Vague or Overbroad Restraints

Introductory Comments

A statute, regulation or governmental order can be challenged under the First Amendment for **facial unconstitutionality** or for **unconstitutionality as applied** specifically to the challenger.

Facial Unconstitutionality

There are two types of challenges for facial unconstitutionality:

- Textual: The terms of the statute, regulation, or order explicitly violate the requirements of the First Amendment.

  Example: A state statute prohibits any assembly to study the philosophy of Karl Marx.

  In this type of challenge for facial unconstitutionality, it is generally unnecessary to inquire into the purposes or effects of the statute, regulation, or order.

- Operational: There are no conceivable circumstances in which the statute, regulation, or order might be constitutional.

  Example: A state statute that requires publication of membership lists for politically dissident groups is enacted in order to expose and discourage private association with such groups.

In this type of challenge for facial unconstitutionality, it is generally necessary to inquire into the purposes or effects of the statute, regulation, or order.

Unconstitutionality as Applied

Although a statute, regulation, or order may be constitutional on its face and may be applied constitutionally to some persons and in some circumstances, it may not be able to be applied validly to the challenger.

Typically, there are two scenarios for unconstitutionality-as-applied challenges:

- The challenger's expression involves some constitutionally protected interest, and the statute, regulation, or order cannot be applied to burden that interest.

- The statute, regulation, or order has been interpreted by enforcing agencies in such a way as to render the law invalid as applied to the challenger.

First Amendment Maxim of "Saving Construction": whether challenged for facial unconstitutionality or unconstitutionality as applied, a statute, regulation, or order should be interpreted in a reasonable manner that saves it from invalidity.

Typically, a court has two choices under this maxim of construction to resolve a challenge for unconstitutionality as applied:

- Interpret the statute, regulation, governmental order narrowly to determine that it was not meant to apply to the likes of the challenger or in such circumstances and conditions as those under review.

- Determine that the statute, regulation, or order is unconstitutional as applied to the challenger.

Even when a statute, regulation, or order may be constitutional as applied specifically to the challenger, it may be invalidated as facially unconstitutional under the First Amendment doctrines of **substantial overbreadth** and **void-for-vagueness**. Both of these doctrines recognize that the First Amendment places procedural restraints on governmental efforts to control expressive activities that are not generally protected under free speech guarantees.

Substantial Overbreadth: The challenger argues that, although the statute, regulation, or order may be constitutional as applied to his or her particular expressive activities, the law is unconstitutional as applied to a real and substantial number of other persons and expressive activities within its plainly legitimate sweep, and thus must be invalidated in its entirety. *See Gooding v. Wilson* (1972); *Broadrick v. Oklahoma* (1973).

Void-for-Vagueness: The challenger argues that the statute, regulation, or order is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, and thus it must be invalidated in its entirety. *See Connally v. General Construction Co.* (1926).

Although conceptually distinct, the substantial overbreadth and void-for-vagueness doctrines overlap and reinforce one another as a practical matter:

- A substantially overbroad statute, regulation, or order is likely also to be void-for-vagueness: the potential to sweep in a substantial number of protected speech activities may well result from the unclear or ambiguous terms of the law that vest excessive discretion in law enforcement authorities.

- The substantial overbreadth and void-for-vagueness doctrines target the same normative concerns and objectives in First Amendment jurisprudence.

Among the most important normative values served by the substantial overbreadth and the void-for-vagueness doctrines are the following:

- An unconstitutionally overbroad or vague law is likely to have a "chilling effect" on constitutionally protected expressive activities: the fear of potential prosecution arises from the uncertainty in determining its application.

- An unconstitutionally overbroad or vague law fails to give adequate notice to the violator and may practically "trap the innocent by not providing fair warning."

- An unconstitutionally overbroad or vague law delegates excessive discretion to governmental officials who may enforce it arbitrarily and discriminatorily. *See Grayned v. Rockford* (1972).

- Invalidation of an overbroad or vague law in its entirety spares the judiciary the repeated and convoluted task of delineating the boundaries of protected and unprotected expressive activities conceivably governed by the defective statute, regulation, or order.

- Invalidation of an overbroad or vague law in its entirety respects the institutional capacity of the political branches to redefine the scope of the statute, regulation, or order so as to target only those expressive activities falling outside of First Amendment protections.

<u>The evolution of the substantial overbreadth doctrine in *Gooding v. Wilson* (1972) and *Broadrick v. Oklahoma* (1973)</u>

The operation and normative rationales of the substantial overbreadth doctrine were explained in Justice Brennan's opinion for the majority in *Gooding v. Wilson* (1972) (granting petition for federal habeas corpus relief from conviction under Georgia breach of the peace statute on the basis that the prohibition of "opprobrious words or abusive language" is susceptible of

application to First Amendment protected expression as well as to unprotected "fighting words"):

> At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," [the] transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." [This] is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Justice Brennan's analysis recognizes a special exception to the Article III case or controversy doctrine that an individual has no standing to litigate the rights of third persons. The narrow exemption from standing restrictions granted by the substantial overbreadth doctrine is warranted in the First Amendment context because of the risk that overbroad statutes and regulations will chill the exercise of constitutionally protected expressive rights. Moreover, the constitutionally protected or unprotected status of the challenger's own expressive activities may be theoretically irrelevant, since a prosecution cannot proceed under a law that is invalid in its entirety for facial unconstitutionality.

Gooding v. Wilson is a classic illustration of the overbreadth doctrine. During an antiwar demonstration at an army induction center, police attempted to move Wilson away from the door and a scuffle began. Wilson said to several of the officers: "You son of a bitch, I'll choke you to death;" "White son of a bitch, I'll kill you;" and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." Wilson was convicted for using opprobrious words and abusive language in violation of the Georgia breach of the peace statute that provided: "Any person who shall, without provocation, use to or of another, and in his presence [opprobrious] words or abusive language, tending to cause a breach of the peace [shall] be guilty of a misdemeanor."

The Georgia Supreme Court sustained Wilson's conviction on the basis that the Georgia statute applied only to a narrowly limited class of constitutionally unprotected "fighting words," as defined by the United States Supreme Court in *Chaplinsky v. New Hampshire* to mean "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," and that Wilson's language constituted such fighting words.

Justice Brennan's opinion for the United States Supreme Court in *Gooding v. Wilson* recognized that Wilson's conduct might have been regulated under a narrowly and precisely drawn statute prohibiting constitutionally unprotected fighting words. Nevertheless, Wilson could bring a challenge to the facial constitutionality of the Georgia breach of the peace statute, and his conviction would be overturned, if the statute were susceptible to

application beyond the category of fighting words to constitutionally protected expression.

Noting that the dictionary definitions of "opprobrious" and "abusive" give them greater reach than "fighting words," the majority of the Court determined that Georgia appellate decisions had construed the breach of the peace statute to apply to utterances that fall within these definitions but extend beyond the sense of "fighting words" as *Chaplinsky* defines them. Georgia Supreme Court decisions prior to 1915 construed "tending to cause a breach of the peace" as including the possibility that the addressee might retaliate at some time in the future.

Moreover, a 1961 Georgia Court of Appeals decision, in applying another statute, adopted the common law definition that "breach of the peace" occurs when one speaks words offensive to some who hear them. The *Gooding* majority concluded that the Georgia appellate courts had not interpreted the breach of the peace statute "so as to avoid all constitutional difficulties."

As the *Gooding* Court acknowledges, the First Amendment overbreadth doctrine tests the constitutionality of legislation, not in terms of its application to the violator at hand, but in terms of its *potential* applications. This presents at least three difficulties:

- In order to prevent any potential interference with the First Amendment rights of others, the doctrine permits the reversal of the conviction of an individual whose own First Amendment

rights have not been violated and frustrates the government's legitimate police power objectives to that extent.

- The doctrine necessarily requires the courts to evaluate factual settings and enforcement proceedings not presented by the record. As Justice Burger suggests in his dissenting opinion in *Gooding*, solicitude for First Amendment values risks judicial overreaching "because of some insubstantial or imagined potential for occasional and isolated applications that go beyond constitutional bounds."

- As Justice Brennan's opinion in *Gooding* explains, the federal courts lack jurisdiction to construe state or municipal regulations authoritatively and cannot adopt narrowing constructions to save overbroad regulations from invalidation. Unless the federal court explains precisely how the regulations might have been drafted to avoid unconstitutional overbreadth, state or municipal officials may be left with little guidance on how to redesign the regulations to avoid First Amendment objections in the future.

In *Broadrick v. Oklahoma (1973)* (rejecting an overbreadth challenge to the facial constitutionality of a state statute that restricted the political activities of civil servants), the Supreme Court responded to such critiques by limiting the First Amendment overbreadth doctrine. In an opinion by Justice White, the *Broadrick* majority restricted the doctrine to invalidation of "substantially overbroad" regulations.

Justice White reasoned:

> Although laws, "if too broadly worded, may deter protected speech to some unknown extent, there comes a point where the effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.
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> [Thus,] particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

The *Broadrick* decision imposed the following restraints on the unconstitutional overbreadth doctrine:

- Essentially, the substantial overbreadth doctrine is largely restricted to governmental burdens on First Amendment expressive activities rather than to other conduct.

- Invalidation of a statute, regulation, or order for substantial overbreadth is not permitted where a limiting and saving construction could be adopted.

- Where the focus of the statute, regulation, or order is expressive conduct rather than "pure speech," the alleged overbreadth must be real (*i.e.* good cause to believe that the law reaches legitimate expressive conduct) and substantial (*i.e.* the law would prohibit protected expressive conduct in a significant number of cases) judged in relation to the law's plainly legitimate sweep.

Several problems inhere in *Broadrick*'s substantial overbreadth doctrine that were not present in the origins of the doctrine in *Gooding v. Wilson*:

- The notion of substantial overbreadth has been described by the Supreme Court in only the most ambiguous terms. Justice Stevens' opinion for the majority in *Los Angeles City Council v. Taxpayers for Vincent* (1984) admitted as much in the following paragraph:

> The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, [there] must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

- How should substantial overbreadth be measured? By the ratio of potentially unconstitutional to potentially constitutional applications? By an absolute number of potentially unconstitutional applications? By more than an imagined potential for occasional and isolated applications that go beyond constitutional bounds?

- Without coherent standards to provide meaningful guidance, the substantial overbreadth doctrine is likely to give rise to unpredictable and arbitrary judicial line drawing.

  In this regard, consider *Board of Airport Commissioners v. Jews for Jesus* (O'Connor 1987) (invalidating as substantially overbroad a regulation banning all "First Amendment activities" within the Central Terminal Area of the Los Angeles International Airport) and *City of Houston v. Hill* (Brennan 1987) (invalidating as substantially overbroad a Houston ordinance making it unlawful for any person to "oppose, molest, abuse or interrupt any policeman in the execution of his duty").

  If these decisions are any indication of the force of the substantial overbreadth doctrine, its use may be reserved for laws that grant *virtually unfettered* discretion to enforcement authorities to penalize individuals for words or conduct that merely annoy or offend them or the general public.