# PARALLEL DOCTRINAL BARS: THE UNEXPLAINED RELATIONSHIP BETWEEN FACIAL OVERBREADTH AND "SCRUTINY" ANALYSIS IN THE LAW OF FREEDOM OF SPEECH

MARC ROHR*



*Professor of Law Emeritus, Shepard Broad College of Law, Nova Southeastern University

## I. INTRODUCTION

Suppose that, as an attorney, you have reason to question the constitutionality of a statute or ordinance that in some way burdens or threatens to suppress the speech of one of your clients. You decide to challenge the validity of that law "on its face," without any need to focus on your client's own speech—but how, in terms of First Amendment doctrine, will you do it? Should you argue that the statute is "facially overbroad," or, alternatively, that (depending on whether the ordinance is a content-based or content-neutral regulation of speech) it fails to survive "strict" or "intermediate" scrutiny? (I will refer to the latter mode of analysis, which starts by asking whether the law in question is content-based or content-neutral, as "scrutiny" analysis.) You may well decide to make both arguments. The more important choice, of course, is the one facing a judge: which of those analyses should she utilize? Both are potentially available, but when should one be used, and when should the other? Should a court ever employ *both* modes of analysis? At the Supreme Court level, the question has arisen most starkly in the case of *United States v. Stevens*, in which the Court of Appeals for the Third Circuit struck down a federal statute as a content-based regulation of speech that failed to survive strict scrutiny. However, the Supreme Court affirmed on the basis of facial overbreadth, with not even a hint of "scrutiny" analysis (other than describing what the Court of Appeals had done).[1] What relationship, then, do these two modes of analysis have to each other? To my knowledge, no satisfactory answer to the latter question has ever been provided by the United States Supreme Court. The result, predictably, is confusion. That confusion is the focus of this article. It manifests itself in three ways: when a court employs *both* analyses in resolving a single issue, in a single opinion;[2] when a court (or a Justice) blends the two analyses;[3] and when a court employs overbreadth analysis when it could have applied scrutiny analysis, as in *Stevens*.[4]

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[1] United States v. Stevens, 533 F.3d 218, 232–35 (3d Cir. 2008), *aff'd on other grounds*, 559 U.S. 460, 467 (2010) ("The Court of Appeals [] held that [the statute] could not survive strict scrutiny as a content-based regulation of protected speech.").

[2] *See infra* text accompanying notes 80–100.

[3] *See infra* text accompanying notes 104–87.

[4] *See infra* text accompanying notes 189–214.

Surprisingly, this confusion has not, to my knowledge, been the subject of scholarly analysis in any academic law journal.[5] Other commentators *have* addressed the differences between "facial" and "as-applied" challenges to laws regulating speech (and the rules that ostensibly govern the choice of one or another of those approaches);[6] the effect of a holding that a statute is facially invalid;[7] and the differences between the facial overbreadth concept (applicable to speech restrictions) and other facial constitutional challenges.[8] None of those commentators appear to question the applicability of the "facial" label to challenges (and rulings) employing "scrutiny" analysis.[9] Indeed, one rarely encounters an application

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[5] *But cf.* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement,* 48 AM. U. L. REV. 359, 416–21 (1998) (examining briefly whether scrutiny analysis is analytically distinct from the overbreadth doctrine but nonetheless concluding that it was not important to article's main thesis); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 38 n.157 (1981) (asserting in passing that the overbreadth doctrine and scrutiny analysis are not analytically distinct).

[6] *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915 (2011); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333 (2005); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657 (2010). *See also* Gillian Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 774 (2009) (describing how the Roberts Court has not "matched its consistency in preferring as-applied constitutional adjudication with clarity about what this preference means in practice.").

[7] *See, e.g.*, Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 HOFSTRA L. REV. 647 (2002); Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997); Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes***,** 2002 UTAH L. REV. 381 (2002).

[8] *See* Isserles, *supra* note 5, at 364 ("The goal of this Article is to elaborate [on] the conceptual and practical distinctions between [the] two kinds of facial challenges . . . and to suggest how [these] distinctions[s] . . . might be used to resolve the current confusion over facial challenges in the abortion context.").

[9] *See* Fallon, *Fact and Fiction About Facial Challenges, supra* note 6, at 935–37; Isserles, *supra* note 5, at 387–93, 416–21. In the words of Marc Isserles:

> [O]verbreadth facial challenges are not the only form of facial challenge. The other kind of facial challenge, which this Article terms a "valid rule facial challenge," presents a completely different picture of facial challenge adjudication. . . . [A] valid rule facial challenge directs judicial scrutiny to the terms of the statute itself, and demonstrates that those terms, measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contains a constitutional infirmity that invalidates the statute in its entirety.

Isserles, *supra* note 5, at 387. Isserles correctly views invalidation of a statute as impermissibly content-based as an example of facial invalidity on "valid rule" grounds. *Id.* at 393, 442.

of strict or intermediate scrutiny to the *facts* of a case.[10] As Professor Richard H. Fallon has written: "If the Supreme Court, in holding a statute unenforceable against a particular challenger, gives reasons broad enough to indicate that the statute cannot be enforced against anyone else either, then it will effectively have held the statute facially invalid even if it never employs those words."[11] I am, accordingly, focusing only on facial challenges,[12] and specifically, the unanswered question of *which* mode of "facial" analysis a court should apply when a regulation of speech is challenged.[13]

## II. THE RULES

Facial overbreadth came first.[14] The concept, a powerful tool for protecting freedom of speech, has been operative at the Supreme Court since at least 1940.[15] It means, in essence and in plain language, that a law

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[10] *But see* Texas v. Johnson, 491 U.S. 397, 412 (1989), in which Justice Brennan's majority opinion, after determining that the state's interest was essentially content-based, ostensibly applied strict scrutiny in evaluating the constitutionality of Texas's anti-flag-desecration statute to Johnson's symbolic act of flag burning. Brennan's application of strict scrutiny, however, in fact amounted to a finding of forbidden viewpoint discrimination. *Id.* at 414–17. *See also* Holder v. Humanitarian Law Project, 561 U.S. 1, 27–29 (2010), in which Chief Justice Roberts' majority opinion engaged in an unstructured as-applied analysis that hinted at strict scrutiny.

[11] Fallon, *Fact and Fiction About Facial Challenges*, *supra* note 6, at 950.

[12] Some commentators have questioned the existence of a bright-line distinction between "facial" and "as-applied" challenges. *See, e.g.*, Kevin C. Walsh, *Frames of Reference and the "Turn to Remedy" in Facial Challenge Doctrine,* 36 HASTINGS CONST. L. Q. 667 (2009). However, I deem the distinction clear enough for this Article's purposes. To quote Professor Fallon: "[B]oth courts and commentators have tended to adopt a definition of facial challenges as ones seeking to have a statute declared unconstitutional in all possible applications." Fallon, *Fact and Fiction About Facial Challenges*, *supra* note 6, at 923.

[13] I do not, in this Article, take any position on the benefits or costs of the facial overbreadth doctrine. *Compare* Luke Meier, *A Broad Attack on Overbreadth*, 40 VAL. U. L. REV. 113 (2005) (arguing that the doctrine's costs outweigh its benefits), *with* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884–903 (1991) (arguing that the doctrine's benefits can sometimes outweigh its costs).

[14] *Compare* Monaghan, *supra* note 5, at 11 (tracing the overbreadth doctrine origins to 1940) *with* Richard H. Fallon, Jr., *Strict Judicial Scrutiny,* 54 UCLA L. REV. 1267, 1275 (2007) (observing that "[b]efore the 1960s, there was no strict scrutiny" but that by "the end of the decade, it dominated numerous fields of constitutional law.").

[15] Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) (holding that a statute which prohibited all loitering or picketing near or at a place of business was overbroad, and that the defendant could challenge it on its face regardless of whether his conduct was protected). Not all commentators, however, agree that the overbreadth doctrine originated from the *Thornhill v. Alabama* decision. *See, e.g.*, Brendan D. Cummins, Note, *The Thorny Path to Thornhill: The Origins at Equity of the Free Speech Doctrine*, 105 YALE L.J. 1671, 1671, 1696 (1996) (arguing

may be invalidated under the First Amendment if it prohibits too much speech – "too much" being understood as excessive in relation to an acceptable justification for official restraint. Such a law is thus said to be "overbroad."[16] The significance of the modifying adjective, "facial," is that the focus of the court is purely on the statute. Even a speaker whose own speech can be punished consistently with the First Amendment is enabled to escape punishment by persuading the court that, the unprotected character of his own speech notwithstanding, the prohibition is capable of suppressing so much protected speech that it should be struck down as violative of the First Amendment.[17] (Indeed, the Supreme Court has asserted that *only* one whose own speech is unprotected may have the benefit of facial overbreadth analysis.)[18] The law in question is thus evaluated—with no consideration of the facts of the speaker's own case—in the abstract, i.e., "on its face."[19] This is a highly speech-protective device, and it remains viable and valuable, despite having been reined in, to some extent, by the provision that, for the doctrine to work, the speaker must persuade a court that the law is "substantially" overbroad, "judged in relation to the statute's plainly legitimate sweep;"[20] the challenger bears the burden of proving that.[21] In addition, a law will not be invalidated as overbroad if it is seen as susceptible to a narrowing construction that will cure the

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that although "[m]ost commentators assert that the doctrine originated . . . in *Thornhill v. Alabama*," the doctrine likely originated from prior picketing cases at equity which allowed "defendants who had committed enjoinable acts to challenge the potential breadth of an injunction against labor activity.").

[16] *See, e.g.*, Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574–75 (1987) (holding that a policy which banned all "First Amendment activities" within an airport's terminal area was overbroad because instead of prohibiting expressive activities that could create problems such as congestion, it explicitly banned all protected expression).

[17] *Id.* at 574. The facial overbreadth doctrine thus represents a major exception to the usual rule that a litigant may not raise the rights of third parties. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S 469, 483–84 (1989); Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973). It is also an exception to the rule, promulgated in *United States v. Salerno,* 481 U.S. 739, 745 (1987), that one making a facial challenge to a statute must show "that no set of circumstances exists under which the Act would be valid." United States v. Stevens, 559 U.S. 460, 473 (2010). For an astute discussion of the *Salerno* rule, *see* Isserles, *supra* note 5, at 385–415.

[18] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985). *But see* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) (holding that a statute was overbroad without discussing whether the challenging plaintiffs' speech was protected by the First Amendment). For more in-depth analysis of the *Ashcroft* decision, *see infra* text accompanying notes 56–78.

[19] *See, e.g.*, *Bd. of Trs. of State Univ. of N.Y.*, 492 U.S at 485.

[20] *Stevens*, 559 U.S. at 473 (internal quotation marks omitted) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008)). *See also* N.Y. v. Ferber, 458 U.S. 747, 769–72 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[21] Virginia v. Hicks, 539 U.S. 113, 122 (2003).

problem.[22] Furthermore, the Supreme Court has, in response to some facial overbreadth challenges, expressed a preference for "as-applied" challenges.[23]

The facial overbreadth doctrine took hold, to a considerable extent, in cases involving categories of speech, the regulation of which are, per Supreme Court rulings, to be evaluated according to special rules, not by "strict" or "intermediate" scrutiny. Importantly, most of those categories were identified and defined prior to the emergence of the modern levels of judicial scrutiny. Such categories include, most notably, advocacy of lawlessness,[24] threats,[25] "fighting words,"[26] obscenity,[27] and child pornography.[28] The "special rules" to which I refer can be viewed, alternatively, as definitions of categories of unprotected speech, the constitutional analysis then being controlled by the definition.[29] If a statutory prohibition conforms to such a definition (e.g., the *Miller* test for obscenity),[30] then the statute is constitutional, with no further analysis required. If the ban extends beyond the constitutionally-based definition, then the statute may be facially overbroad. "Strict" or "intermediate" scrutiny, even now, never comes into play. Thus, for example, the Supreme Court struck down as facially overbroad an Ohio statute punishing advocacy of "the propriety of crime" that did not conform to the newly-announced *Brandenburg* test,[31] and a Georgia "fighting words" statute which reach exceeded the judicially-approved definition of that category.[32] It is in such cases, moreover, that the concept of the saving narrowing construction is easiest to understand.[33]

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[22] City of Houston v. Hill, 482 U.S. 451, 468 (1987); *Broadrick*, 413 U.S. at 613.

[23] *Brockett*, 472 U.S. at 504; *Bd. of Trs. of State Univ. of N.Y.*, 492 U.S. at 484–85 (1989). *But see Ashcroft*, 535 U.S. at 244 (holding that a statute was overbroad without even mentioning the Court's preference for as-applied adjudication). For more in-depth analysis of the *Ashcroft* decision, *see infra* text accompanying notes 56–78.

[24] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[25] Virginia v. Black, 538 U.S. 343, 359 (2003).

[26] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[27] Miller v. California, 413 U.S. 15, 18–20 (1973).

[28] New York v. Ferber, 458 U.S. 747, 764–65 (1982).

[29] *See* United States v. Stevens, 559 U.S. 460, 471 (2010) (explaining the different categories of speech and how certain regulations of speech are analyzed).

[30] *Miller,* 413 U.S. at 24.

[31] Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969). The decision clearly represents a facial overbreadth holding, despite the fact that those words were never used in the brief *per curiam* opinion.

[32] Gooding v. Wilson, 405 U.S. 518, 528 (1972).

[33] *See*, *e.g.*, Osborne v. Ohio, 495 U.S. 103, 113–14 (1990).

Meanwhile, decades after the concept of overbreadth came upon the First Amendment scene, the Supreme Court began to construct a parallel methodology used—when no special rule applies[34]–to assess the constitutionality of laws restricting speech: "content-based" regulations of speech were to be subjected to "strict" judicial scrutiny,[35] while "content-neutral" regulations were to be evaluated according to an analysis that has come to be known as a form of "intermediate" scrutiny.[36] As every American law student knows (at least at some moment in time), strict scrutiny requires the government to have a "compelling" reason for the speech restriction[37] and the restriction must be necessary[38] or (as is often said, alternatively or conjunctively) "narrowly tailored"[39] to accomplish the stated goal. A law is not seen as narrowly tailored (or necessary) if it is "overinclusive"[40] (meaning that it suppresses more speech than necessary to accomplish the

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[34] *See supra* text accompanying notes 23–27. In addition to the categories of unprotected speech referenced therein, the Court has promulgated a variety of specialized constitutional tests applicable in various contexts in which speech has been regulated, notably including commercial speech, *see* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)*;* symbolic speech, *see* Texas v. Johnson, 491 U.S. 397, 403 (1989)*;* speech by government employees, *see* Garcetti v. Ceballos, 547 U.S. 410, 417–24 (2006)*;* and speech by public-school students, *see* Morse v. Frederick, 551 U.S. 393, 403–05 (2007).

[35] Reed v. Town of Gilbert, 135 S.Ct. 2218, 2226–27 (2015); United States v. Alvarez, 567 U.S. 709, 724 (2012); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011). The Court began to utilize this analysis, on a fairly dependable basis, in the early 1970's, *see* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101–02 (1972), but has occasionally sidestepped it without explanation. *See, e.g.*, Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002); *see* City of Ladue v. Gilleo, 512 U.S. 43 (1994). The Court has, additionally exempted content-based speech restrictions in "non-public" or "limited public" forums from strict scrutiny. *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 (2010); *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 454–48 (1983). Viewpoint discrimination, meanwhile, may or may not be subject to strict scrutiny, *compare* McCullen v. Coakley, 134 U.S. 2518, 2530 (2014), *with* Matal v. Tam, 137 U.S. 1744, 1763 (2017) (plurality opinion), but it appears to be a fatal infirmity. *See* Minnesota Voters All. v. Mansky, 585 U.S. 1876 (2018).

[36] Packingham v. North Carolina, 137 U.S. 1730, 1736 (2017); McCullen v. Coakley, 134 U.S. 2518, 2534–35 (2014); Hill v. Colorado, 530 U.S. 703, 725–26 (2000). Use of this analytical approach also began in the early 1970's, *see* Grayned v. City of Rockford, 408 U.S. 104, 115–17 (1972). *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

[37] *Reed*, 135 U.S. at 2226; Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002).

[38] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

[39] *Reed*, 135 U.S. at 2226; *White*, 536 U.S. at 775.

[40] *Simon & Schuster*, 502 U.S. at 121–23; Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987).

goal) or "underinclusive"[41] (meaning that it suppresses *less* speech than necessary to do so). In addition, the regulation must represent the "least restrictive means" of accomplishing the goal.[42] In other words, a very tight fit is required between the means and the ends.[43] Much more judicial deference is given to a content-neutral regulation (usually—but not always—designated alternatively, as a "time, place and manner" regulation[44]), which, to withstand challenge, must only be narrowly tailored (but not as tightly as under strict scrutiny[45]) to effectuate a "significant" (or "substantial") government interest and leave available "ample alternative channels of communication."[46] Under either level of scrutiny, the general rule is that the government bears the burden of demonstrating that these requirements have been satisfied.[47]

## III. COMPARING THE ANALYSES

As with overbreadth analysis, each form of "scrutiny" analysis essentially asks whether a regulation of speech is excessive, in relation to its proffered justification, but each of these "scrutiny" analyses is obviously more structured and complex than that utilized under the heading of "facial overbreadth," whose methodology typically consists primarily of hypoth-

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[41] *Reed*, 135 U.S. at 2232; *Brown*, 564 U.S. at 802–04; *but see* Williams-Yulee v. Fla. Bar, 135 U.S. 1656, 1668, 1670 (2015):

> "Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding 'underinclusiveness limitation.' A state need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws–even under strict scrutiny–that conceivably could have restricted even greater amounts of speech in service of their stated interests. . .. Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." (emphasis in original)

[42] Ashcroft v. ACLU, 542 U.S. 656, 666 (2004); United States.v. Playboy Entm't Grp. Inc., 529 U.S. 803, 813 (2000); Reno v. ACLU, 521 U.S. 844, 874 (1997).

[43] Although it is rarely stated as one of the components of strict scrutiny, the Court has indicated, in recent years, that strict scrutiny also requires the government to provide evidence that the harm it claims to be combating is real. United States v. Alvarez, 567 U.S. 704, 725–26 (2012); *Brown*, 564 U.S. at 799–800; *Playboy Entm't Grp.*, 529 U.S. at 819.

[44] McCullen v. Coakley, 134 U.S. 2518, 2535; Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

[45] Hill v. Colorado, 530 U.S. 703, 726 (2000); Ward v. Rock Against Racism, 491 U.S. 781, 797–800 (1989).

[46] *McCullen*, 134 S.Ct. at 2529; Frisby v. Schultz, 487 U.S. 474, 481–82 (1988)

[47] Reed v. Town of Gilbert, 135 S.Ct. 2218, 2226–27 (2015); *McCullen*, 134 S.Ct. at 2540.

esizing applications of the challenged law that the court deems unacceptable.[48] Similar hypothesizing commonly takes place, under the heading of strict or intermediate scrutiny, in determining whether a statute is sufficiently "narrowly tailored"[49]—but with no stated requirement that the overinclusiveness (or underinclusiveness) of a law must be "substantial" in order for it to be fatal.[50] And such analyses rarely, if ever, embody an inquiry as to the protected or unprotected nature of the challenger's speech. Nor does a court, in applying a "scrutiny" analysis, typically consider the possibility of a saving narrowing construction.

The differences—and similarities—of the two modes of analysis can be appreciated by comparing two Supreme Court decisions, one of which proceeded on the basis of facial overbreadth and one of which relied on strict scrutiny.[51]

The overbreadth decision was made in *Ashcroft v. Free Speech Coalition,*[52] which involved the federal Child Pornography Prevention Act of 1996 (CPPA). The CPPA prohibited, *inter alia,* "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[53] The prohibition extended to "virtual child pornography" (*i.e.,* computer-generated images)[54] as well as the use of youthful-looking adult actors.[55] The constitutionality of the statute was challenged in federal court by a handful of plaintiffs, most notably the Free Speech Coalition,

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[48] *E.g.*, United States v. Stevens, 559 U.S. 460, 475–76 (2010), discussed *infra* text accompanying notes 193–214. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 247–48 (2002), *see infra* text accompanying notes 49–66.

[49] *E.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121–23 (1991), *see infra* text accompanying notes 67–78. As Professor Fallon has observed, "When inquiring whether statutes are narrowly tailored, courts must often anticipate cases that may differ in material respects from the case before them in order to ascertain whether a statute will withstand constitutional attack." Fallon, *Fact and Fiction, supra* note 6, at 944.

[50] *But see Ward*, 491 U.S. at 800 (1989), in which Justice Kennedy explained the narrow tailoring called for under intermediate scrutiny in a way that arguably approximates a "substantiality" requirement:

> "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."

[51] *Compare Ashcroft*, 535 U.S. at 234 (proceeding on the basis of facial overbreadth), *with Simon & Schuster*, 502 U.S. at 105 (relying on strict scrutiny).

[52] *Ashcroft*, 535 U.S. at 234.

[53] *Id.* at 241 (quoting 18 U.S.C. § 2256(8)).

[54] *Id.*

[55] *Id.*

described in Justice Kennedy's majority opinion as "a California trade association for the adult-entertainment industry," which "alleged that their members did not use minors in their sexually explicit works, but they believed some of these materials might fit within the CPPA's expanded definition of child pornography."[56] Nothing further was said concerning the plaintiffs, their artistic works, or the protected or unprotected status thereof and no Justice suggested that their facial challenge to the statute was inappropriate for consideration.[57] The Court of Appeals for the Ninth Circuit held the statute to be substantially overbroad.[58] Justice Kennedy, writing for the Supreme Court majority, seamlessly adopted that methodology, which made sense given the law's ultimate concern with unprotected child pornography[59]: "the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression."[60] In doing so, he referenced the "chilling effect" rationale for the facial overbreadth concept[61]: "[T]his case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers . . . would risk distributing images in or near the uncertain reach of this law."[62]

The government's defense of the statute was based on the fact that the Court, in *New York v. Ferber,*[63] had recognized "child pornography as a category of material outside the protection of the First Amendment"[64] because "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[65] The Court in *Ferber* provided no precise definition of unprotected "child pornography," but Justice White, for the majority, wrote that "the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age."[66] The Court in *Ashcroft* rejected the government's reliance on *Ferber*, largely because

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[56] *Id.* at 243.

[57] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243–73 (2002).

[58] Free Speech Coalition v. Reno, 198 F.3d 1083, 1096 (9th Cir. 1999).

[59] *Ashcroft*, 535 U.S. at 239–58 (2002).

[60] *Id.* at 244.

[61] *Id. See also* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.")

[62] *Ashcroft*, 535 U.S. at 244.

[63] *Id.* at 243.

[64] New York v. Ferber, 458 U.S. 747, 763 (1982).

[65] *Id.* at 757.

[66] *Id.* at 764.

neither "virtual" nor "youthful-adult" pornography caused the harm to children that was the basis for the Court's ruling in *Ferber*; in Justice Kennedy's words, "[t]hese images do not involve, let alone harm, any children in the production process."[67]

En route to that key conclusion, Kennedy also made clear that the statute could not be validated by any connection to another category of unprotected speech, namely obscenity, because the statute incorporated none of the required elements of unprotected obscenity.[68] By way of both making that observation and pointing out the breadth of the CPPA, Kennedy hypothesized some potential applications of the statute at issue:

> The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age . . . .Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See *Romeo and Juliet*. . . . Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene. Contemporary movies pursue similar themes. [Here Kennedy referenced the films *Traffic and American Beauty.*] . . . .
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> Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films. . . . contain a single graphic description of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene.[69]

The remainder of Kennedy's opinion consists of his rejection, free of any doctrinal structure, of the government's additional proffered justifications for the prohibition.[70] He concluded:

> In sum, sec. 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.[71]

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[67] *Ashcroft*, 535 U.S. at 241.

[68] *Id.* at 246 (citing Miller v. California*,* 413 U.S. 15, 24 (1973)).

[69] *Ashcroft*, 535 U.S. at 246–48 (citations omitted).

[70] *Id.* at 248–58.

[71] *Id.* at 256.

Three Justices, dissenting in part, would have upheld the statute's ban on "virtual" child pornography.[72] As to that aspect of the statute, Justice O'Connor, writing for those Justices, said this:

> [L]itigants may challenge the regulation on its face as overbroad, but in doing so they bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech. Respondents have not made such a demonstration. Respondents provide no examples of films or other materials that are wholly computer-generated and contain images that "appea[r] to be . . . of minors" engaging in indecent conduct, but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.[73]

From the standpoint of facial overbreadth theory, O'Connor's point appears valid. The majority made no comparison, quantitatively, of constitutional versus unconstitutional applications of the ban on virtual child pornography. One may infer, however, that the majority concluded that the provision was overbroad—and "substantially" so, even as applied to virtual child pornography generally—because in its entirety, and thus in *all* applications, it lacked any adequate justification.[74]

Compare the approach taken in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board.*[75] Justice O'Connor, writing for the majority, began by succinctly describing the issue at hand:

> New York's "Son of Sam" law requires that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account.

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[72] *Id.* at 267 (O'Connor, J, concurring in the judgment in part and dissenting in part).

[73] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 265–66 (2002) (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor also offered a suggested narrowing interpretation of the provision at issue that would have bolstered her rejection of the prevailing overbreadth argument. *id.* at 264–65, and so did Chief Justice Rehnquist, in a separate dissenting opinion joined by Justice Scalia, *id.* at 269–73. The majority opinion lacks any such suggestions, or any discussion of those offered in dissent. *See infra* text accompanying notes 125–31 and accompanying text for further discussion of O'Connor's opinion.

[74] The *Ashcroft* majority opinion may therefore be seen as blurring Marc Isserles' suggested distinction between "overbreadth" facial challenges and "valid rule" facial challenges. *See* Isserles, *supra* note 5. Isserles explained the distinction as follows:

> First, a facial challenge may be asserted as an "overbreadth facial challenge," which predicates facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law. Second, and quite distinctly, a facial challenge may be asserted as a "valid rule facial challenge," which predicates facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute's application to particular cases.

Isserles, *supra* note 5, at 363–364.

[75] *Simon & Schuster, Inc.*, 502 U.S. 105 (1991).

> These funds are then made available to the victims of the crime and the criminal's other creditors. We consider whether this statute is consistent with the First Amendment.[76]

Simon & Schuster brought suit challenging the constitutionality of this law after the state's Crime Victims Board, pursuant to the statute, ordered the publisher to turn over all money payable to Henry Hill as compensation for his contributions to the book *Wiseguy*, in which Hill "admits to having participated in an astonishing variety of crimes."[77] O'Connor devoted several paragraphs to describing Hill and his book,[78] but those facts ultimately played no part in the decision. (There was, of course, no reason for thinking that the book contained unprotected speech.)[79]

Turning to legal analysis, O'Connor correctly identified the statute as content-based—because "[i]t singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content"[80]—and thereby subject to strict scrutiny. Did the state have a compelling interest? O'Connor said it did: "a compelling interest in ensuring that victims of crime are compensated by those who harm them."[81] She added: "The State likewise has an undisputed compelling interest in ensuring that criminals do not profit from their crimes."[82]

But was the New York statute narrowly tailored to accomplish either of those objectives? No, said O'Connor, because "[a]s a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive."[83] Why was this so? O'Connor's next sentence was apparently intended to provide an answer: "[T]he statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally."[84] She then observed that the law "encompass[ed] a potentially very large number of works,"[85] and went on to hypothesize the application of the statute (explicitly reaching into the recent and distant past) to literary

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[76] *Id.* at 108.

[77] *Id.* at 113.

[78] *Id.* at 112–14.

[79] Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 112–15 (1991).

[80] *Simon & Schuster, Inc.*, 502 U.S. 105, 116 (1991).

[81] *Id.* at 118.

[82] *Id.* at 119.

[83] *Id.* at 121.

[84] *Id.* (emphasis in original).

[85] *Simon & Schuster, Inc.*, 502 U.S. 105, 121 (1991)..

works by Malcolm X, Thoreau, Saint Augustine, Emma Goldman, and Martin Luther King, Jr., among others.[86] Exactly what this list of exalted authors accomplished, analytically, may be debated, but O'Connor doubtlessly believed that it supported these concluding assertions:

> [T]he Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated. Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, . . . despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the State's objective of compensating crime victims from the profits of crime.[87]

In both *Ashcroft* and *Simon & Schuster*, the decisions were in no way affected by the speakers, their works, or the protected or unprotected status of those works. Neither majority opinion considered a narrowing construction of the statute at issue, nor did any Justice indicate a preference for an as-applied challenge.[88] In each decision, the Court hypothesized applications of the challenged statute to artistic works created by non-parties—but in *Ashcroft* this was done, in an unstructured facial overbreadth analysis, to provide examples of unconstitutional applications of the law.[89] In *Simon & Schuster* it was done to show the existence of applications of the law that would not (in Justice O'Connor's view, at least) further the law's objectives.[90] *Ashcroft* found (and appeared to require) "substantial" overbreadth, whereas *Simon & Schuster* did not require substantial overinclusiveness (although such a requirement, if it existed, would probably have been satisfied in this case). There is no reason to believe that the chosen methodology affected the outcome of either decision.[91]

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[86] *Id.* at 121–22.

[87] *Id.* at 122–23.

[88] *Ashcroft*, 535 U.S. at 234; *Simon & Schuster, Inc.*, 502 U.S. at 105.

[89] *Ashcroft*, 535 U.S. at 234.

[90] *Simon and Schuster, Inc.*, 502 U.S. at 105.

[91] Marc Isserles astutely observed that, in some cases,

> [T]he overbreadth doctrine seems to do the same analytical work as the narrow tailoring requirement: a finding of substantial overbreadth identifies the same set of statutory applications embraced by a non-narrowly tailored statute . . . [A]ny claim that could otherwise have been brought under the overbreadth doctrine could be recharacterized and asserted as a valid rule facial challenge under the narrow tailoring requirement.

Isserles, *supra* note 5, at 418 n.216. *See also* Fallon, *Fact and Fiction*, *supra* note 6, at 943–44.

## IV. ONE ANALYSIS, OR TWO?

A preliminary question that must be asked, before exploring the confusion that the use of these two modes of analysis has arguably engendered, is this: are there really two separate doctrinal approaches or (terminology notwithstanding) only one? Typically, in any given judicial opinion, in a First Amendment case not governed by a specially-designed analytical framework,[92] a court will refer to, and utilize, *either* "overbreadth" analysis *or* "scrutiny" analysis.[93] A fundamental premise of this Article is that these are truly separate and independent doctrinal approaches. Is there any reason to think otherwise?

The relationship of these two modes of free-speech analysis has never been adequately explained by the Supreme Court. Only once, to my knowledge, has the Court expressly attempted to provide such an explanation (in a footnote, no less), suggesting, when it did, an essential equivalence between them.[94] In *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*,[95] a 1984 decision holding a municipal ordinance regulating charitable organizations to be substantially overbroad, Justice Blackmun, for the majority, said this:

> "[O]verbreadth" is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. "Overbreadth" has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling government interest. . . . Whether [the second kind of] challenge should be called "overbreadth" or simply a "facial challenge," the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in all its applications falls short of constitutional demands.[96]

Blackmun thus appeared, fairly clearly, to have placed what I am calling "scrutiny" analysis under the heading of facial overbreadth.[97]

This pronouncement was echoed (again in a footnote) by Justice Scalia eight years later in his majority opinion in *R.A.V. v. City of St. Paul,*

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[92] *See supra* text accompanying notes 34–35.

[93] A court may, of course, expressly perform both analyses in a single opinion, when deciding two different issues—one via overbreadth and one via scrutiny. *E.g.*, Boos v. Barry, 485 U.S. 312, 329 (1988); Regan v. Time, Inc., 468 U.S. 641, 650–52, 655–58 (1984).

[94] Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965–66, n.13 (1984).

[95] *Joseph H. Munson Co.*, 467 U.S. 947 (1984).

[96] *Id.* at 965–66, n.13.

[97] *Id.*

*Minnesota,*[98] in which Scalia essentially employed a strict scrutiny analysis.[99] Justice White, concurring in the judgment, objected, in part, on the ground that the Court had granted certiorari to decide questions explicitly framed in terms of overbreadth.[100] Scalia responded as follows:

> Contrary to Justice White's suggestion, petitioner's claim is "fairly included" within the questions presented in the petition for certiorari. It was clear from the petition. . . . that his assertion that the St. Paul ordinance "violat[es] overbreadth. . . . principles of the First Amendment" was *not* just a technical "overbreadth" claim—*i.e.,* a claim that the ordinance violated the rights of too many third parties—but included the contention that the ordinance was "overbroad" in the sense of restricting more speech than the Constitution permits, .. . . because it is content-based.[101]

These statements, rare and muted, can be viewed as signaling a refreshing acknowledgment of the similarities between the two modes of analysis, but they tell us nothing concerning (a) why, given their analytical differences, the two doctrines should be placed under a common heading;[102] (b) why the analysis generally known as facial overbreadth is singularly burdened with special limitations;[103] or (c) when one approach or the other is to be employed (a question to which we will return).[104] When, moreover, a court utilizes *both* approaches, or blends them in a unitary analysis, the result is a kind of doctrinal chaos.[105] I will now consider, in turn, each of those manifestations of confusion.

## V. MANIFESTATIONS OF CONFUSION

### *A. Supreme Court Opinions*

#### 1. Redundant Analysis

Does it ever make sense, in the process of resolving a single free speech issue, to employ both analyses in the same judicial opinion? Because the logical result of *each* analysis is either constitutional validity or invalidity and because inconsistent outcomes (e.g., a statute satisfies strict

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[98] *R.A.V.*, 505 U.S. 377 (1992).

[99] *Id.* at 395–96, n.7.

[100] *Id.* at 397–98 (White, J., concurring in the judgment).

[101] *Id.* at 381–82, n.3 (citations omitted).

[102] *See infra* notes 122–23 and accompanying text.

[103] *See supra* text accompanying notes 17–21.

[104] *See infra* Part VI.

[105] *See infra* Section V.A.2(b).

scrutiny but is nevertheless facially overbroad) would appear to be impossible, is not the use of both approaches in a single case patently redundant? Yet one encounters instances of such dual-track judicial analysis, even in United States Supreme Court opinions.[106] In doing so, it should be noted, the Court effectively contradicts Justice Blackmun's suggestion, in *Munson,* that the two analyses are essentially one.[107]

The most notable example is *Hill v. Colorado.*[108] *Hill* involved a facial challenge to a Colorado statute that Justice Stevens, writing for the majority, described as:

> [R]egulat[ing] speech-related conduct within 100 feet of the entrance to any health care facility. The specific section of the statute that is challenged . . . makes it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "forthe purpose of passing a leaflet or handbill to, . . . or engaging in oral protest, education, or counseling with such other person . . . ."[109]

Stevens observed that the Colorado Supreme Court had noted that the challengers "agreed that the question for decision was whether the statute was a valid time, place and manner restriction."[110] That Court had answered this question affirmatively, and a divided Supreme Court affirmed: "We . . . agree with the state courts' conclusion that § 18-9-122(3) is a valid time, place, and manner regulation . . . because it is 'narrowly tailored.'"[111] Stevens came to that conclusion by applying the established form of intermediate scrutiny applicable to content-neutral regulations of speech,[112] focusing primarily on the narrow-tailoring requirement.[113] So, game over, yes?

Oddly, no. In the next section of his opinion, Stevens entertained the argument "that sec. 18-9-122(3) is invalid because it is 'overbroad.'"[114] One of the challengers' arguments in support of that conclusion was "that the statute is too broad because it protects too many people in too many places, rather than just the patients at the facilities where confrontational

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[106] To be distinguished, again, are cases in which the two analyses are employed, in the same opinion, in the resolution of *separate* free speech issues. *See supra* note 92 and accompanying text.

[107] *See supra* text accompanying notes 93–96.

[108] *Hill*, 530 U.S. 703 (2000).

[109] *Id.* at 707.

[110] *Id.* at 713.

[111] *Id.* at 725.

[112] Hill v. Colorado, 530 U.S. 703, 725–26 (2000).

[113] *Id*. at 726–30.

[114] *Id.* at 730.

speech had occurred."[115] They argued, too, "that the statute is overbroad because it 'bans virtually the universe of protected expression, including displays of signs, distribution of literature, and mere verbal statements."[116] Rejecting these arguments, Stevens wrote that "the comprehensiveness of the statute is a virtue, not a vice."[117] But why did he bring facial overbreadth analysis into such a conventional "time, place and manner" case? Just because the petitioners had so argued? Weren't they essentially making an argument based on the concept of overinclusiveness, which would have fit perfectly into the preceding discussion of narrow tailoring? Stevens went on, moreover, to reject the second part of petitioner's overbreadth argument, because the statute at issue "merely regulates the places where communications may occur,"[118] and:

> Petitioners have not persuaded us that the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counseling. Like petitioners' own activities, the conduct of other protesters at all health care facilities are encompassed within the statute's "legitimate sweep." Therefore, the statute is not overly broad.[119]

Was it not clear that the statute's "legitimate sweep" was the result of its withstanding intermediate scrutiny?

### 2. Overlapping Verbiage

A related confusion arises when a Supreme Court decision contains allusions to both analyses, either within a single opinion or within different opinions (*e.g.,* a majority opinion and a concurring opinion) in the same case. Examples of each phenomenon follow.

#### *(a) Mixed Messages in Majority Opinions*

Start with *Grayned v. City of Rockford*,[120] arguably the first Supreme Court decision of the modern era to effectively subject a time, place and

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[115] *Id.*

[116] *Id.*

[117] Hill v. Colorado, 530 U.S. 703, 731 (2000).

[118] *Id.*

[119] *Id.* at 732.

[120] *Grayned*, 408 U.S. 104 (1972).

manner regulation to intermediate scrutiny[121]—but which did so ostensibly as a way of determining whether the ordinance was facially overbroad.[122]

Another early (doctrinally speaking) example of this phenomenon is *Erznoznik v. City of Jacksonville*,[123] a 1975 case in which the Court struck down an ordinance "that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place."[124] As with *Grayned*, the decision emerged at a point in time when the now-familiar levels of scrutiny, already formulated, had not yet fully taken hold.[125] The blend of methodologies that one sees in Justice Powell's majority opinion is nonetheless relevant to this discussion. Note, first, that (in contrast with typical decisions embodying "scrutiny" analysis during subsequent decades)[126] Powell did not begin by identifying the ordinance as content-based and then stating that strict scrutiny would apply.[127] Instead, he was well into his legal analysis before he pointed out that "[t]he Jacksonville ordinance discriminates among movies solely on the basis of content,"[128] a declaration to which no analytical consequence was attached; indeed, the opinion never mentions strict scrutiny.[129] His

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[121] For the majority, Justice Marshall asserted that, to be valid, the "antinoise" ordinance at issue "must be narrowly tailored to further the State's legitimate interest," *id.* at 116–17, a formulation that soon evolved into the now-established test known as "intermediate scrutiny," *see supra* text accompanying notes 44–47. In yet another manifestation of the unsettled condition of First Amendment doctrine at this time, the opinion went on to conclude that the ordinance, which applied only to locations adjacent to schools, "is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning," *Grayned*, 408 U.S. 104 at 119. (Marshall did not speak explicitly of content neutrality, but rather observed that "the ordinance gives no license to punish anyone because of what he is saying." *Id.* at 120.)

[122] All of Marshall's analysis was presented under the topic heading "Overbreadth." *Grayned*, 408 U.S. 104 at 114. Justice Douglas, dissenting in part, also spoke the language of overbreadth. *Id.* at 124, n.* (Douglas, J., dissenting).

[123] *Erznoznik*, 422 U.S. 205 (1975).

[124] *Id.* at 206.

[125] *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978), as an example of a Supreme Court decision in which the recognition that a statute was content-based, *id.* at 744, did not lead to the application of strict scrutiny.

[126] *E.g.,* Brown v. Entm't Merchants' Ass'n, 564 U.S. 786, 799 (2011); United States v. Playboy Entm't Grp., 529 U.S. 803, 811–13 (2000); Boos v. Barry, 485 U.S. 312, 318–21 (1988).

[127] Erznoznik v. City of Jacksonville 422 U.S. 205, 209 (1975).

[128] *Id.* at 211.

[129] *Id.* at 205–18.

opinion, instead, addressed the City's three proffered justifications, in turn, as follows.[130]

Responding to the City's interest in protecting its citizens from unwilling exposure to offensive material, Powell relied on the "avert your eyes" rationale put forth in *Cohen v. California,*[131] a 1971 "as-applied" ruling.[132] As to the City's more narrowly focused interest in protecting children from exposure to nudity,[133] Powell said this:

> [A]ssuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, . . . ,or scenes from a culture in which nudity is indigenous . . . Clearly all nudity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. . . . Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.[134]

It is thus clear that, in considering the constitutionality of an ordinance expressly recognized as content-based, Powell choose to speak the language of facial overbreadth.[135] But, as in *Hill,* was not the defect one of overinclusiveness, which goes to narrow tailoring (or the lack thereof) in a strict scrutiny analysis? (Granted, Powell's discussion, in part, rejected the possibility that the City could rely on the unprotected category of obscenity, but he went beyond that in finding no other adequate justification under the heading of "protecting minors.")

Finally, Powell rejected the City's argument that the ordinance was adequately justified by its interest in traffic safety, i.e., its interest in preventing drivers from being distracted by nudity on visible drive-in movie theater screens.[136] The problem here was underinclusiveness, since many

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[130] *Id.* 208–15.

[131] Cohen v. California, 403 U.S. 15, 21 (1971).

[132] *Erznoznik*, 422 U.S. at 216.

[133] *Id.* at 212.

[134] *Id.* at 213–14 (citations omitted).

[135] That Powell understood that he was doing so was made clear by Part III of his opinion, in which, seeming to have already reached his conclusion, he considered "whether the ordinance should be invalidated on its face," *id.* at 215–16, or whether it was readily subject to a narrowing construction. (He concluded that it was not.) *Id.* at 216–17. That inquiry is not part of a "scrutiny" analysis.

[136] *Erznoznik*, 422 U.S. 205 at 214.

other images on a drive-in movie theater screen could also be distracting.[137] This reasoning was not tied to any identified mode of analysis, but Powell did take the opportunity at this point to refer again to the concept of content discrimination.[138] In any event, one would not normally associate underinclusiveness with overbreadth. Was Justice Powell perhaps using the word "overbroad" as a synonym for "unconstitutional"?[139]

*Los Angeles City Council v. Taxpayers for Vincent*,[140] decided in 1984, provided the next opportunity for doctrinal confusion of this kind in a Supreme Court majority opinion, this one from the pen of Justice Stevens.[141] The Los Angeles Municipal Code prohibited the posting of signs on public property.[142] Vincent was a candidate for election to the City Council.[143] A group of his supporters known as Taxpayers for Vincent arranged for the production and posting, on utility poles within the city, of 15" x 44" cardboard signs bearing the message "Roland Vincent–City Council."[144] After city employees removed all of the signs, Taxpayers for Vincent sued in federal court, seeking an injunction against continued enforcement of the sign ordinance.[145] The District Court granted summary judgment for the city, finding that the ordinance was constitutional.[146] The Court of Appeals reversed, finding that the ordinance violated the First Amendment, on its face.[147] The Supreme Court then reversed that ruling, thereby upholding the validity of the ordinance.[148]

The ordinance was a classic example of a "time, place and manner" regulation, focusing on "place," and the Court of Appeals analyzed it as

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[137] *Id.* at 214–15.

[138] *Id.* at 215.

[139] Similar semantic confusion appears in Justice Marshall's majority opinion in Austin v. Mich. Chamber of Commerce*,* 494 U.S. 652 (1990). Applying strict scrutiny to a provision of the Michigan Campaign Finance Act, Marshall rejected an argument that the statute was "substantially overinclusive," concluding as a result that "[t]he section therefore is not substantially overbroad." *Id.* at 661.

[140] Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 789–817 (1984).

[141] *Id.* at 817.

[142] *Id.* at 791.

[143] *Id.* at 792.

[144] *Id.* at 792–93.

[145] Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 793 (1984).

[146] *Id.*

[147] Taxpayers for Vincent v. Members of City Council of L.A., 682 F.2d 847, 853 (9th Cir. 1982).

[148] *Members of the City Council of L.A.*, 466 U.S. at 817.

such, using the already well-established form of intermediate scrutiny applicable to such regulations.[149] But Stevens, noting that a facial challenge was before the Court, chose to begin his analysis by discussing the concept of facial overbreadth,[150] working his way to this conclusion:

> In short, 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. . . .
>
> . . . This is not, however, an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech than it has on [the plaintiffs]. . . .
>
> . . . They have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to their political signs. . . . It would therefore be inappropriate in this case to entertain an overbreadth challenge to the ordinance. . . .
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> . . . We therefore limit our analysis of the constitutionality of the ordinance to the concrete case before us, and now turn to the arguments that it is invalid as applied to the expressive activity of [the plaintiffs].[151]

Given the result, none of this ultimately mattered in this case. But why was he talking about facial overbreadth at all in a case involving the validity of a "time, place or manner" regulation, which would ordinarily be evaluated, "on its face," under intermediate scrutiny, which includes a "narrow tailoring" requirement?[152] Does not a finding of the absence of narrow tailoring generally imply that there are *some* applications of the

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[149] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981).

[150] *Members of the City Council of L.A.*, 466 U.S. at 789–801.

[151] *Id.* at 801–03. Stevens briefly used this line of reasoning at least once more, in Hill v. Colorado, 530 U.S. 703, 732 (2000).

[152] Stevens actually muddied the water even further in this opinion, by inextricably trotting out the test set forth in United States v. O'Brien, 391 U.S. 367, 377 (1968), rather than the usual version of intermediate scrutiny applicable to "time, place and manner" regulations. *Taxpayers for Vincent*, 466 U.S. at 804–05. The *O'Brien test*—generally used in "symbolic speech" cases, *see* Texas v. Johnson, 491 U.S. 397, 403 (1989)—says nothing about "narrowly tailoring," but instead requires a law to be "no greater than is essential" to furthering an important governmental interest. *O'Brien,* 391 U.S. at 377. But then he blended a reference to "narrow tailoring" into his discussion of that element. *Taxpayers for Vincent*, 466 U.S. at 808. In Clark v. Cmty for Creative Non-Violence, 468 U.S. 288 (1984), Justice White shed some light on the relationship between these two tests, stating that "the four-factor standard of *O'Brien v. United States* . . . for validating a regulation of expressive conduct" was, "little, if any, different from the standard applied to time, place, and manner restrictions." *Clark,* 468 U.S. at 288. In a footnote, he said: "We note that only recently, in a case dealing with the regulation of signs, the Court framed the issue under *O'Brien* and then based a crucial part of its analysis on the time, place, and manner cases," citing *Taxpayers for Vincent. Clark v. Cmty for Creative Non-Violence*, 468 U.S. at 298–99, n.8.

regulation that are neither over nor underinclusive, yet result in an invalidation of the regulation across the board? How does one decide whether a regulation is narrowly tailored, other than by considering all possible applications thereof? And if Stevens had found an absence of narrow tailoring in this case, how could the ordinance survive scrutiny?[153]

Justice Stevens blended the language of overbreadth and scrutiny analysis in a majority opinion, again, in *Reno v. American Civil Liberties Union,*[154] decided in 1997.[155] The Court therein invalidated provisions of the federal Communications Decency Act which essentially made it illegal to use the Internet to knowingly transmit an "indecent" communication to a minor or to display a "patently offensive" sexual communication "in a manner available to" a minor.[156] Stevens ultimately found (in part VII of his opinion) that these content-based provisions failed to satisfy strict scrutiny because they were not sufficiently narrowly tailored.[157] But then (in part VIII of his opinion) he added this: "In an attempt to curtail the CDA's facial overbreadth, the Government advances three additional arguments for sustaining the Act's affirmative prohibitions."[158] He rejected those arguments with no further reference to any doctrinal approach, but his casual passing reference to facial overbreadth, in an opinion ostensibly based on the use of strict scrutiny, represented another blurring of theoretical lines.[159]

*(b) Doctrinal Dissonance Between Justices*

Doctrinal confusion has also arisen when a concurring or dissenting Justice speaks the language of facial overbreadth in a case in which the majority opinion relies on scrutiny analysis—or vice versa.[160]

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[153] Justice Brennan, joined in dissent by Justices Marshall and Blackmun, believed that the ordinance "sweeps so broadly . . . that it must be struck down as violative of the First Amendment." *Taxpayers for Vincent,* 466 U.S. at 831 (Brennan, J., dissenting).

[154] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[155] *Id.*

[156] Communications Decency Act (CDA) of 1996, Pub. L. No. 104–104, 110 Stat. 133 (1996), *invalidated by* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[157] *Reno,* 521 U.S. at 874–79.

[158] *Id.* at 879.

[159] *Id.*

[160] I exempt from this critique a decision in which the majority and the concurrence explicitly take different doctrinal approaches to the resolution of the issue at hand. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), in which Justice Scalia, for the majority, relied essentially on strict scrutiny (arrived at, in this case, in an unprecedented and controversial way), *id.* at 395–

*Frisby v. Schultz,*[161] decided in 1988, exemplifies this problem.[162] The case involved "an ordinance that completely ban[ned] picketing 'before or about' any residence"[163] in the town of Brookfield, Wisconsin.[164] The ordinance was clearly a "time, place and manner" regulation of speech; Justice O'Connor, for the majority, recognized it as such and applied intermediate scrutiny thereto,[165] ultimately upholding it.[166] While not my primary focus in this article, O'Connor's opinion is itself not without a bit of mystery because she concluded (as she had to, to uphold the ordinance) that the law was narrowly tailored,[167] and yet added this:

> Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance—to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketers present at a particular home by invitation of the resident—may present somewhat different questions. . . . These are, however, questions we need not address today in order to dispose of appellees' facial challenge.[168]

But why not? Would not such "hypothetical applications" be relevant to a potential finding of overinclusiveness, which is part of the "narrow tailoring" analysis? And would it not be an "as-applied" analysis, not a facial challenge, that would leave such questions to another day? But that goes to a different kind of arguable confusion.

Consider instead the opinion of Justice White, concurring in the judgment in this case, which persistently spoke in terms of overbreadth.[169] White displayed serious concern as to the exact meaning, and reach, of the ordinance,[170] but concluded:

> There is nevertheless sufficient force in the town counsel's representations about the reach of the ordinance to avoid application of the overbreadth doctrine in this case, which as we have frequently emphasized is such "strong

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96, while Justice White, concurring in the result with three other Justices, rejected Scalia's creative new theory, *id.* at 399–403, and instead employed, sensibly, a conventional facial overbreadth analysis predicated on the proper understanding of the meaning of unprotected "fighting words." *Id.* at 411–14 (White, J., concurring).

[161] Frisby v. Schultz, 487 U.S. 474 (1988).

[162] *Id.*

[163] *Id.* at 476.

[164] *Id.*

[165] *Id.* at 482. So did Justice Brennan, joined by Justice Marshall in dissent. *Id.* at 491 (Brennan, J., dissenting).

[166] Frisby v. Schultz, 487 U.S. 474, 488 (1988).

[167] *Id.*

[168] *Id.*

[169] *Frisby*, 487 U.S. at 491 (White, J., concurring); *id.* at 491 (White, J., concurring).

[170] *Id*.

> medicine" that it "has been employed by the Court sparingly and only as a last resort." In my view, if the ordinance were construed to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional on its face and hence prohibit its enforcement against those, like appellees, who engage in single-residence picketing. At least this would be the case until the ordinance is limited in some authoritative manner. Because the representations made in this Court by the town's legal officer create sufficient doubts in my mind, however, as to how the ordinance will be enforced by the town or construed by the state courts, I would put aside the overbreadth approach here, sustain the ordinance as applied in this case, which the Court at least does, and await further developments.[171]

Again, as in my prior examples: why was anyone talking about facial overbreadth, in a case involving a time, place and manner regulation? (And why did Justice White say that O'Connor, who explicitly declared that hers was a facial ruling, had rendered an "as-applied" ruling?)

Justice Stevens, dissenting, joined Justice White in speaking only in terms of facial overbreadth, making the remarkable statement that "the ordinance is unquestionably 'overbroad' in that it prohibits some communication that is protected by the First Amendment."[172] (Well, of course it did; otherwise the ordinance would have been indisputably constitutional with no need for intermediate scrutiny.) He went on to say that this overbreadth "is unquestionably 'real,'" but he wasn't sure whether it was "substantial."[173]

The roles were reversed in *Reno,* the 1997 decision invalidating core provisions of the federal Communications Decency Act.[174] As noted earlier,[175] Justice Stevens' majority opinion was essentially based on the use of strict scrutiny, albeit with a dash of facial overbreadth sprinkled in. In a partly dissenting opinion addressing the same statutory provisions, Justice O'Connor (joined by Chief Justice Rehnquist) spoke in terms of overbreadth.[176]

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[171] *Id.* (citations omitted).

[172] *Id.* at 499 (Stevens, J., dissenting).

[173] *Id.* Stevens even suggested that "the Court may be right in concluding that its legitimate sweep makes its overbreadth insubstantial," *id.*,—words that O'Connor never spoke.

[174] *Reno*, 521 U.S. 844 (1997).

[175] *See supra* text accompanying notes 153–58.

[176] *Reno,* 521 U.S. at 893–96 (O'Connor, J., concurring in the judgment in part and dissenting in part). O'Connor wrote: "I agree with the Court that the provisions are overbroad in that they cover any and all communications between adults and minors, regardless of how many adults might be part of the audience to the communication," *id.* at 894,—even though Stevens never said precisely that. But, relying on the rule set forth in *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504 (1985), she deemed only partial invalidation to be called for. *Id.* at 894–96.

Consider next O'Connor's partly dissenting opinion in *Ashcroft v. Free Speech Coalition*,[177] the 2002 decision invalidating key provisions of the federal Child Pornography Prevention Act, discussed at length above.[178] As noted, Justice Kennedy's majority opinion proceeded purely on the path of facial overbreadth.[179] O'Connor's opinion however, took her from overbreadth to strict scrutiny and back again, thereby not only taking a different tack than the majority opinion but within her own analysis as well. (The challengers had clearly made both arguments.)[180] She indicated her agreement with the majority's conclusion "that the CPPA's ban on youthful-adult pornography is overbroad,"[181] and said this:

> I also agree with the Court's decision to strike down the CPPA's ban on material presented in a manner that "conveys the impression" that it contains pornographic depictions of actual children . . . The Government fails to explain how this ban serves any compelling state interest . . . The Court concludes that § 2256(8)(D) is overbroad, but its reasoning also persuades me that the provision is not narrowly tailored. The provision therefore fails strict scrutiny.[182]

What followed, in a part of her opinion joined by Chief Justice Rehnquist and Justice Scalia, is more striking. It began with this paragraph:

> I disagree with the Court, however, that the CPPA's prohibition of virtual-child pornography is overbroad. Before I reach that issue, there are two preliminary questions: whether the ban on virtual-child pornography fails strict scrutiny and whether that ban is unconstitutionally vague. I would answer both in the negative.[183]

(But why would a strict scrutiny analysis be "preliminary" to an overbreadth analysis? She didn't explain.) She then acknowledged the longstanding recognition of a compelling government interest in the protection of children[184] and suggested a narrowing interpretation of the provision at issue—namely, "[r]eading the statute only to bar images that are virtually indistinguishable from actual children" —that would "assure that the ban on virtual-child pornography is narrowly tailored."[185] This remarkable assertion followed:

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[177] Ashcroft v. Free Speech Coalition*,* 535 U.S. 234 (2002).

[178] *See supra* text accompanying notes 52–74.

[179] *See supra* text accompanying notes 52–71.

[180] *Ashcroft*, 535 U.S. at 261 (O'Connor, J., concurring in the judgment in part and dissenting in part).

[181] *Id.* at 263.

[182] *Id.* at 262.

[183] *Id.* at 263.

[184] *Id.*

[185] Ashcroft v. Free Speech Coalition*,* 535 U.S. 234, 265 (2002)..

> Although a content-based regulation may serve a compelling interest, and be as narrowly tailored as possible while substantially serving that interest, the regulation may unintentionally ensnare speech that has serious literary, artistic, political, or scientific value or that does not threaten the harms sought to be combatted by the Government. If so, litigants may challenge the regulation on its face as overbroad....[186]

Can this statement—apparently unique, and made in the name of three Supreme Court Justices—possibly be read to imply anything other than the remarkable possibility that a content-based statute might survive strict scrutiny, yet be stricken as facially overbroad? Moreover, how *could* a statute "be as narrowly tailored as possible"[187] while ensnaring speech "that does not threaten the harms sought to be combated by the Government"?[188] Would that not amount to overinclusiveness, and therefore a *lack of s*ufficiently narrow tailoring? Happily, this surprising theoretical assertion has not, to my knowledge, reappeared.

Finally, note the oddly contrasting view of the majority's reasoning taken by the dissenters in *United States v. Alvarez* in 2012.[189] The Court in that case struck down the federal Stolen Valor Act,[190] which made it a crime to falsely represent oneself "to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States," as violative of the First Amendment.[191] Justice Kennedy wrote for a plurality of four Justices and made it pretty clear that he viewed the statute as content-based and was therefore subjecting it to "the 'most exacting scrutiny.'"[192] He found the government interest "in protecting the integrity of the Medal of Honor" to be compelling,[193] but concluded that "[t]he link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars . . . has not been shown."[194] Speaking the familiar language of strict scrutiny, he further concluded that the statute "is not actually necessary to achieve the Government's stated interest"[195] and that at least one

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[186] *Id.* The paragraph continued with the language quoted *supra* in the text accompanying note 73.

[187] *Id.*

[188] *Id.*

[189] United States v. Alvarez, 567 U.S. 709 (2012).

[190] Stolen Valor Act of 2005, Pub. L. No. 109–437, 120 Stat. 326, *invalidated by* United States v. Alvarez, 567 U.S. 709 (2012).

[191] *Alvarez*, 567 U.S. at 732.

[192] *Id.* at 724.

[193] *Id.* at 725.

[194] *Id.*

[195] *Id.* at 726.

less restrictive means for achieving its goal was available to the government.[196] Justice Breyer, joined by Justice Kagan in concurring in the judgment, explicitly employed a creative variant of "intermediate scrutiny"[197] and found the statute to be insufficiently tailored.[198] Both of those opinions hypothesized arguably harmless applications of the statute,[199] as one does when considering whether a law is narrowly tailored. Focusing on those aspects of the plurality and concurring opinions, Justice Alito, joined in dissent by Justices Scalia and Thomas, managed to make the surprising assertion that "those opinions appear to be based on the distinct concern that the Act suffers some overbreadth."[200] He was thus moved to take the position that the required "substantial" overbreadth had not been shown,[201] in a decision based solely and explicitly on "scrutiny" analysis.[202]

### *B. Lower Court Opinions*

Given the numerous instances, at the Supreme Court level, of the failure to distinguish and keep separate the facial overbreadth approach and "scrutiny" analysis, it is not surprising to find comparable confusion at the lower court level. A few recent examples should suffice to show its existence.

A striking example, *Thayer v. City of Worcester,*[203] included the participation of a retired Supreme Court Justice, David Souter, sitting by designation on the First Circuit panel that issued the opinion.[204] The case involved a challenge to "two city ordinances prohibiting coercive or risky behavior by panhandlers, other solicitors, and demonstrators seeking the

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[196] United States v. Alvarez, 567 U.S. 709, 729 (2012).

[197] *Id.* at 730–32 (Breyer, J., concurring in the judgment).

[198] *Id.* at 737-739. *See* Broaderick v. Oklahoma, 413 U.S. 601 (1973); United Public Workers v. Mitchell, 330 U.S. 75 (1947). There are also overbreadth decisions in cases, like the seminal case of *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), in which earlier precedent, rendered in the pre-"scrutiny" era, effectively established a rule of decision for the kind of speech at issue–specifically, in *Broadrick,* political campaign activities by government employees, governed by *United Public Workers v. Mitchell,* 330 U.S. 75 (1947).

[199] *Alvarez*, 567 U.S. at 722–23, 736–37 (Breyer, J., concurring).

[200] *Id.* at 753 (Alito, J., dissenting).

[201] *Id.*

[202] *See also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998), in which the majority opinion addressed the issue of viewpoint discrimination (finding none), *id.* at 580–87, but Justice Souter, alone in dissent, argued that the statute at issue was substantially overbroad on its face. *Id.* at 622 (Souter, J., dissenting).

[203] Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014), *vacated and remanded*, 135 S. Ct. 2887 (2015).

[204] *Id.*

attention of motor vehicle drivers."[205] The first made it "unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner."[206] The second made it illegal to walk or stand on any traffic island or roadway "after having been given due notice warning by a police officer," except for crossing the roadway at an intersection or crosswalk, entering or exiting a vehicle at the curb, "or for some other lawful purpose."[207] The constitutionality of the ordinances was challenged by two homeless persons who regularly solicited donations and a local official "who has customarily displayed political signs on median strips and traffic circles during the campaign season."[208] Their motion for a preliminary injunction was denied. The District Court, applying intermediate scrutiny to what it viewed as content-neutral time, place and manner restrictions, ruled that the plaintiffs had not shown a likelihood of success on the merits.[209] The appellate panel affirmed, but emphasized that "[t]he First Amendment claim has been presented as a facial challenge based on substantial overbreadth, and we continue to regard it as such here"—even though the District Court did *not* speak the language of facial overbreadth.[210] How did that affect Justice Souter's analysis? Very oddly.

Souter began by spending a fair amount of time on the threshold issue of whether the ordinances were content-based or content-neutral,[211] concluding that they were "subject to scrutiny as content-neutral time, place and manner regulations."[212] But that intermediate level of scrutiny, which Souter then properly set forth,[213] was never utilized. Why? Because the plaintiffs had identified their challenge as a facial overbreadth challenge![214] Therefore, content-neutrality notwithstanding, this followed:

> The appellants here have assumed that . . . the burden rests on the City from the start to demonstrate that the applicable standard of scrutiny is satisfied. But that is not the law. The appellants have chosen to challenge these ordinances

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[205] *Id.* at 63.

[206] *Id.* at 64.

[207] *Id.* at 65.

[208] Thayer v. City of Worcester, 755 F.3d 60, 66 (1st Cir. 2014).

[209] *Id.* The Court reached the same conclusion with regard to plaintiffs' due process and equal protection claims.

[210] *Id.*

[211] *Id.* at 61–70.

[212] *Id.* at 71. It was this conclusion—based as it was on the determination that "the ordinances were not designed to suppress messages expressed by panhandlers . . . or anyone else"—that led to the Supreme Court's vacating of this decision "for further consideration in light of *Reed v. Town of Gilbert*," 135 S. Ct. 2218 (2015), which clearly repudiated such reasoning. *Id.* at 2887.

[213] Thayer v. City of Worcester, 755 F.3d 60, 71 (1st Cir. 2014).

[214] *Id.*

> for facial overbreadth, a standard under which "a law may be invalidated as overbroad" only if "a substantial number of its applications are unconstitutional. . . ." In a facial overbreadth challenge, the claimant has the initial burden to make at least a prima facie showing of such "substantial" overbreadth before any burden of justification, be it strict or intermediate, passes to the government.[215]

Here, he concluded, such a showing had not been made.[216] He added:

> When dealing with a content-neutral speech restriction, we recognize a regulation as substantially overbroad if, but only if, it is susceptible to a substantial number of applications that are not necessary to further the government's legitimate interest. In this way, the substantial overbreadth standard anticipates the narrow tailoring component of the intermediate standard of scrutiny, if the challenge proceeds to a final merits determination.[217]

The District Court had erred here, he said, because it had "proceeded directly to hold the ordinances up to intermediate scrutiny."[218]

But why would a court *not* proceed as the District Court did in this case? Even the Supreme Court, to my knowledge, has not done otherwise, once it has determined that a regulation of speech is content-neutral. Even when a challenge to a content-based[219] or content-neutral[220] regulation has been described as a "facial" challenge (which one would expect it to be), the Supreme Court has proceeded directly to the appropriate level of scrutiny.[221] The intertwining of facial overbreadth and "scrutiny" analysis effectuated by Souter in this opinion is utterly astonishing, apparently unprecedented,[222] and would effectively create a requirement of "substantial" overinclusiveness in at least some cases in which strict or intermediate scrutiny is being applied. Did Souter believe this to be appropriate only when, and simply because, the plaintiff's complaint contains the magic words "facial overbreadth"? If so, why? Happily, this ruling was soon vacated,[223] but it reveals—and may give rise to—a profound degree of doctrinal confusion.

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[215] *Id.* (citation omitted).

[216] *Id.* at 72, 73–75 ("The best we can conclude is that there is probably some overbreadth, but not apparently to a substantial degree," *id.* at 74.).

[217] *Id.* at 72 (citations omitted).

[218] Thayer v. City of Worcester, 755 F.3d 60, 73 (1st Cir. 2014).

[219] *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[220] *E.g.*, Frisby v. Schultz, 487 U.S. 474, 476 (1988); *see supra* text accompanying notes 161–73.

[221] *Id.* at 482.

[222] None of the Supreme Court cases he cited in support of his pronouncements, at *Thayer,* 755 F.3d at 71, n. 4, is directly on point.

[223] *See* Thayer v. City of Worcester, Mass., 135 S. Ct. 2887 (2015). On remand, the District Court, finding one of the ordinances to be content-based and the other content-neutral, applied

A more benign hint of confusion emanates from one of the cases Justice Souter cited in *Thayer,*[224] *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,*[225] in which the Court began its legal analysis by laying out general principles of facial overbreadth,[226] which then played no part in its application of intermediate scrutiny to a content-neutral ordinance.[227]

Yet another example is *Doe v. Cooper,*[228] in which the Court similarly began by setting forth the rules of facial overbreadth, segueing to intermediate scrutiny with this remarkable statement. "In analyzing overbreadth, we initially identify the appropriate level of scrutiny to apply to the statute. Because [the statute] implicates protected First Amendment activities, our first task is to determine whether it is 'content neutral.'"[229] It was, and no more was said about overbreadth.

Consider also *United States v. Petras,*[230] in which the Fifth Circuit Court of Appeals rejected a First Amendment challenge to a federal statute which made it a crime for an "individual on an aircraft" to "intimidat[e]" a flight crew member and thereby "interfere with the performance of the duties of the [crew]."[231] The Court did so by finding, first, that the statute survived strict scrutiny[232] and, second, that the defendants' overbreadth contentions failed because their suggested instances of overbreadth were "insubstantial" and "unlikely."[233] The redundancy of these analyses went unnoticed, aside from the Court's observation, in a footnote, that even if the statute applied to the defendants' hypothetical examples, the statute

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strict and intermediate scrutiny, respectively, and granted summary judgment to the plaintiffs—*ignoring* Justice Souter's reasoning. Thayer v. City of Worcester, 144 F. Supp. 3d 218, 233–38 (D. Mass. 2015).

[224] *Thayer*, 755 F.3d at 75 n.8.

[225] Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 944–45 (9th Cir. 2011).

[226] *Id.* at 944–45.

[227] One would not be able to detect that from Souter's brief description of the decision, which says that the Court found the Redondo Beach ordinance "overbroad." *Thayer*, 755 F.3d at 75 n.8; *see also* Duhe v. City of Little Rock, 902 F.3d 858, 865 (8th Cir. 2018), in which the analysis mirrors that of the Court in *Redondo Beach*.

[228] Doe v. Cooper, 842 F.3d 833 (4th Cir. 2016).

[229] *Id.* at 845.

[230] United States v. Petras, 879 F.3d 155 (5th Cir. 2018).

[231] *Id.* at 160 (quoting 49 U.S.C. § 46504).

[232] *Id.* at 167.

[233] *Id.* at 167–68. Both conclusions were dictated by the Court's earlier, analytically identical decision in United States v. Hicks, 980 F.2d 963, 970–72 (5th Cir. 1992).

"might pass strict scrutiny, given the compelling government interest in air-travel safety."[234]

Another case in which the two analyses are redundantly intertwined is *Citizens United v. Schneiderman,*[235] involving a challenge on freedom of association grounds to financial disclosure requirements applicable to non-profit organizations.[236] Dismissal of the complaint was affirmed on appeal.[237] Judge Pooler, for the Second Circuit Court of Appeals, first settled on "exacting, or 'intermediate,' scrutiny" as the appropriate standard of review for the content-neutral regulation at issue[238] and found it satisfied.[239] *Then* he inserted the sub-heading "Facial Challenge,"[240] and proceeded to (in essence) speak the language of facial overbreadth (although without using the word "overbreadth"),[241] including the following (partly unconventional) assertions:

> Our facial review thus focuses on whether too many of the applications interfere with expression for the First Amendment to tolerate. How many potential applications would be impermissible is made more determinate by the degree of scrutiny being applied. Exacting scrutiny, as we have already discussed, requires a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." Thus, if a substantial number of likely applications of the statute correspond to an important interest, a minority of potentially impermissible applications can be overlooked.[242]

Judge Pooler then effectively concluded this analysis thusly:

> We have already articulated the important government interests at stake: preventing fraud and self-dealing in charities. The Attorney General's regulations clearly further those interests by making it easier to police for such fraud.[243]

The entire discussion under the heading "Facial Challenge"[244] was, I submit, redundant and the statements that alluded to the concept of overbreadth, superfluous.

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[234] *Petras*, 879 F.3d at 168 n.20.

[235] Citizens United v. Schneiderman, 882 F.3d 374 (2d Cir. 2018)

[236] *See id.* at 374.

[237] *Id.* at 390.

[238] *Id.* at 382.

[239] *Id.* at 382–83.

[240] Citizens United v. Schneiderman, 882 F.3d 374, 383 (2d Cir. 2018).

[241] *Id.*

[242] *Id.* (citations omitted). The last sentence just quoted is not only a distorted expression of the substantial overbreadth requirement; taken literally, it also negates the possibility of the fatal overinclusiveness of a content-neutral regulation of speech.

[243] *Id.* at 384.

[244] *Id.* at 383–85.

Blending of overbreadth and scrutiny analysis occurred as well in *American Entertainers, LLC v. City of Rocky Mount*,[245] involving an "overbreadth" challenge to a license requirement applicable to "sexually oriented businesses."[246] Judge Wynn, for the Fourth Circuit Court of Appeals, devoted some time to the general principles of First Amendment overbreadth[247] before making clear, in these words, the link to the analysis that followed:

> The level of First Amendment scrutiny a court applies to determine the 'plainly legitimate sweep' of a regulation depends on the purpose for which the regulation was adopted. If . . . the regulation was adopted for a purpose unrelated to the suppression of expression—*e.g.*, to regulate conduct, or the time, place and manner in which expression may take place—a court must apply . . . intermediate scrutiny. . . .
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> . . . Rocky Mount adopted the Ordinance to regulate the deleterious secondary effects of adult entertainment and therefore enacted the regulation for a purpose unrelated to the suppression of expression. Accordingly, intermediate scrutiny applies.[248]

What followed was, in essence, an application of intermediate scrutiny.[249] While Judge Wynn linked the two analyses once more—by concluding that the overbreadth challenge failed *because* the licensing requirement was narrowly tailored to serve a legitimate interest[250]—the references to overbreadth in his opinion were, I contend, wholly superfluous.

Compare these decisions with the treatment of a redundant facial overbreadth claim in *Hodge v. Talkin*,[251] involving a First Amendment challenge to a statutory ban on expressive activity on "the grounds" of the United States Supreme Court, "including the Court's plaza: the elevated marble terrace running from the front sidewalk to the staircase that ascends to the Court's main doors."[252] Oddly, the challenger put forth, as separate arguments, that the statutory provisions at issue were both "unconstitutional restrictions of speech" and "overbroad."[253] The District Court

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[245] Am. Entertainers LLC v. City of Rocky Mount, 888 F.3d 707 (4th Cir. 2018).

[246] *Id.* at 712.

[247] *Id.* at 714–15.

[248] *Id.* at 715 (citations omitted).

[249] *Id.* at 716–19. Oddly, the Court concluded, ostensibly as part of its application of intermediate scrutiny, that "there is no evidence that the licensing requirement, by itself, imposes any significant burden on speech." *Id.* at 719, a conclusion that would seemingly have been dispositive without any need for *any* further analysis.

[250] Am. Entertainers LLC v. City of Rocky Mount, 888 F.3d 707, 720 (4th Cir. 2018).

[251] Hodge v. Talkin, 799 F.3d 1145 (D.C. Cir. 2015).

[252] *Id.* at 1149–50.

[253] *Id.* at 1154.

obliged him by granting summary judgment on both grounds.[254] For the appellate court, Judge Srinivisan, after a bit of needless and inconclusive wheel-spinning concerning whether or not the challenge should be considered "facial,"[255] did the right thing. He found the property at issue to be a non-public forum and, applying the proper mode of analysis, concluded that the restrictions were reasonable and viewpoint-neutral, and thus constitutional.[256]

But what of the plaintiff's separate overbreadth claim? This was "not such a case," wrote Judge Srinisivan.[257] He explained:

> Hodge never argues that [the statute] may be constitutionally applied to his own conduct but is unconstitutional in its application to the protected speech of others. Instead, he contends that [the statute] cannot be applied to anyone (including himself) in the Supreme Court plaza, because the law curtails too much speech in light of the government's underlying interests. Descriptively, that is indeed an argument that the law is "overly broad." But we have already addressed the substance of that argument in evaluating the reasonableness of [the statute's] restrictions on speech in light of the purposes of the forum. Having concluded that the government's means-ends fit is reasonable, we see no viable avenue for concluding nonetheless that [the statute] has too many unconstitutional applications to survive. We therefore decline to run what would amount to the same analysis a second time.[258]

In other words, plaintiff's two ostensibly separate claims, unreasonableness and overbreadth, were redundant—and how could they be viewed otherwise, given the prescribed analysis applicable to speech restrictions in a non-public forum? Arguably, Judge Srinisivan could have dispensed with his explanation of why Hodge's argument did not amount to a true facial overbreadth claim, but what matters is the Court's recognition that the challenger could not logically prevail by raising overbreadth when he had already lost his case pursuant to the appropriate First Amendment analysis.[259]

As the other decisions described in this section illustrate, however, the perplexing blending of overbreadth and scrutiny analysis by federal appellate courts is by no means uncommon.

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[254] *Id.* at 1156.

[255] *Id.* at 1156–57.

[256] Hodge v. Talkin, 799 F.3d 1145, 1157–70 (D.C. Cir. 2015).

[257] *Id.* at 1171.

[258] *Id.* The Court cited one of its precedents, Bryant v. Gates, 532 F.3d 888 (D.C. Cir. 2008), as having reached exactly the same conclusion; thus, "Our approach breaks no new ground." *Hodge*, 799 F.3d at 1171.

[259] *Hodge,* 799 F.3d at 1171.

## VI. WHICH APPROACH TO USE?

When, then, is one or the other analysis properly employed?

As noted earlier,[260] facial overbreadth analysis has been most commonly and sensibly used, in the First Amendment arena, in cases involving regulations directed at unprotected categories of speech.[261] The Court has also used the term "overbreadth" to characterize the invalidity of a permit-requirement ordinance that gives unfettered discretion to administrative officials.[262]

It is, however, in the vastly larger world of speech regulation—involving protected speech not governed by special constitutional rules, where the presumptive constitutional test is either strict or intermediate scrutiny—that a judge's choice to utilize the facial overbreadth approach, instead, raises questions.[263] The prime example at the Supreme Court level is *United States v. Stevens,*[264] decided in 2010.[265]

The case involved the constitutionality of a federal statute that criminalized the knowing creation, sale, or possession, for commercial gain in interstate commerce, of certain depictions of cruelty to animals.[266] A depiction of "animal cruelty" was defined as one "in which a living animal

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[260] *See supra* text accompanying notes 23–32.

[261] Broadrick v. Oklahoma, 413 U.S. 601 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). There are also overbreadth decisions in cases, like the seminal case of Broadrick v. Oklahoma*,* 413 U.S. 601 (1973), in which earlier precedent, rendered in the pre-scrutiny era, effectively established a rule of decision for the kind of speech at issue—specifically, in *Broadrick,* political campaign activities by government employees, governed by United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

[262] *See* Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 129–30 (1992) ("Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker. . . ." *id.* at 129–30). *See also* Virginia v. Hicks, 539 U.S. 113 (2003). *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 793–95 (1989). *See also* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1345–46 (2005).

[263] An example is *Bd. of Airport Commissioners of L.A. v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987), invalidating a resolution banning "all First Amendment activities" at an airport. Writing for a unanimous Court, Justice O'Connor skipped over forum analysis and declared that "such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575. The presumptively available alternative approach would have been to treat the rule as content-neutral and apply intermediate scrutiny, with the same result.

[264] United States v. Stevens, 559 U.S. 460 (2010).

[265] *Id.*

[266] 18 U.S.C. § 48.

is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place."[267] In what was referred to as the "exceptions clause," the law exempted from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[268]

Stevens was prosecuted under this statute for selling videos of pit bulls engaging in dogfights and attacking other animals.[269] Stevens moved to dismiss the indictment, arguing that the statute was facially invalid under the First Amendment.[270] The District Court denied the motion, holding that the statute was not substantially overbroad.[271] The jury convicted Stevens on all counts, but the Court of Appeals for the Third Circuit, sitting en banc, declared the statute facially unconstitutional and vacated Stevens's conviction.[272] The Court of Appeals held that the statute was content-based and could not survive strict scrutiny, for all of these reasons: the government lacked a compelling interest and the law was neither narrowly tailored to preventing animal cruelty—due to over and underinclusiveness—nor the least restrictive means of doing so.[273] Interestingly, the Court of Appeals noted, in a footnote, that the statute "might also be unconstitutionally overbroad," because it "potentially covers a great deal of constitutionally protected speech," but the Court declined to rest its ruling on this mode of analysis and proclaimed itself satisfied to rely on strict scrutiny.[274] Why? "[B]ecause voiding a statute on overbreadth grounds is 'strong medicine,' and should be used 'sparingly and only as a last resort.'"[275] (One may understandably wonder why a fatal dose of strict scrutiny should be viewed as *weaker* medicine.) In any event, the appellate court had demonstrated that, redundant references to overbreadth notwithstanding, the case was quite susceptible to resolution via the application of strict scrutiny.[276]

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[267] 18 U.S.C. § 48(a)(c)(1).

[268] *Stevens*, 559 U.S. 460 (2010); *see* 18 U.S.C. § 48(b).

[269] *Stevens*, 559 U.S. at 466.

[270] *Id.* at 467.

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] United States v. Stevens, 533 F.3d 218, 235 n.16 (3d Cir. 2008) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

[275] *Id.*

[276] *Id.* at 233.

Its resolution at the Supreme Court, however, was entirely via the facial overbreadth doctrine, apparently for no reason other than the fact, observed by Chief Justice Roberts for the majority, that Stevens had challenged the statute on its face.[277] In the part of his opinion that rejected the government's argument that depictions of animal cruelty should be entirely without First Amendment protection, Roberts characterized the statute as content-based,[278] but that never led him to strict scrutiny. His overbreadth analysis, such as it was, is revealed in these excerpts from his opinion:

> Stevens argues that § 48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of § 48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. As the parties have presented the issue, therefore, the constitutionality of § 48 hinges on how broadly it is construed. It is to that question that we now turn.[279]
>
> We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." § 48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation. . . .[280]
>
> While not requiring cruelty, § 48 does require that the depicted conduct be "illegal." But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." . . . The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.[281]
>
> What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the . . . wounding . . . or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be "a broad societal consensus" against cruelty

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[277] United States v. Stevens, 559 U.S. 460, 472 (2010).

[278] *Id.* at 468.

[279] United States v. Stevens, 559 U.S. 460, 473 (2010) (citation omitted).

[280] *Id.* at 474.

[281] *Id.* at 475.

> to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel. . . .[282]

> In the District of Columbia, for example, all hunting is unlawful. Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, and hunting television programs, videos, and Web sites are equally popular. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital. . . .[283]

What should we make of this reasoning? First, given that the obvious goal of Congress was to combat cruelty to animals,[284] should not the Court have considered (as the Court of Appeals did) the magnitude of that government interest? Second (and even if one wished to skip over that first step), did Roberts' reasoning not, in essence, amount to a finding of overinclusiveness in relation to that interest?

Roberts went on to reject the government's argument that the statute's "exceptions clause" adequately limited the statute's reach, thereby curing its potential overbreadth:

> Quite apart from the requirement of "serious" value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. . . . There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.[285]

That last (somewhat odd) sentence could have been reworked to invoke, again, the concept of overinclusiveness. Roberts concluded, "Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of § 48(b), but nonetheless fall within the broad reach of § 48(c).[286]

That pronouncement seems meaningful, until one remembers that *all* of the speech banned by this statute was protected by the First Amendment. Protected speech can still be (and regularly is) restricted,[287] so how does the mere fact of its protected status end the analysis? It did, in this

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[282] *Id.* at 475–76 (citation omitted).

[283] *Id.*at 476 (citations omitted).

[284] *See* United States v. Stevens, 559 U.S. 460, 492–93 (2010).

[285] *Id.* at 478–79.

[286] *Id.* at 480.

[287] *Id.* at 481.

case, because the government "ma[de] no effort to defend the constitutionality of [the statute] as applied beyond crush videos and depictions of animal fighting."[288] With that concession, a finding of "substantial" overbreadth easily followed.[289]

The lone dissenter, Justice Alito, guided by precedent,[290] argued that the Court was bound to first determine the constitutionality of the statute as applied to Stevens' videos, before considering facial overbreadth.[291] Responding to that contention in a footnote, Roberts relied simply on the conclusion that "here no as—applied claim has been preserved."[292] From all that appears, it occurred to no one that no prior "as—applied" analysis would have been even arguably required if the decision had been based on the application of strict scrutiny.

## VI. CONCLUSION

The Supreme Court continues to utilize two potentially overlapping methodologies in resolving most freedom of speech issues—the facial overbreadth doctrine and scrutiny analysis—without ever having offered a comprehensive explanation of (a) when to employ one approach rather than the other; or (b) exactly how they relate to each other.[293] The resulting confusion is undeniable. Given this state of affairs, attorneys challenging the constitutionality of speech restrictions will often (and understandably) rely on both analyses, and thus judges (particularly those who do not regularly delve into the law of freedom of speech) may feel obliged to address both of them in cases in which either mode of analysis may be applicable.[294] When that occurs, the result is redundancy, as it is virtually impossible to imagine a court reaching opposite results, with respect to the same issue, in the same case, by employing two different doctrinal approaches.[295]

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[288] *Id.*

[289] United States v. Stevens, 559 U.S. 460, 481–82 (2010) (Alito, J., dissenting); *see also id.* at 490–91.

[290] *See supra* text accompanying notes 17–20.

[291] *Stevens*, 559 U.S. at 483 (Alito, J., dissenting).

[292] *Id.* at 473 n.3 (2010).

[293] Christopher A. Pierce, *The "Strong Medicine" of the Overbreadth Doctrine: When Statutory Exceptions Are No More than a Placebo*, 64 FED. COMM. L.J. 177, 191–92 (2011).

[294] *Id.* at 196–98.

[295] My assertion assumes the incorrectness of the approach put forth by Justice O'Connor in her partly dissenting opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 260–68 (2002). *See supra* text accompanying notes 177–86.

Cases like *Stevens*, meanwhile, raise the question of *when* the facial overbreadth doctrine is the appropriate mode of analysis.[296] The answer to that question matters, because the use of strict or intermediate scrutiny—unlike facial overbreadth—does not require a finding of "substantial" invalidity,[297] places the burden of proof on the government,[298] and typically will not turn away such a facial challenge in favor of an "as-applied" challenge.[299]

How, then, should this question be answered? Given the difficulty of formulating a viable generalization about when facial overbreadth *should* be employed, I think it more helpful to suggest when it should *not*, as follows: when a regulation of speech reasonably lends itself to a determination of whether it is content-based or content-neutral and is not the kind of regulation subject to analysis via a special constitutional rule, strict or intermediate scrutiny should be the only applicable mode of First Amendment analysis. In such a case, moreover, there need not, and should not, be any reference to "overbreadth." The United States Supreme Court should so state at its first opportunity.

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[296] Pierce, *supra* note 293, at 187–88.

[297] *See supra* text accompanying note 22.

[298] *See supra* text accompanying notes 23 and 52.

[299] *See supra* text accompanying note 25. *But see* Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).