable from the rest of the statute.\(^{140}\) Furthermore, he rejects the First Amendment overbreadth doctrine as unsound, arguing that the decisions rendered pursuant to that doctrine can be better understood as turning upon nonseparability of the pertinent statutes.\(^{141}\)

1. Separability as a Constitutional Issue

Monaghan’s starting point is *Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*\(^{142}\) In that case, the railroad complained of a state statute that required settlement of claims for lost or damaged

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\(^{140}\) See id. at 5.

\(^{141}\) See id. at 30-31.

\(^{142}\) 226 U.S. 217 (1912); see Monaghan, supra note 139, at 6.
freight within a specified period. The railroad argued that the statute, in violation of due process, required the settlement of even frivolous claims. But it was enough for the Court that the statute was valid as applied to the railroad’s conduct. The 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.

Monaghan maintains that this decision is wrong and indeed “unintelligible,” unless seen as resting on a presumption that the valid and invalid terms of the statute were separable. This rationalization, now known as the “Yazoo presumption,” has been accepted as fundamental by other scholars. In this view, separability vel non is an issue of constitutional dimension. This is a delusion. As previously argued by this Author:

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. In the absence of such a clause, the claim rests upon

143. See Yazoo, 226 U.S. at 218.
144. See id. at 219.
145. Id. at 219-20.
146. See Monaghan, supra note 139, at 6-7, 7 n.26.
147. Id. at 12 n.49, 29; But see Dorf, supra note 42, at 251 (calling it the “Yazoo/Salerno Presumption”); Hill, First Amendment, supra note 106, at 1082 (noting that the Author did “not see... any talk of a presumption” in the Yazoo decision).
149. Cf. Fallon, Overbreadth, supra note 102, at 874-75 (“[A] statute that proscribes any constitutionally protected conduct is unconstitutional in its totality unless severable[.]”; see also id. at 889 (“If overbreadth doctrine were limited to protecting the personal right not to be subjected to sanctions under an unconstitutional rule of law, sanctions should be sustained even under overbroad statutes so long as... the statutes are severable... This approach would virtually never require a court... to invalidate a statute... on grounds of overbreadth.”).
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 paramountcy 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 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.150

2. The First Amendment Overbreadth Doctrine

Also influential has been Monaghan’s criticism, in the same article, of the First Amendment overbreadth doctrine.151 The Court has said that the doctrine does not apply when plaintiffs complain that the particular statute violates their own rights, for “[t]here is then no want of a proper party to challenge the statute.”152 In that situation, the doctrine would serve no function—there would be no need for an injunction restraining enforcement of the statute until overbreadth is subsequently eliminated.153 The doctrine comes into play when the plaintiff has violated a valid part of the statute and is permitted to challenge it on

150. Hill, First Amendment, supra note 106, at 1083-84 (footnotes omitted). As noted in the text, Monaghan believes Yazoo to be “unintelligible” unless resting upon a presumption of separability. See supra note 142 and accompanying text. His clinching argument is that “[i]f . . . the state court subsequently holds the statute inseparable, the initial application of the statute to the railroad in Yazoo cannot be justified.” Monaghan, supra note 139, at 7 n.26. But there is no indication that a claim of nonseparability was made in the state court, or that that court intimated any views on the subject. Even if the state court had held the statute to be separable in Yazoo and held it to be nonseparable in a later case, that would not have rendered the second decision unconstitutional. It is a fundamental tenet of our jurisprudence that a court is free to change its mind. See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680, 681 n.8 (1930) (Brandeis, J.) (“Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is.”). However, the problem of unfair surprise, at least in criminal cases, has to be guarded against.

151. See Monaghan, supra note 139, at 2-3.


153. See id.
behalf of third persons, with a view to eliminating the chilling effect of the statute on the exercise of First Amendment rights. That is the doctrine as expounded by the Court.

Monaghan’s explanation of the First Amendment cases is quite different. According to him, the Court has simply been applying (and sometimes misapplying) what he deems to be a traditional rule, to the effect that hybrid statutes are invalid in their entirety. He recognizes that what he calls “the Yazoo separability presumption” prevents such a result in the ordinary case. But he says that there is “little scope” for separability law to function in the case of a statute violative of the First Amendment. His explanation of this point is less than clear. Despite seemingly contradictory statements in successive paragraphs, he seems to believe that, when a hybrid statute is in part violative of the First Amendment, there is “little scope” for a saving construction by separation of the good and bad parts. Yet, it is exceedingly difficult to find in his article any plausible reason why First Amendment statutes should be treated differently in this regard, apart from an enigmatic suggestion that, as to such statutes, separability may not be feasible.

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156. See Monaghan, supra note 139, at 3-4, 12.
157. See id. at 7, 29.
158. See id. at 29. Monaghan believes the Court has been wrong in denying relief when the chilling produced by the statute was not substantial. See id. at 27-28.
159. With reference to Monaghan’s article as a whole, Fallon has stated that it is “cryptic” and not easy to summarize. See Fallon, Facial Challenges, supra note 15, at 1353. Earlier, he had said that Monaghan gave “no adequate account” of why First Amendment statutes should receive special treatment. See Fallon, Overbreadth, supra note 102, at 872 & n.115.
160. Monaghan states:

[When a trespass statute is in fact applied to anything embraced within the constitutional definition of speech, the contextually specific construction given to the statute must be valid. If it is not, the statute is to that extent—and to that extent only—invalid as a matter of constitutional law.

The requirement of an acceptable, contextually specific construction ordinarily will mean that the relevant constitutional principles must be sufficiently elaborated by the state court to ensure that the statute’s reach is sufficiently constrained. An elaboration requirement leaves little scope for application of the Yazoo separability “presumption” in the First Amendment context.

Monaghan, supra note 139, at 29 (emphasis added) (footnotes omitted).
161. See id.
162. Monaghan’s concern is that the defendant be tried under a constitutional rule. See id. at 21. As he puts it, a statute must not be “facially defective . . . at the time and in the terms in which it is applied to a litigant.” Id. at 29. But this is achievable by separability.
163. This appears in his discussion of the least restrictive means test as applicable in First Amendment adjudication. See id. at 24-25. He states that “the state court may not be in an appropriate institutional position to truncate a statute to satisfy the least restrictive alternative...
The case on which Monaghan principally relies is one in which a conviction had been set aside only for failure of the lower courts to apply separability doctrine. The statute involved impaired First Amendment rights, but the opinion leaves no room for doubt that the conviction would have been upheld if the defendant had been charged only under the valid part of the statute.

In any event, separability doctrine, which Monaghan sees as determinative, is not of constitutional dimension, as has been shown by the Yazoo-Raines practice. The defendant has no ground for complaint if punished for conduct in violation of the valid provision of a hybrid statute, as long as the jury was instructed that it could convict only on the basis of such conduct. The special treatment of First Amendment cases has been amply explained by the Court.

analysis." Id. at 25. It is unclear what to make of this, since Monaghan also insists, properly, that there are no federal constraints on the construction by state courts of their statutes. See id. at 16, 21. How far a state may go in saving ("truncating") a state statute is entirely a matter of state law. See id. at 21. Is the legislature really in a better position to fine-tune the statute, and, if so, what follows? Is the judicial role precluded? Monaghan does not develop the point.

164. His reliance was on Terminiello v. Chicago, 337 U.S. 1 (1949), which is a leading case in its line. See Monaghan, supra note 139, at 10-11. In Terminiello, the claimant had been convicted for violation of a disorderly conduct statute that, as construed by the state courts, outlawed protected as well as unprotected speech. See Terminiello, 337 U.S. at 2-5. Whether the actual speech involved in the case fell into the one class or the other was disputed at the trial. See id. at 3. The Supreme Court held that determination of the character of the speech was unnecessary, since the jury had been charged in terms of the statute as construed, and the jury had returned a general verdict of guilty. See id. at 3-4. The Court said: "We need not consider whether as construed [the statute] is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses." Id. at 5.

It should be plain that, despite construction of the statute as embracing protected as well as unprotected speech, if the jury had been charged that it could convict only on the basis of a finding of unprotected speech (as explained to it by the trial judge), there would have been no ground for reversal—assuming fair notice of what the statute forbade, which apparently did not present a problem. The quoted language indicates that the court assumed application of the principle enunciated in Yazoo and Raines to be as appropriate in a First Amendment case as in any other.

165. See id. at 5-6 (discussing Stromberg v. California, 283 U.S. 359 (1931)).
166. See Hill, First Amendment, supra note 106, at 1083-84.
167. See supra note 161 and accompanying text.
168. See, e.g., Terminiello, 337 U.S. at 4.

The right to speak freely and to promote diversity of ideas . . . is . . . one of the chief distinctions that sets us apart from totalitarian regimes.

. . . That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. (citations omitted).
B. Michael C. Dorf

In a 1994 article, Professor Dorf maintains that facial (total) invalidation is appropriate in all cases involving fundamental rights, of which the First Amendment overbreadth doctrine is but one example. He does not say that the Court has announced such a rule, but he musters cases which, in his view, show that such a rule is being followed. These cases do not support his thesis. In some of them, the Court did in fact invalidate, without qualification, statutes apparently susceptible to some valid applications. But the opinions show no awareness of this, or of the principle that permits litigants to assert only their own rights. Further, Dorf is apparently unmindful in this connection of the rule that limits the scope of a decision to issues considered and actually decided. Another class of cases on which he relies involves prophylactic rules. These two classes of cases do not deal exclusively with the protection of fundamental rights, and the opinions do not distinguish between fundamental rights and other rights. The case that comes closest to supporting his position is *Aptheker v. Secretary of State*, which was discussed above and shown to be essentially a First Amendment overbreadth case.

Like Monaghan, whom he cites extensively, Dorf analyzes the issue largely in terms of separability and presumptions. In principal part, his article is an analysis of *United States v. Salerno*. In brief, Dorf contends that *Salerno*'s declaration to the effect that a statute susceptible
to both valid and invalid applications is not facially invalid carries with it the implication that such a statute is "facially valid." Since this would be intolerable, he insists that, if Salerno is sound, it must be read as "establish[ing] an irrebuttable presumption that a statute's unconstitutional applications are severable from its constitutional ones." He then proceeds to demonstrate that such a presumption does not make sense. But his argument is founded on a non sequitur. Rejection of a facial challenge to an entire statute is not tantamount to a holding that the entire statute is facially valid. Whatever the Court may have had in mind in Salerno, part of a statute may be unconstitutional as written or construed, and the Court has never held otherwise. And even should it be clear that a court has purported to adjudge a statute to be constitutional in its entirety, this would not insulate unconstitutional parts from later invalidation if the constitutionality of such parts was not actually passed upon.

C. Richard H. Fallon, Jr.

Professor Fallon advances an overarching principle to explain the facial invalidation of hybrid statutes, namely, that in almost all cases involving such statutes, the challenged statute faces invalidation in its entirety unless, presumably by construction, the terms of the statute are "relatively fully specified." In fuller text, he declares:

> Doctrinally, it is clear that the Supreme Court sometimes finds that a statute must be relatively fully specified at the point that a constitutional test is applied, and that if the statute as so specified does not survive the applicable test, it will be deemed unconstitutional on its face. . . . [T]he clearest, best known example involves the First Amendment overbreadth doctrine.

If the statute is thus invalidated, he says, "otherwise valid subrules cannot subsequently be separated from invalid ones."

178. See Dorf, supra note 42, at 239-40.
179. Id. at 238.
180. See id. at 240.
181. See supra note 10 and accompanying text.
182. See supra Part III.A.
183. Fallon, Facial Challenges, supra note 15, at 1346. This phrase is also used in id. at 1342, 1347-48, 1351-52.
184. Id. at 1346-47; see also id. at 1348, 1353-54.
185. Id. at 1346; see also id. at 1348, 1352-54. Elsewhere in the same article, Fallon states that whether this is indeed the law "is not wholly clear." Id. at 1341 n.109.
To take a minor point first, there is no warrant for the assertion that later separation of good from bad provisions is forbidden. In the case of Fallon's prime example of First Amendment overbreadth—where an unprotected plaintiff is accorded standing to assert the rights of protected persons—\(^{186}\) the Court's asserted purpose is to prevent enforcement of the statute until the unconstitutional features of the statute are eliminated, either by judicial or legislative action, after which the statute may be applied even to past violators.\(^{187}\) Fallon relies on an opinion in an earlier case, which is distinguishable.\(^{188}\) Indeed, the Supreme Court probably lacks power to bar state courts from subsequent validation of state statutes by construction.\(^{189}\)

While Fallon is not clear as to what he has in mind by the phrase "relatively fully specified," his discussion of Raines provides a clue.\(^{190}\) Under the Raines practice, he says, the "meaning [of a statute] is . . . permitted to emerge on a case-by-case basis."\(^{191}\) However, this is not permitted when "an applicable legal principle establishes that . . . the challenged statute must be relatively fully specified at the time of [the statute's] application."\(^{192}\) This is uncommon usage, and its meaning is not readily apparent. Fallon says that his "basic approach" is derived generally from Monaghan,\(^{193}\) who employed somewhat similar language ("contextually specific construction") in his explanation of the valid rule requirement.\(^{194}\) As best this Author can determine, Fallon means only that, under Raines, the Court is unconcerned with possibly invalid applications, while in other cases such applications are considered and the statute is invalidated in its entirety, unless, through construction or otherwise, it comes to the Court divested of its invalid features.

186. See id. at 1348.
187. See, e.g., Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 494, 503-04, 503 n.12 (1985); Dombrowski v. Pfister, 380 U.S. 479, 490-92 (1965). There is some contrary language in Osborne v. Ohio, 495 U.S. 103, 121 (1990), but there is no evidence that this has changed the basic thrust of the decisions.
188. See Fallon, Overbreadth, supra note 102, at 853 n.3 (citing United States v. Petrillo, 332 U.S. 1, 6 (1947)). The Court did indeed make such a statement in Petrillo and with special force, since the Court was explaining why there should be hesitation before resort to facial invalidation. See Petrillo, 332 U.S. at 6. But the opinion by Justice Black failed to take account of the elemental rule that facial invalidation has no effect beyond issues actually decided. Monaghan, discussing Petrillo, was aware of its deficiency on this score, observing that "questions of issue preclusion will arise." Monaghan, supra note 139, at 32 n.134.
189. See discussion supra Part II.G.
191. Id. at 1346.
192. Id.
193. See id. at 1353.
194. See Monaghan, supra note 139, at 29.
Apparently, in Fallon's terminology, the statute is "relatively fully specified" when there has been such divestment.

Raines, he tells us, is the "norm," seldom to be departed from.\(^{195}\) As to when departure is proper, he states that the requirement of "relatively full specification" is a product of "particular constitutional tests developed by the Supreme Court to enforce specific constitutional provisions."\(^{196}\) But Fallon does not do much to elucidate this statement. It is noteworthy that, except for the First Amendment overbreadth doctrine, he cites no authority even remotely suggesting that the valid portions of a hybrid statute are unenforceable.\(^{197}\)

Fallon further states that facial invalidation "most commends itself when a constitutional provision both affords protection to speech or conduct that is especially prone to 'chill' and reflects a value that legislatures may be unusually disposed to undervalue in the absence of a significant judicially established disincentive."\(^{198}\) The "disincentive" referred to at the end of this statement is threat of punishment,\(^{199}\) which earlier in this Article this Author has concluded to be inappropriate.\(^{200}\) As to the suggestion of facial invalidation for statutes that chill speech or conduct, the Author would more fully agree if the prescription were for third-party standing rather than facial invalidation, for reasons that have been examined.\(^{201}\)

**D. Matthew D. Adler**

Adler maintains, on the basis of a lengthy and abstract analysis, that questions of facial and as-applied invalidation are, or should be,


\(^{196}\) Id. at 1351.

\(^{197}\) In cases arising under the First Amendment overbreadth doctrine, the Supreme Court appears to assume that claimants go free, although their conduct is not constitutionally protected. It is submitted that, in principle, this does not follow inexorably from the fact that the statute has been invalidated on its face. When there is facial invalidation, others similarly situated can rest on the *stare decisis* effect of the statute. But while the claimant in the First Amendment case seems to go free, persons similarly situated are thereafter punishable, even for conduct antedating the facial invalidation. See Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965). Perhaps more plausibly, the claimant's exoneration can be seen as resting on the need to provide someone with an incentive to sue—just as an incentive is needed to provide a willing claimant in *jus tertii* cases. See Fallon, *Facial Challenges*, supra note 15, at 1352 (footnote omitted).


\(^{200}\) See discussion *supra* Part III.C.

\(^{201}\) See *supra* notes 122-24 and accompanying text.
governed largely by moral considerations.\textsuperscript{202} He states that “[e]very constitutional claimant has one and the same type of legal right: a right to secure the invalidation ... of a rule that goes morally awry.”\textsuperscript{203} Further, he rejects the notion of valid subrules.\textsuperscript{204} He claims that, once it is determined that a rule goes beyond valid bounds, “there is no further question of the rule being largely, or only a little bit, wrong.”\textsuperscript{205} But Adler concludes that it may be judicially expedient to “limit[] ... intervention to the most serious cases of morally problematic rules.” Fallon understandably takes Adler to mean that “[t]o stop serious wrongdoers from escaping punishment under defective statutes ... courts might sometimes be morally justified in imposing criminal punishments under constitutionally invalid rules of law.”\textsuperscript{206}

\textbf{E. Constitutional Tests}

A number of commentators have said that the key to whether a statute should be invalidated in its entirety is to be found in the specific constitutional principle applicable in the particular case.\textsuperscript{203} They point to the First Amendment overbreadth doctrine as an example.\textsuperscript{203} Otherwise, however, their suggestions of specific constitutional tests are unhelpful.

Thus, it is argued that, when a statute is infected with an unconstitutional purpose, the entire statute is necessarily invalid.\textsuperscript{205} But the unconstitutional purpose may not extend to all applications of the statute, and, when this is so, the statute should survive as to valid applications. This has been recognized by the Supreme Court.\textsuperscript{210}

\begin{thebibliography}{99}
\bibitem{203} Adler, Rights Against Rules, supra note 202, at 159.
\bibitem{204} See id. at 157.
\bibitem{205} Id. at 157 n.542.
\bibitem{206} Id.
\bibitem{207} Fallon, \textit{Facial Challenges}, supra note 15, at 1325.
\bibitem{208} See Dorf, supra note 42, at 251; Fallon, \textit{Facial Challenges}, supra note 15, at 1327, 1344; Isserles, supra note 15, at 423.
\bibitem{210} See Dorf, supra note 42, at 279, 281 n.208 (asserting that “the invalid purpose pervades all of the statute’s applications”); cf. Fallon, \textit{Facial Challenges}, supra note 15, at 1338 (noting that one “bad . . . statutory subrule . . . typically will infect all others”).
\bibitem{211} See Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion). Language suggesting total invalidation should not be taken uncritically. For example, the Court used such language in \textit{Hunter v. Underwood}, 471 U.S. 222, 230-31 (1985), but it disposed of the case by

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Similarly, a statute in violation of the equal protection clause may be void as to all applications embraced by its provisions, but, then again, it may not; the Supreme Court has routinely invalidated parts of a statute for denial of equal protection, while leaving the rest of the statute standing. It has been argued that underinclusiveness renders a statute void in all applications, but, again, the Supreme Court has not so viewed the matter. Apart from the mistaken assertion that the foregoing tests are pertinent as to when facial invalidation is in order, the significance of facial invalidation as such has been overblown, as previously argued.

The question of third-party standing is another matter. The specific constitutional tests applicable in this area are similarly difficult to ascertain, apart from the obvious pertinence of the First Amendment in the overbreadth cases. However, this Author has tried to show that the doctrine governing these cases is part of a more general principle that accords third-party standing to prevent impairment of constitutional rights. The jus tertii cases also illustrate this general constitutional principle. Nobody seems to have suggested specific constitutional tests to govern these cases, and that is just as well.

VI. CONCLUSION

The current controversy is largely driven by misconceptions about the meaning and implication of facial invalidation. Traditionally, facial invalidation meant simply that statutory language was struck down as written. Further, the holding was understood to apply only to the rights of the successful litigant. Minority justices and academic critics have assumed that such a disposition confers no benefit, or insufficient benefit, upon persons similarly situated. They have further assumed that, when a court invalidates a statute on its face, it is striking down the statute not just as applied to the litigant but also as to all persons within its scope. But even if the court were to employ language making this

affirming the judgment below, see id. at 225, and it was obvious that the lower court had left standing provisions untainted by an illicit purpose. See Underwood v. Hunter, 730 F.2d 614, 621 (11th Cir. 1984), aff'd, 471 U.S. 222 (1985).

214. See Dorf, supra note 42, at 251; Fallon, Facial Challenges, supra note 15, at 1345-46.
216. See discussion supra Part III.A.
217. See supra notes 121-23 and accompanying text.
218. See supra notes 124-25 and accompanying text.
219. See supra notes 106-18 and accompanying text.
explicit, nonparties would secure no rights greater than those conferred by the traditional mode of as-applied adjudication. For as nonparties, they would gain nothing from the judgment quaqujudgment. Their rights would derive only from the stare decisis effect of the decision, which is exactly what happens in the case of the traditional practice.

It has also been widely assumed that, when a statute is facially invalidated, it is stricken down in its entirety, even if it contains valid as well as invalid components. But when persons subject to the valid components are absent, as seems invariably to be the case, they are not affected by either the judgment or the stare decisis effect of the decision. Were it otherwise, a serious constitutional problem would arise.

Much confusion would be avoided if it were recognized that courts only adjudicate the rights of litigants, and are not in the business of killing or mutilating statutes. Of course, the nature of the federal judicial power is what the Supreme Court says it is. At present, however, it is clear that, despite an unqualified holding that a statute is null and void, the statute remains alive and well as to issues not actually passed upon, at least in the case of nonparties. As to issues actually decided, the statute may be technically alive but it is not well, since stare decisis stands in the way of its enforcement. The result is that attempts at enforcement are effectively discouraged.

The confusion regarding facial invalidation should not carry over to third-party standing. Here, persons who are not themselves constitutionally protected derive benefit from the constitutional rights of others, but only for the purpose of preventing constitutional detriment to those others. To this end, and upon a proper showing, third-party standing can be usefully expanded.

Academic commentators have been unhelpful because they have started with the premise that a statute having both valid and invalid components is invalid in its entirety—this in the face of repeated holdings and declarations of the Supreme Court to the contrary. In an attempt to reconcile this basic difference, they have erected theoretical structures that are rickety and unsound.

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220. The judgment, of course, protects the litigant.