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AVOIDANCE OF CONSTITUTIONAL ISSUES
IN THE UNITED STATES SUPREME COURT:
LIBERTIES OF THE FIRST AMENDMENT

Burton C. Bernard*

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."†

"Civil liberties, like substantive law itself, frequently inhere in the interstices of procedure. . . ."‡

The frequently criticized reluctance of the Supreme Court to consider complaints of unconstitutional governmental action is manifested in the utilization by the Court of various rules of avoidance of constitutional issues. Uncompromising defense of this self-restraint would not be easy to reconcile with the Court's pronounced sensitivity, in modern times, to the liberties of the First Amendment.¹ This article will examine the considerations underlying the traditional restraint, and will suggest that the Court should modify several of its rules of avoidance,² at least when liberties of the First Amendment are threatened.³

* Member of the Illinois and Missouri Bars. The writer wishes to acknowledge the assistance in revising this article of Lewis C. Green, Esq., a member of the Missouri Bar, who is, however, not responsible for any of the opinions expressed herein.


¹ See e.g., pp. 267-270, infra, especially at note 38.

² Among discretionary techniques by which the Court may avoid constitutional issues, not within the scope of this article, are

(a) The granting of judicial review by writ of certiorari is a matter of judicial discretion. For some broad standards of application, see Rule 38(5) of the Rules of the Supreme Court; Maryland v. Baltimore Radio Show, 338 U.S. 912 at 917-18, 70 S.Ct. 252 (1950) (separate opinion by Frankfurter, J., filed with a per curiam denial of certiorari); Harper and Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari," 99 Univ. Pa. L. Rev. 293 (1950); Stern and Gressman, Supreme Court Practice, c. 4 (1950). Cf. the references cited in note 36 infra.

(b) Appeals to the Supreme Court as a matter of right may be dismissed for failure to present a "substantial federal question." See generally note, 62 Harv. L. Rev. 488 (1949); Robertson and Kirkeham, Jurisdiction of the Supreme Court of the United States, Wolfson and Kurland ed., §58 (1951).

(c) The Court will not pass upon a "political question." For some standards guiding
THE RATIONALE OF JUDICIAL SELF-RESTRAINT

An understanding of the reluctance to face constitutional issues cannot be developed without appreciating the role of the Court in drawing the lines beyond which the other organs of government may not go. Marshall, Cooley, Thayer, Hughes, and Frankfurter, among others, have reminded the Court that the crucial power of review and its exercise admit of the utmost delicacy. When state action is challenged, the Court must confront the problem of balancing state


(e) The Court may conclude that a party has failed to follow the proper procedure in asserting a constitutional question. For example, he may have failed to raise the issue for timely consideration in the proceedings below. With regard to state courts, compare Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949), with Herndon v. Georgia, 295 U.S. 441, 55 S.Ct. 794 (1935); as to federal courts, see Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261 (1946).

(F) As a matter of "comity," the Court may decline to entertain a constitutional argument until another court of competent jurisdiction has had an opportunity to make a determination. See the discussion of this problem in relation to habeas corpus petitions of prisoners confined under state authority in Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587 (1950).

The first person to attempt an enumeration of rules of avoidance was Cooley in his CONSTITUTIONAL LIMITATIONS, 1st ed., 162 (1868). The only modern survey of state court decisions bearing on the general subject seems to be Burnett, "Avoidance of Judicial Decision upon Constitutional Ground When Decision Can Be Based upon Other Ground," 28 Ore. L. Rev. 201 (1948). The first Supreme Court opinion to include a relatively detailed listing of rules of avoidance was written by Brandeis, J., concurring in Ashwander v. TVA, 297 U.S. 288 at 346, 56 S.Ct. 588 (1936).

While the scope of this article is limited, procedural developments herein suggested may eventually affect other "civil liberties"—i.e., liberties protecting the more personal interests, as distinguished from property interests—or even those liberties protecting property interests.

4 See The Federalist, No. 78 (Hamilton); Jackson, THE STRUGGLE FOR JUDICIAL SUPREMACY, c. 10 (1941). It has long been settled that the Court should act as an arbiter, although at one time there was doubt: Jefferson's thought that each branch of government must have a right in cases within its proper function to determine independently the validity of an act was put to rest by Marshall. See Beveridge, LIFE OF JOHN MARSHALL 52-53 (1919). However, the wisdom of judicial review is still questioned by an occasional writer. See Hendel, CHARLES EVANS HUGHES AND THE SUPREME COURT, c. 21 (1951) ("... the democratic progress of the United States has been and may again, in crisis, be impeded unless the Court is deprived of this power." p. 296).
and federal power; if the state action is in the form of judicial procedure, there is involved the additional principle of "comity"—i.e., deference to a substantially independent judicial system. Even when federal action is challenged, the delicacy is acute. Court condemnation of federal executive or legislative action may, because of the inherent assertion of judicial supremacy, tend to undermine the principle of separation of powers thought to underlie the structure of the federal government; and the approval of congressional action may tend to undermine the same principle by sanctioning excessive delegation of power to the Executive, or to the Court, or, excessive limitation of the power of the Executive, or of the Court. Furthermore, should the Court invalidate a statute, either state or federal, a rule of a representative branch of government would be nullified, and if the legislative act has had the approval of a popularly elected executive officer, the delicacy would be accentuated. Similarly, to invalidate executive or judicial action may handicap the implementation of governmental policies by authorities at least ultimately responsible to the electorate.

The nature of the federal system has not alone been responsible for the deference of the Supreme Court. Another persuasive factor is that the Court may be less competent than the legislature to decide the important questions of public policy which are imbedded in many

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6 Cooley, Constitutional Limitations 159 (1868).
8 HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) passim.
9 FRANKFURTER, LAW AND POLITICS, MacLeish and Pritchard ed., 24-29 (1939).
15 See United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946).
16 Cf. p. 264 infra, especially at note 23.
18 Strict federal rules on the admissibility of evidence unlawfully obtained are often said to hamper law enforcement officials in their work. See, e.g., Upshaw v. United States, 335 U.S. 410 at 414, 69 S.Ct. 170 (1948) (dissenting opinion); comment, 42 Mich. L. Rev. 679 (1944). See also Lowenthal, THE FEDERAL BUREAU OF INVESTIGATION, cc. 17, 19 (1950).
constitutional controversies. The Court works within a judicial framework, and the adversary procedure is often ineffective to collect, summarize and interpret the experiences of society.\textsuperscript{19} A further factor is that the comparative finality which results from a holding of unconstitutionality is in marked contrast to the flexibility found in the legislative process.\textsuperscript{20} Finally, it would seem that self-restraint rests in part on considerations of wise statesmanship. The influence wielded by the Court at any one time depends in large measure upon the temper of the community. History suggests that if the Court exercises its power of review too readily and too independently it will be met with rebuke and disdain, with a consequent diminution of influence on the national scene.\textsuperscript{21} Indeed, the President has ignored judicial mandate,\textsuperscript{22} and the Congress has restricted the Court's appellate jurisdiction,\textsuperscript{23} while in the mid-thirties, the Court's willingness to block social reforms gave rise to considerable clamor for restriction of its power.\textsuperscript{24}

An awareness of the need for carefully considered constitutional decisions often bolsters the Court's self-denial.\textsuperscript{25} Such a need is apparent when constitutional litigation is viewed with discernment of the public interest at stake. A decision which is rooted in sound policy is

\begin{footnotesize}
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\item \textsuperscript{20} See AFL v. American Sash & Door Co., 335 U.S. 538 at 542, 553-57, 69 S.Ct. 258 (1949) (concurring opinion).
\item \textsuperscript{21} See Dennis v. United States, 341 U.S. 494 at 517, 525, 71 S.Ct. 857 (1951) (concurring opinion.) See also Hughes, The Supreme Court of the United States, 50 et seq. (1928).
\item \textsuperscript{22} See Ex parte Merryman, (C.C.D. Md. 1861) 17 Fed. Cas. 144, No. 9847 (Taney, C.J., on circuit); 2 Warren, The Supreme Court in United States History, 2d ed., 368-74 (1926).
\item \textsuperscript{24} During the years 1935 and 1936 the Court in eleven cases declared congressional acts or parts of acts to be invalid. U.S. LIBRARY OF CONGRESS: LEGISLATIVE REFERENCE SERVICE, PROVISIONS OF THE FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES 146-67 (1936). See generally Hendel, Charles Evans Hughes and the Supreme Court, c. 19 (1951). Garrison, "The Constitution and The Future," New Republic, Jan. 29, 1936, p. 328. More than a score of books were written at the time concerning the powers of the Court. See also Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States," 47 AM. L. REV. 1 at 161 (1913).
\item \textsuperscript{25} See, e.g., CIO v. United States, 335 U.S. 106 at 127, 68 S.Ct. 1349 (1946) (concurring opinion); AFL v. McAdory, 325 U.S. 450 at 460-61, 65 S.Ct. 1384 (1945); Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 at 346, 12 S.Ct. 400 (1892).
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more conducive to smooth-working adjustments of conflicting interests; and sound policy is more readily perceived when the question for decision has been adequately presented and clarified in prior proceedings.**26**

A reluctance, then, to accede to demands for decision of a question, in the face of premature or inadequate presentation in the record of the litigation, is part of an effort to perform with skill the judicial function.

An additional influence is the expectation that each pronouncement will be read and followed by the lower federal and state courts, and will often govern the conduct of other branches of government and of private individuals. A lucid opinion, partially made possible by the thorough understanding which derives from a carefully presented case, serves to minimize confusion in the inferior courts and elsewhere, at once enhancing a proficient administration of the law and the prestige of the Court.

**Self-Restraint and the First Amendment**

While any impatience with the Court's hesitation to decide constitutional issues should be tempered by the realization that nebulous considerations of public policy are frequently the only guides to decision of such problems,**27** the sound principles underlying self-restraint should not obscure a serious criticism to be leveled at the policy. Perhaps the nail was hit squarely by Justice Jackson, who, a decade ago, asked:

"Can we not establish a procedure for determination of substantial constitutional questions at the suit of real parties in interest which will avoid the prematurity of advisory opinions on the one hand and also avoid technical doctrines for postponing inevitable decisions? Should we not at least try to lay inevitable constitutional controversies to early rest?"**28**

In effect, the question was posed whether the Court must be impaled on either horn of the dilemma presented by considerations of restraint and alacrity, whether power properly invoked should not be promptly


**27** See Braden, "The Search for Objectivity in Constitutional Law," 57 Yale L.J. 571 (1948). Also deserving of consideration is the fact that the avoidance of constitutional issues has the effect of lessening the workload of the Court. Statistical data on the business of the Court may be found in the Harvard Law Review citations in note 31 infra, and in the issues of the Annual Report of the Director of the Administrative Office of the United States Courts.

exercised. Subsequently, only one Supreme Court opinion has presented what may be called a thorough analysis of the basic policy. In *Rescue Army v. Municipal Court*, Justice Rutledge seems to have concluded that the prolonged uncertainty produced by the avoidance of constitutional questions would have to be tolerated. The Justice, however, failed to analyze the policy in the light of the changing nature of the Court's business; herein is offered an immediate justification for re-examining the traditional attitude questioned by Justice Jackson.

Until the last quarter of the nineteenth century, the Court was primarily concerned with litigation waged by private parties disputing questions of private law in which there was little public moment. An ensuing change saw the emergence of an increasing number of cases, in which the government was a party, introducing constitutional problems concerning public authority and property rights. Similar to that development has been the notable increase in recent years of cases presenting conflicts between governmental activity and personal interests protected principally by the Bill of Rights and the Fourteenth Amendment. The reasons for this alteration in the nature of the cases filling the Court's dockets are several. First, the gradual incorporation of portions of the Bill of Rights into the Fourteenth Amendment, thereby limiting actions of the state governments, has prompted much litigation in the Supreme Court. Second, the government's assumption of new and expanding functions has limited the freedom of the people in conducting their daily lives, thereby giving rise to many demands

266 MICHIGAN LAW REVIEW [Vol. 50


30 See FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT 300-303 (1928).

31 Despite the fact that individual writers do not define what constitutes a "civil liberty" case, much less agree among themselves as to a definition, the number of such cases by whatever definition is substantial. About one-half of the constitutional decisions 1946-50 were primarily concerned with "civil rights." Frank, "Court and Constitution: The Passive Period," 4 VAND. L. REV. 400, 401 (1951). In the 1949 term, 15 cases decided with full opinion involved "civil liberties." Frank, "The United States Supreme Court: 1949-50," 18 UNIV. CHI. L. REV. 1 at 37 (1950). In the three terms prior to the 1949 term there were 57 cases dealing with "civil liberties." Dilliard, "Truman Reshapes the Supreme Court," ATL. MONTHLY, Dec. 1949, p. 30. See also Table III, "The Supreme Court, 1949 Term," 64 HARV. L. REV. 114 at 161 (1950); Table III, "The Supreme Court, 1948 Term," 63 HARV. L. REV. 119 at 123 (1949); Tables XVI, XVII, Pritchett, THE ROOSEVELT COURT 131, 141 (1947). For comparison see Frankfurter and Landis, Frankfurter and Hart, Frankfurter and Fisher, and Hart, "The Business of the Supreme Court," HARV. L. REV., 43:33, 54; 44:1, 16, 24; 45:271, 286, 294; 46:226, 242, 250; 47:245, 261, 272; 48:238, 250, 258; 49:68, 80, 88; 51:577, 600, 608; 53:579, 592, 602 (for the terms 1928-1938).

on the Court to strike a balance between personal liberty and official action;\(^{33}\) in turn, these demands have been intensified by war and postwar tensions.\(^{34}\) Third, it may be conjectured that the self-restraint which the Court has manifested in matters of economic concern since the mid-thirties allows more time to handle cases involving personal interests.\(^{35}\) Finally, predilections of four or more Justices would seem to have been responsible for a liberal granting of certiorari in such cases.\(^{36}\)

This change in the nature of the Court's business has given the Court great opportunity to develop several areas of constitutional law which had lain relatively dormant for many years. The case-to-case development of the law has given rise to considerable uncertainty as to the constitutional limits of official action. Coupled with the increasing governmental restrictions on individual liberties and an increasing public concern for the protection of those liberties, this uncertainty suggests that greater importance should be attached to the need for early clarification of constitutional questions. In particular, when those liberties of the First Amendment are endangered, some relaxation of restraint appears to be in order, especially in view of the assertion by six Justices that the liberties of the First Amendment enjoy a "preferred position" in the hierarchy of constitutional values.\(^{37}\) In other words, constitutional limitation on legislative power is comparatively greater.


\(^{34}\) See Fraenkel, "War, Civil Liberties and the Supreme Court, 1941-1946," 55 Yale L.J. 715 (1946); Corwin, Total War and the Constitution, c. 3 (1947).


\(^{36}\) Cf. editorial St. Louis Post-Dispatch, October 23, 1949, §2, p. 2:2; Frank, "The United States Supreme Court: 1949-50," 18 Univ. Chi. L. Rev. 1 at 40, 52 (1950).


The following table is a resume of the above cited opinions, showing which Justices have used express language of preference. This table does not include opinions from which
when these liberties are imperiled. The reasons for this preference, though they have never been clearly articulated by the Justices, may well support some relaxation of the Court's reluctance to decide constitutional questions.

Most fundamental is the fact that our political process is rooted in the free interplay of opinion. The First Amendment is designed to guarantee freedom for the individual to express his beliefs. This freedom is essential to an accurate reflection of the sentiment of the people in the formation of public opinion and in the operation of the government. Any official restrictions of this freedom will in the first instance be the work of the legislative and executive branches of government. Such restrictions will, by their very nature, tend to forestall minority efforts to influence public opinion, thereby depriving those persons affected of full opportunity to undo the restrictions through the workings of the political process. Furthermore, the availability of the political process as a means of checking official abuse of economic interests, or other personal interests, is lessened when legislative or executive action curtails free expression. Accordingly, an especial responsibility for safeguarding free expression should devolve upon the Court. If this analysis is the sole basis for preference, then it is clear that for the most

a preferred status might be inferred from the fact that the presumption of validity normally attaching to legislation was regarded as altered. Two footnote affirmations are deemed opinion language. The Opelika dissent is listed in the first column of numbers.

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<th>Opinions Written by</th>
<th>Opinions Delivering the Judgment of the Court</th>
<th>Concurring Opinions</th>
<th>Dissenting Opinions</th>
<th>Total Opinions</th>
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38 The “clear and present danger” test requires the Court, in addition to questioning the reasonable character of legislation curbing free speech, to determine independently whether the legislation is needed. See generally Antieau, “Clear and Present Danger—Its Meaning and Significance,” 25 Notre Dame Lawyer 603 (1950); Barnett, “Mr. Justice Murphy, Civil Liberties and the Holmes Tradition,” 32 Cornell L. Q. 177 (1946). That the “clear and present danger” test may henceforward be far less demanding than in the past is indicated by the opinion delivering the judgment of the Court in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951). For an excellent critical description of the impact of the Dennis opinion on the test, see Separate Petition of Petitioner John Gates for Rehearing, 39-52.

39 The Federalist, No. 78 at 483-484 (Lodge ed. 1888).
part only those personal interests protected by the First Amendment are to be preferred. 40

Still a broader basis for preferring First Amendment liberties may be that the lessons of history have taught us that these liberties are more precious to society than are others. 41 Philosophic notions may provide further support for a preference. 42 Another relevant but less substantial consideration is that First Amendment liberties, not to mention other parts of the Bill of Rights, are in specific form as contrasted with the guarantees protecting property interests, which guarantees must be carved out of the vague phrases of due process and equal protection. 43 Probably the reasons vary according to the beliefs of the Justice who uses words of preference in a given case; probably most or all of the factors mentioned are relevant.

Preferring the liberties of free expression over others is open to serious criticism. A reluctance to entrust the protection of the First Amendment liberties to the elected organs of government to the same

40 The cases cited in note 37 supra all involve First Amendment liberties. This analysis was first judicially stated as a possible ground for treating statutes dealing with First Amendment liberties differently from those of economic import by Justice Stone in United States v. Carolene Products Co., 304 U.S. 144 at 152, n. 4, 58 S.Ct. 778 (1938). See KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 269 (1945). An early judicial explanation of the idea that the First Amendment was essential to our political structure is found in Whitney v. California, 274 U. S. 357 at 372, 375, 47 S.Ct. 641 (1927) (Brandeis, J., concurring). Subsequent espousal of this line of thought, but without reference to a "preferred position," is found in Thornhill v. Alabama, 310 U.S. 88 at 95, 60 S.Ct. 736 (1940) (Murphy, J.); Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U.S. 287 at 301-302, 61 S.Ct. 552 (1941) (Black, J., dissenting); United Public Workers v. Mitchell, 330 U.S. 75 at 105, 114, 67 S.Ct. 556 (1947) (Black, J., dissenting); CIO v. Douds, 339 U.S. 382 at 422, 442-443, 70 S.Ct. 674 (1950) (Jackson, J., concurring in part, dissenting in part); Dennis v. United States, 331 U.S. 494 at 581, 71 S.Ct. 857 (1951) (Douglas, J., dissenting). See also Mandlejohn, FREE SPEECH 26-27 (1948).

41 See Freund, "The Supreme Court and Civil Liberties," 4 VAND. L. REV. 533 at 548-550 (1951); RUSSELL, AUTHORITY AND THE INDIVIDUAL 104-105 (1949); J. S. MILL, ON LIBERTY, McCallum ed., c. 2 (1946); Riesman, "Civil Liberties in a Period of Transition," 3 PUBLIC POLICY 33 at 63-68 (1942) (Harvard Graduate School of Public Administration).

42 See Freund, "The Supreme Court and Civil Liberties," 4 VAND. L. REV. 533 at 548-550 (1951); RUSSELL, AUTHORITY AND THE INDIVIDUAL 104-105 (1949); J. S. MILL, ON LIBERTY, McCallum ed., c. 2 (1946); Riesman, "Civil Liberties in a Period of Transition," 3 PUBLIC POLICY 33 at 63-68 (1942) (Harvard Graduate School of Public Administration).

extent that property interests are now entrusted to them is said to betray a lack of faith in the democratic process. In the spirit of *quid leges sine moribus* the related argument is advanced that the preservation of liberty rests ultimately with the people and their agents; and, correspondingly, increased concern for free expression on the part of the Court will tend to erode the sense of responsibility of the people.

To meet the criticism directly, recourse to the fundamental precept of the First and Fourteenth Amendments is in order: There shall be limitations on the power of government. An alerted Court can prevent the sapping of the vitality of the First Amendment at the hands of well-intentioned representatives. As one observer has testified, to quarrel with a vigilant exercise of such judicial review is to quarrel with the Constitution. The same observer has lauded the Court’s vigilance as an invigoration of popular responsibility, suggesting that the Court has been the greatest single force for popular education in the matter of individual liberties, and adding that, but for constitutional litigation, much unduly restrictive legislation would have continued in force indefinitely, unnoticed (except by a negligible minority), unconsidered, and unchanged. In fine, the reply is at hand that a sharpened response to alleged deprivations of those liberties guaranteed by the First Amendment stimulates, rather than erodes, popular concern.

A further cause for dissent from the assertion of a preference for the First Amendment is the fear that the Court would impede the legislatures in achieving a desirable reconciliation of liberty with authority, giving rise to the danger that liberty might be lost altogether. This fear assumes that too much freedom would undermine the prestige, efficiency and stability of democracy; yet the vitality and fiber of American institutions cast serious doubt on the premise. Furthermore, without the increased scrutiny afforded by a body of authority relatively far


47 Green, Book Review, 32 Calif. L. Rev. 111 (1944), criticizing in penetrating fashion the position of Professor Commager.


removed from political pressures, unnecessarily drastic curtailments of liberty may ensue, deriving from exaggerated apprehensions. The implications would be ominous in the light of the expanding role of government in the ordering of the people’s affairs. With increased governmental regulation, the ability of the individual freely to express his convictions assumes increased importance.

The available bases for preferment and the growing role of government may in the aggregate provide the answer to those who insist in this matter upon an absolute equality of values in constitutional decisions. And even if one rejects the idea of a “preferred position” with regard to the merits of claims of unconstitutional action, he may logically conclude that the considerations set forth above warrant some relaxation of the Court’s traditional reluctance to consider the merits of such claims. In fact, criticisms of a “preferred position” seem largely inapposite to such a relaxation. Thus it is appropriate to examine in detail two of the more common rules of avoidance in order to determine the wisdom of accelerating the determination of constitutional controversies.

**Two Rules of Avoidance**

A. **Constitutional Questions Will Not Be Considered at the Instance of One Who Fails To Show that He Has Been Injured by the Allegedly Unconstitutional Feature of a Statute—Herein: The Defenses of Overbreadth and Vagueness.**

Assume that a private party has committed acts which indisputably bring him within the purview of the statute under which he is being prosecuted, and that his conduct is not constitutionally protected.

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52 Judge Learned Hand seems to stand by an equality of values. See his “Chief Justice Stone’s Conception of the Judicial Function,” 46 Cor. L. Rev. 696 at 698 (1946); also, St. Louis Post-Dispatch, July 15, 1951, §3, p. 1:1-4. Such a view is bolstered by the formidable demonstration which is available to show that property rights have always been markedly present in the American spectrum of values. Freund, On Understanding the Supreme Court 14-22 (1949).

Although contending that the liberties of the First Amendment should be preferred, the present writer leaves open the larger and more difficult question of whether other or all personal interests should also be preferred. Enlarging the number of preferred interests
The query may be raised whether the statute's language, which has been applied to the defendant, is so broadly phrased that it is by a reasonable construction capable of application to other conduct, which cannot constitutionally be proscribed. If so, the problem is presented whether the present defendant can raise as a defense the possibility of unconstitutional applications. Or, in other words, can the defendant attack the statute "on its face" for overbreadth without regard to the particular facts of his case? (This problem should be distinguished from the question which arises when a defendant seeks to assert the invalidity of a different and unrelated section or clause of the same statute under which judicial proceedings are being brought, thereby raising what may be called the problem of separability.)

On the basis of precedent, the answer might seem to be wholly in the negative. The underlying rationale derives from our adversary system of litigation. The Court is understandably reluctant to decide a case on the basis of conduct not fully described in the record, conduct which may in fact never take place. Since neither party is principally concerned with the hypothetical facts, the Court may lack not only a clear statement of these facts but also an adequate argument directed toward them. Hence, it is said that a defendant cannot complain of the unconstitutional aspects of hypothetical applications by which he has not been injured—even though he has been adversely affected by the statute. As a result, there may be injustice to the defendant being convicted, for he would not be convicted if the Court invalidated the statute for excessive breadth. Moreover, there is the prospect of hardship on other individuals who in the future may be prosecuted (although, theoretically, not convicted) for conduct protected by the Constitution, since the excessively broad statute is left in effect without a restrictive construction. The possible injustice to the defendant is traditionally justified in two ways. First, it is said that the defendant is...
entitled to no consideration, because even if the statute had been drawn so narrowly that it could not be applied to conduct protected by the Constitution, he would still be subject to conviction. Second, the legislature may have indicated its intention that the invalidity of the statute in one application should not affect the validity of the statute in other applications. Little, if any, consideration has been given to hypothetical defendants, perhaps in view of the fact that the possibility of a restrictive construction by the courts, or of an exercise of discretion by the prosecuting officials, gives substance to the contention that the probability of invalid application is at best conjectural. Influenced by these considerations, and sensitive to the delicate nature of judicial review, the Court ordinarily confines itself to the actual application in the pending case.\footnote{56}

Significantly, however, a number of the Court's opinions during the past two decades have in effect permitted a private party to attack on its face as being overbroad a statute curbing First Amendment freedoms, and the action of the Court and the language used by some of the Justices in concurring and dissenting opinions seem to express approval of a doctrine which would allow such an attack. There follows an analysis of this doctrine which is here termed the defense of overbreadth.

**Overbreadth and Vagueness**

*Thornhill v. Alabama*\footnote{57} was the first case to articulate the proposition that a defendant could assert the defense of overbreadth. Thornhill was convicted under an indictment phrased in terms of an Alabama statute which prohibited all picketing in labor disputes. On appeal, the Supreme Court of the United States held that peaceful picketing was entitled to protection as free speech, and, without considering whether the particular picketing involved was peaceful, reversed the conviction. The Court stated:

"... [where] a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state..."
control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press . . . an accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him . . .

Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. 58

Those reasons, Justice Murphy explained, were essentially that an overbroad statute such as the one then before the Court served as a deterrent on all discussion that might reasonably be regarded as coming within its scope, even though much of the discussion might be constitutionally protected. 59

Justice Murphy had some modern precedent upon which to rely in writing the Thornhill opinion. In 1931 the defense of overbreadth was recognized and utilized, perhaps inadvertently, in proceedings involving the First Amendment. In Stromberg v. California, 60 the first count of an information brought the specifically worded first clause of the California “red-flag” statute before the Court. Chief Justice Hughes, writing for the Court, held the section to be invalid because the section as written and as authoritatively construed by the state courts was “so vague and indefinite as to permit the punishment of the fair use of the opportunity for . . . free political discussion.” 61 The thrust of the opinion in this regard did not rely on the quality of the defendant’s activity. The quoted language was reiterated and utilized six years later by Justice Roberts in Herndon v. Lowry. 62 The choice of language was unfortunate. Chief Justice Hughes in using the words “vague and indefinite” to express the thought that the definitely worded

58 310 U.S. 88 at 97-98 (alternative holding).
59 See p. 293 infra, especially at note 133.
60 283 U.S. 359, 51 S.Ct. 532 (1931).
61 Id. at 369. The fact that the statute had been authoritatively construed does not belie the recognition of the defense of overbreadth; rather such a construction presents a special context in which the doctrine may be applied. Thornhill was an application of the rationale used by Chief Justice Hughes in a case where the state courts had not construed the statute in spite of the opportunity to do so. See pp. 284-286 infra.
California statute was capable of invalid application apparently failed to make, or to perceive, the distinction between the breadth of a statute and the vagueness of a statute. A statute may be quite definite (the antonym of vague), but despite its definiteness it may be overbroad in the sense that it permits of unconstitutional application. Admittedly, a vague statute is likely also to be broad; nevertheless, it does not follow that when a statute is broad there is inherent a quality of vagueness.

In referring to the quality of indefiniteness, Chief Justice Hughes apparently had in mind the rule of vagueness which had been recognized by the Court since 1875. A criminal statute is said to be void for vagueness under the due process clauses of the Fifth and Fourteenth Amendments, if the activities which comprise the crime or crimes created are not clearly delineated. Traditionally, the rationale underlying the rule of vagueness had been and still is that an indefinite statute exudes "injustice" and "fundamental unfairness" because of its failure to provide an "ascertainable standard of guilt" which would enable individuals to curtail their activities, even those which might constitutionally be proscribed, so as to avoid criminal proceedings. However, the Stromberg language indicated that an additional vice inherent in at

63 Although Chief Justice Hughes used the phrase "punishment of," it would seem he meant "application of the statute against," for, by hypothesis, constitutionally protected activity cannot be punished.

64 See United States v. Reese, 92 U.S. 214 at 220 (1875). Judicial recognition of the vagueness rule is traced in note, 23 Ind. L. J. 272 (1948).

65 See CIO v. Douds, 339 U.S. 382 at 413, 70 S.Ct. 674 (1950); see Quarles, "Some Statutory Construction Problems and Approaches in Criminal Law," 3 Vand. L. Rev. 531 (1950). Another explanation is that definiteness in the place of vagueness provides a standard by which judges and juries may perform the function of adjudication with uniformity and fairness. Note, Due Process Requirements of Definiteness in Statutes, 62 Harv. L. Rev. 77 (1948). Closely related to the idea of implementing fair adjudication is the suggestion that vague statutes enhance the growth of arbitrary government. See Screws v. United States, 325 U.S. 91 at 138, 149, 65 S.Ct. 1031 (1945) (dissenting opinion). In addition, statutory definiteness assists the accused to prepare and make his defense. See Screws v. United States, supra at 113, 128 (concurring opinion).

The use of the words "criminal proceedings," in the text is deliberate. The preponderance of judicial language, with little or no analysis, seems to indicate that individuals are enabled by the vagueness rule to protect themselves against punishment. If punishment without notice is the evil of vagueness, then the rule exists to protect individuals against only valid applications of a vague statute. For, by hypothesis, an invalid application cannot cause punishment, unless of course a defendant should fail to appeal from an erroneous decision. It is submitted that individuals should be able to protect themselves against application of a statute, valid or invalid. Cf. p. 293. United States v. Sharp, (C.C. D.Pa. 1815) 27 Fed. Cas. 1043, No. 16264. For confusion in this matter, see: "And since the constitutional vice in a vague and indefinite statute is the injustice to the accused in placing him on trial for an offense the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge..." CIO v. Douds, 339 U.S. 382 at 413, 70 S.Ct. 857 (1950) (emphasis added).
least some vague statutes was that they might be used against activity constitutionally protected, and therefore would tend to suppress an indeterminate amount of legitimate activity. The proposition that a cloud on conduct is a by-product of vagueness assumes that individuals will be prone to curtail activity rather than run the risk of criminal prosecution and the attendant loss of time, money, effort, and reputation. Since all constitutionally protected activity—for our purpose the free expression of ideas—is of benefit to society, this expanded basis for the rule gives proper emphasis to the social impact of many vague statutes.

In short, in order to avoid an unnecessary hampering of constitutionally protected activity, the Court should permit any defendant to attack a vague statute on the ground that it might be used against conduct protected by the Constitution, if in fact the statute is too broad. Likewise, to afford fairness to the defendant, who has been unable to predict that his activity would be punished, and to enable others to avoid criminal proceedings in the future, even though their proposed activity may not be protected by the Constitution, any defendant should be allowed to attack any vague statute on the ground that it provides no reasonably ascertainable standard of guilt.

While one may accept the expanded rationale of the vagueness rule as suggested in the Stromberg opinion, one should recognize that the statutory language in issue, at least as construed, was not vague. Rather, the language was definite but so broad that it could be used against expression constitutionally protected. These facts serve to reveal the close relationship of the vagueness rule and the rule against overbreadth. If a vague statute hampers legitimate activity, a fortiori will a definite statute hamper the same activity, for the probability of the statute's being applied invalidly appears even greater when prosecuting officials deal with definite language. Unlike a vague statute, however, a definite statute does give notice of the conduct which is within the scope of the statute. Despite the partial dissimilarity of the two rules, the Court in Thornhill reasoned that a statute could be invalid on its face for overbreadth even though it was not vague.

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66 This rationale may have been judicially noted for the first time by Justice Holmes in International Harvester v. Kentucky, 234 U.S. 216 at 223, 34 S.Ct. 853 (1914). See comment, 46 ILL. L. Rev. 274 at 278 (1951).

67 But if the statutory language were construed as effective only in those cases where constitutionally applicable, the statute would take on a vague character. This type of construction technically precludes the defense of overbreadth, but eliminates none of the vices of the overbroad statute. On the contrary, such a construction adds the objections inherent in any vague statute. See pp. 282-283 infra.
The confusion in prospect after the *Stromberg* and *Herndon* cases was realized in *Winters v. New York*. The case dealt with a statute which was vague and by virtue of that fact was also open to the charge of being overly broad. The defendant was indicted and convicted under sub-section 2 of that part of the New York Penal Law which deals with obscene prints and articles. The sub-section as written was a broad proscription of printing, distributing, and selling matter devoted to accounts of criminal deeds or stories of bloodshed, lust and crime. The language was construed by the state courts to encompass only matter which might become a "vehicle . . . for inciting violent and depraved crimes against the person." In reversing the conviction, the Court, through Justice Reed, stated that the sub-section as restrictively construed was void on its face because it permitted "within the scope of its language the punishment of incidents fairly within the guarantee of free speech," citing *Stromberg* and *Herndon*. However, the Court's subsequent emphasis was on argument and citation of cases dealing with vagueness, i.e., whether fair notice is provided by a statute. As indicated, the Court did use the language of the *Thornhill* rationale; but it did not cite that case, being content to cite two cases on which Justice Murphy had relied in *Thornhill*. That the theory of the Court in *Winters* was meant to be vagueness is indicated by the dissenters' interpretation of the Court's opinion as well as by a statement of Justice Reed in a later case. The failure of the Court to recognize the distinction between a broad statute and a vague statute, to recognize the expanded rationale of the vagueness rule, and to recognize a fundamental similarity in the rules which would allow a defendant to attack a statute on its face for vagueness or overbreadth all have encouraged confusion.

**Overbreadth in the Guise of Prior Restraint**

Shortly after *Stromberg*, Chief Justice Hughes wrote the Court's opinion in *Near v. Minnesota*. In that case, the Court held invalid, as violating the First and Fourteenth Amendments, a Minnesota statute which enabled public officials to enjoin the publication of "malicious,

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71 283 U.S. 697, 51 S.Ct. 625 (1931).
scandalous, and defamatory" newspapers and periodicals. The case has since been generally interpreted as authority for the proposition that a "prior restraint" on First Amendment liberties is more objectionable than a "subsequent restraint." By definition, a prior restraint is one which is imposed before expression is aired, as distinguished from that restriction which is imposed in the form of judicial sanction after the expression has been aired. However, it should be added that it is difficult to determine what the Justices will deem a prior restraint. Although writers have persuasively argued that a distinction based on the temporal characteristics of a restraint curtailing free expression is not worthy of judicial recognition, the Court has never responded. It is here suggested that the prior restraint cases may be and should be absorbed into the more meaningful and all-embracing theory here discussed, which would allow a defendant standing to assert overbreadth. Indeed, a perusal of the Near opinion indicates that Chief Justice Hughes was principally concerned with the overbreadth of the Minnesota statute.

Whereas the Winters case had posed the problem of overbreadth in a vague statute, Saia v. New York present the problem of overbreadth in a specifically worded ordinance imposing a prior restraint. In question was a city ordinance which required operators of sound trucks to obtain a permit from the chief of police, issuable in his discretion, before making use of the trucks in specified municipal areas. Justice Douglas in writing the Court's opinion declared the restriction void on its face as a curtailment of freedom of speech. The definite manner in which the ordinance was drawn is evidenced by the fact that no question of vagueness was discussed in the opinion. The present writer suggests that the theory of Saia, like Near, is the theory of the overbroad statute. It is true that the Court did not cite Stromberg, Herndon, Thornhill, or Winters; nevertheless, the writer would persist. At least six prior restraint cases were available to sustain the conclusion in Saia: Near v. Minnesota, Lovell v. Griffen, Hague v.

72 Compare Butler, J., who dissented in Near v. Minnesota, 283 U.S. 697 at 723 (1931), concluding that an injunction against the continued publication of a newspaper was not a prior restraint, with Black, J., who dissented in Dennis v. United States, 341 U.S. 794 at 579, 71 S.Ct. 857 (1951), concluding that the Smith Act in prescribing criminal penalties for past actions imposed a prior restraint.

73 See Freund, "The Supreme Court and Civil Liberties," 4 VAND. L. Rev. 533 at 537-539 (1951); Antieau, "Judicial Delimitation of the First Amendment Freedoms," 34 MARQ. L. Rev. 57 at 59-61 (1950); 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 885 (1927); CHAFFEE, FREEDOM OF SPEECH 8-12 (1920).


75 283 U.S. 697, 51 S.Ct. 625 (1931).

76 303 U.S. 444, 58 S.Ct. 666 (1938).
CIO,\textsuperscript{77} Cantwell v. Connecticut,\textsuperscript{78} Jones v. Opelika,\textsuperscript{79} and Largent v. Texas,\textsuperscript{80} three of which were cited by the Court. Cases typified by Saia do not invalidate prior restraint per se; rather the objection is to the wide discretion conferred by the ordinance on the city official who administers the ordinance. The wide discretion exists because the ordinance is drawn too broadly. For example, in Saia, the Court stated that the ordinance was not "narrowly drawn to regulate the hours or places of use of loudspeakers, or the volume of sound (the decibels) to which they must be adjusted."\textsuperscript{81} It is clear that the Court would uphold a prior restraint imposed by an ordinance of sufficiently narrow scope.\textsuperscript{82} This reasoning is the essence of the Thornhill rationale.

More insight may be gleaned from the case of Kovacs v. Cooper,\textsuperscript{88} which brought before the Court an ordinance imposing penalties for violation of an outright prohibition against using sound amplifiers in certain municipal areas. Justice Reed delivered the judgment of the Court, upholding the ordinance at issue, in an opinion in which Chief Justice Vinson and Justice Burton joined. The opinion assumed that the state courts had interpreted the ordinance to prohibit only sound trucks which produced "loud and raucous" noises; hence the ordinance might fairly be considered neither too vague nor too broad. But in reaching the conclusion of validity, the Court did not expressly recognize the overbroad doctrine. First, Saia was distinguished, unfortunately by ambiguous language. Characterizing the Saia enactment as (a) a previous restraint and (b) one with no standards prescribed for its exercise, Justice Reed stated, "This ordinance [Kovacs] is not of that character. It contains nothing comparable to the ... ordinance in the Saia case."\textsuperscript{84} The ensuing reasoning was to the effect that a ban on "loud and raucous" noises emitted by sound trucks was a permissible exercise of the city's power to combat nuisances. Even if it is assumed that the Justice considered the distinction of breadth and not the distinction of prior restraint as the significant one, the opinion left open the question whether he and the other two Justices would have upheld an overbroad statute.

\textsuperscript{77} 307 U.S. 496, 59 S.Ct. 954 (1939).
\textsuperscript{78} 310 U.S. 296, 60 S.Ct. 900 (1940).
\textsuperscript{79} 316 U.S. 584 at 603, 62 S.Ct. 1231 (1942) (dissenting opinion) adopted per curiam on rehearing, 319 U.S. 103, 63 S.Ct. 890 (1943).
\textsuperscript{80} 318 U.S. 418, 63 S.Ct. 667 (1943).
\textsuperscript{81} 334 U.S. 558 at 560, 68 S.Ct. 1148 (1948).
\textsuperscript{82} Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1941).
\textsuperscript{83} 336 U.S. 77, 69 S.Ct. 448 (1949).
\textsuperscript{84} Id. at 82-83 (emphasis added).
Justices Frankfurter and Jackson were of the opinion that the ordinance as interpreted by the state courts was a blanket prohibition. Consistent with their stand in *Saia*, they concluded that it was valid notwithstanding. Although it is possible that these Justices recognized the existence of the doctrine of the overbroad statute, upholding the statute in *Kovacs* because it was either sufficiently narrow as written or because they reject the doctrine, there is no support for these conclusions in their opinions.85 Nor do their opinions mention the arguments made by the dissenters.

Justices Black, Douglas, Murphy, and Rutledge agreed that the prohibition was a blanket one in the absence of a restrictive construction by the state courts, recognized the doctrine of overbreadth as underlying *Saia*, and accepted that doctrine, concluding that the ordinance was invalid on its face.86

In two cases decided midway in the 1950 term, the Court, with the exception of one Justice, again demonstrated that the defense of overbreadth is available to a defendant prosecuted under what the Court deems a prior restraint. In *Kunz v. New York*,87 the defendant's conviction was reversed because it was based on a New York City ordinance which did not contain "appropriate standards" limiting the discretion of the administrative official whose duty was to grant or refuse permits authorizing the use of the streets for religious worship meetings. Presenting a spirited defense of the technique of adjudging a prior restraint on its face, Justice Frankfurter in a concurring opinion stated that the vice to be guarded against is arbitrary action on the part of the administrative officials.88 Yet officials responsible for invalid applications may be acting quite reasonably, perhaps due to the very fact that the statute is excessively broad. The essential vice would seem to be the danger of invalid application, not arbitrary application. Alone in dissent, Justice Jackson refused to consider even a prior restraint on its face, stating that the instant application of the restraint is the only issue to be considered

85 Id. at 89, 97 (concurring opinions).
86 Id. at 98, 104 (dissenting opinions).
87 340 U.S. 290, 71 S.Ct. 312 (1951) (Vinson, C.J., delivering the opinion of the Court, concurred in by Justices Black and Frankfurter). In Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325 (1951) (Vinson, C.J. delivering the opinion of the Court, concurred in by Justices Black and Frankfurter), the Court assumed that a prior restraint was involved, and held such a restraint invalid on its face because of the lack of proper standards. But because the opinion seems to be based also on a denial of equal protection of the laws, the position of the Justices who joined in the opinion is not altogether clear. Justice Frankfurter based his concurring opinion solely on the ground of denial of equal protection of the laws. 340 U.S. 268 at 273.
88 340 U.S. at 273, 284.
and concluding that Kunz was constitutionally convicted. His unqualified refusal to allow a defendant to assert overbreadth seems grounded in the apprehension that government authorities could not effectively regulate evils as they arise if statutes intended to curb those evils are struck down for overbreadth. He points out the absence of specific criteria formulated by the Court which would aid legislative draftsmen to enact statutes sufficiently narrow to sustain convictions. It is true that the Court has never formulated criteria which would assure the validity of statutes dealing with certain evils, but it would not seem improper if the Court were to indicate with some amount of specificity the reasons why a condemned statute was considered too broad. Furthermore, permitting the defense of overbreadth serves to give notice that draftsmen must make a conscientious effort to write reasonably narrow statutes. It is submitted that the minimization of the hampering of constitutionally protected activity which would result from judicial condemnation of overbroad statutes outweighs both the burden of exacting draftsmanship imposed on legislators and the effects on society of reversals of some convictions valid but for statutory overbreadth.

In the companion case of Feiner v. New York the Court upheld a conviction under a disorderly conduct statute, which imposed penalties for using threatening and abusive language or acting in a disturbing manner, or congregating with others on a public street, refusing to move on when ordered by the police. The prevailing opinion of the Court rested the decision on a valid application of the statute and made no mention of the problem of the statute's breadth. Justice Frankfurter, concurring, indicated that he will not allow the defense of overbreadth with regard to the face of what he deems a subsequent restraint. A position which concedes the wisdom of allowing an attack on the face of a prior restraint appears difficult to reconcile with a position which denies the wisdom of such an attack on the face of a subsequent restraint. Indeed, Justice Douglas, in a dissenting opinion, observed that police censorship has all the vices of the censorship which has been rejected in prior restraint cases. Yet he did not mention the defense of overbreadth, dis-

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80 Id. at 295.
81 In Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325 (1951), the Court stated that "appropriate standards" must be "narrowly drawn, reasonable and definite."
82 340 U.S. 315, 71 S.Ct. 303 (1951) (Vinson, C.J., delivering the prevailing opinion of the Court).
83 Id. at 329.
senting on the ground that the application of the statute in the instant case was invalid. 94

Is it not time for the Court to announce that the prior restraint cases are authority for the proposition that a defendant may assert overbreadth in First Amendment litigation?

**Overbreadth and Federal Legislation**

The defense of overbreadth has only recently affected the course of constitutional decision with regard to federal legislation. While recognizing the issue of overbreadth, the Court has avoided it by facile restrictive construction. Should the issue of overbreadth be pressed in a future case where a restrictive construction of a definitely worded statute would be inappropriate, the following analysis of two recent cases involving federal legislation seems to indicate that the defense of overbreadth would be allowed and the issue decided.

In *CIO v. Douds* 95 the language in section 9(h) of the Taft-Hartley Act was attacked as being too vague and also too broad. 96 Upholding the validity of the provision, Chief Justice Vinson, delivering the judgment of the Court, stated that "the breadth of the provision concerning belief in overthrow of the Government by force would raise additional questions . . ." if a restrictive construction were not adopted. 97 Although seemingly conceding that a challenge to the face of an unequivocally specific statute for overbreadth would be proper, the Chief Justice, in disposing of the charge of vagueness, employed only terms of injustice to individuals, not terms of suppression of legitimate activity. He held that as restrictively construed the provision was not too vague. In contrast, Justice Frankfurter, in a separate opinion, refusing to make a restrictive construction, and declaring the provision as written void for vagueness, recognized the expanded rationale of the vagueness rule. He stated that statutory vagueness is condemned because it "raises hazards unfair to those who seek obedience or involves surrender of freedoms which exceeds what may fairly be exacted." 98 However, Justice Frankfurter was silent on the question of overbreadth.

On June 4, 1951, the concept of statutory overbreadth received peculiar and puzzling treatment in the historic case of *Dennis v.*

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94 To the same effect was the dissenting opinion of Justice Black, id. at 321.
95 339 U.S. 382, 70 S.Ct. 674 (1950).
96 See pp. 289-290 infra.
97 339 U.S. 382 at 406.
98 Id. at 415, 419 (concurring in part, dissenting in part). In the instant case, according to the opinion, the vaguely worded oath was unfair in that it raised the hazard of prosecution for perjury for those who would seek obedience. Id. at 420. The added ground for invalidity was that the oath because of its vagueness touched upon matters which could "not be subjected to compulsory avowal of belief or disbelief." Id. at 421-422.
Chief Justice Vinson, who wrote the prevailing opinion which was joined in by Justices Burton, Minton and Reed, seems to have recognized the defense of overbreadth but ignored its rationale. In response to the defendants' argument that sections 2 and 3 of the Smith Act were overbroad because they purported to prohibit speech which did not create the requisite danger of violence, the Court thought it necessary to construe those sections restrictively; accordingly, they were construed to outlaw the activity described by them only where there is a "clear and present danger" of violence. Yet this vague restrictive construction, while it theoretically eliminates the possibility of invalid application of and unconstitutional conviction under the Smith Act, would seem to impose on constitutionally protected activity as great a cloud as did the written language of the Smith Act. While the statute is no longer overbroad, it has all the vice of an overbroad statute. The restrictive construction accomplished little, except to add an element of vagueness. The Court handled the problem of vagueness solely in terms of fair notice to individuals with no mention of the deterrent effect on constitutional activity which seems to be as characteristic of the Smith Act as construed as it was of the Smith Act as written. On this analysis, the Court in the first instance should either have denied the defendants' standing to assert overbreadth or have decided whether the statute as written was excessively broad. Had the Court denied standing or had it decided this issue one way or the other, there would have been no need for the restrictive construction which presented the problem of vagueness, while retaining the vice of overbreadth.

Overbreadth and the Present Justices

What then is the current status of the law? All of the present Justices, except Justice Jackson, will permit the defense of overbreadth when prior restraints are before the Court. When a statute not imposing a prior restraint is before the Court, Justices Black and Douglas have indicated in the dissents of Kovacs v. Cooper that they will then also permit the defense of overbreadth. Not so with Justice Jackson, who has indicated in his Kunz dissent that he regards prior restraints and subsequent restraints in the same light. Justice Frankfurter has indicated in his Feiner concurring opinion that he will not permit the defense of overbreadth with regard to a subsequent restraint, even

99 341 U.S. 494, 71 S.Ct. 857 (1951). See the discussion of this case with regard to another canon of avoidance at pp. 290-292 infra.
though in Douds he recognized the expanded basis of the vagueness rule and indicated that he would permit a statute to be attacked on its face for vagueness. Justices Burton, Minton, Reed and Vinson, on the basis of the Douds and Dennis performances,\textsuperscript{100} appear to take the incongruous position that the defense of overbreadth is also allowable with regard to subsequent restraints, at the same time refusing to recognize the expanded rationale of the vagueness rule, even when the vague statute throws a cloud on constitutionally protected activity. It would not be a long step for Justice Frankfurter to join with the six Justices who appear to recognize the defense of overbreadth without regard to the insubstantial distinction between prior restraint and subsequent restraint. Nor should it be too difficult for these six Justices in turn to join with Justice Frankfurter who has recognized the expanded rationale of the vagueness rule. It is hoped that Justice Clark will declare himself in favor of the defense of overbreadth and the expanded rationale of the vagueness rule, and that Justice Jackson will reconsider his position. At this writing, the defense of overbreadth appears to have achieved over the course of the past twenty years full status as a judicial technique in the struggle to preserve First Amendment liberties against invasion by state legislatures; the defense, although recognized by a majority of the Justices when federal legislation is before the Court, has nevertheless been frustrated by the technique of vague restrictive construction utilized in the Dennis case.

\textit{When Should a Defendant Have Standing to Challenge the Face of a Statute}

The argument in favor of permitting a private party to attack a statute on its face for overbreadth, or indefiniteness, is most persuasive in those cases where, if the attack is not allowed, future unconstitutional applications would be possible. For example, when the Supreme Court is called upon to review a prosecution under a state statute, authoritatively construed by the state courts in an overly broad or indefinite manner, the defense should be permitted.\textsuperscript{101} The danger of prospective invalid applications is likewise present when the state court has not restricted the state statute by construction at all despite an opportunity to do so,\textsuperscript{102} or when a federal statute has not been narrowed by construc-

\textsuperscript{100} Justice Clark did not participate in the decision of either case.
\textsuperscript{102} See, e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940); Illinois v. Beaubien, 408 Ill. 508, 97 N.E. (2d) 343 (1951), cert. granted, 20 U.S.L. \textit{Week} 3088 (1951); also the second paragraph of note 107 infra.
tion, or has been narrowed by an inferior tribunal so unreasonably that the construction cannot be tolerated. Where an authoritative construction renders a statute not capable of sustaining unconstitutional application and conviction, but nevertheless renders it unduly vague, the defense of vagueness should be allowed. While the danger of invalid applications is equally prevalent when the state courts have not yet had an opportunity to construe a state statute challenged for overbreadth or indefiniteness, the policy of allowing the states a wide latitude in working out their own problems with a minimum of federal interference would justify a denial of standing to challenge the statute on its face in this context.

Where a sufficiently narrow and definite construction has been properly imposed, there can be no complaint of prospective overbreadth. In this situation the Court has indicated that the attack will not be permitted, or, in other words, the face of a statute includes judicial construction as well as legislative draftsmanship. Thus the Court here implicitly rejects the use of the defenses of overbreadth and vagueness as a spur to encourage more precise draftsmanship in Congress and in the state legislatures. At the same time the Court tolerates the unnecessary uncertainty prevalent from the effective date of the statute to the time of a binding construction by the highest appropriate state or federal court.

103 Contra: Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951) (alternative holding) semblé. There are available two techniques which enable the Court to avoid the issue of vagueness, whether created by the Court or by the legislature. One is based on the reasoning that if the defendant has had or should have had notice from his activities that he was violating the statute, he should not have standing to assert vagueness. Accord, Dennis v. United States, (2d Cir. 1950) 183 F. 2d 201 (alternative holding) semblé, aff'd on other grounds semblé 341 U.S. 494, 71 S.Ct. 857 (1951); cf. CIO v. Douds, 339 U.S. 382, 70 S.Ct. 674 (1950) semblé; see Screws v. United States, 325 U.S. 91 at 113, 129, 65 S.Ct. 1031 (1945) (concurring opinion). The other technique is based on the idea that a defendant who has acted with what the statute in question prescribes as an improper "intent" or motive should not have standing to assert vagueness. Accord, Dennis v. United States, 341 U.S. 494 (1951) (alternative holding) semblé; Williams v. United States, 341 U.S. 97, 71 S.Ct. 576 (1951); Screws v. United States, 325 U.S. 91 (1945); Contra: Williams, supra at 104 (Justices Frankfurter, Jackson and Minton dissenting without opinion); Screws, at 138 (Justices Roberts, Frankfurter and Jackson dissenting). Since under this theory the statute requires the improper "intent" or motive, no defendant could be convicted who had a proper motive. Hence, future defendants, depending on the quality of their motive, either could not or would not have to rely on the defense of vagueness. Since both techniques contemplate that the vague statute in question shall remain indefinite for the future, it seems clear that a use of them by the Court will reflect a desire to avoid the implications in constitutional decision of a meaningful rule of vagueness. Cf. Frankfurter, J., in CIO v. Douds, 339 U.S. 382 at 415, 420, 70 S.Ct. 674 (1950) (concurring in part, dissenting in part); comment, 46 Ill. L. Rev. 274 at 278 (1951); see p. 276 supra.

104 This would be the case if the lower court proceeding were an injunction suit brought in a federal court to restrain the enforcement of a state law. E.g., AFL v. Watson, 327 U.S. 582, 66 S.Ct. 761 (1946); cf. 36 Stat. L. 1162 (1911), 28 U.S.C. §379 (1940), as amended, 62 Stat. L. 968 (1948), 28 U.S.C. (Supp. IV, 1951) §2283.

court. Absent future uncertainty, these considerations are regarded as outweighed by the objections, previously noted, to the defense of overbreadth. A compromise perhaps more fair might be achieved by upholding the restrictive construction as to the future, but reversing the instant conviction, thereby giving the statute validity only in a prospective sense. And at least with regard to federal legislation, it is of course arguable that the entire statute should be struck down. However, the suggested compromise is probably the most liberal available when state legislation is being litigated because of the wise deference to the autonomy of the states, and in recognition of the propriety of leaving to the state courts the responsibility of prodding the state legislatures in the matter of draftsman ship.

Any discussion of a defendant's standing to question statutory overbreadth should point out the difficulties which may attend a recognition of such standing. Which potential applications of a statute are material in determining the validity of a statute on its face? For example, the likelihood of some applications may be deemed too remote to merit attention. Or, the conduct subject to invalid application may be regarded as too inconsequential to serve as a basis of sustaining a defendant's attack on the face of a statute. Should any weight be given to the fact that overbroad language in an act has long been taken, whether judicially construed or not, to convey a meaning more restrictive than literalness would indicate? What importance should attach to the inability of the legislature, because of the nature of the activity being proscribed, to frame a narrow statute to combat given evils? It is suggested that the resolution of these matters is for the sound judgment of the Court in the specific case. But analysis would be unrealistic if it discounted the probability that these elements will to some degree enter into the deliberations of the Court on welcoming the concept of statutory overbreadth as such—a concept having special force when related to the liberties of the First Amendment—into the substance of constitutional law.

B. The Court Will if Reasonably Possible Construe a Statute To Avoid a Serious Question of Constitutionality.

"We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.

106 See note, 61 Harv. L. Rev. 1208 at 1212 (1947).
Even to avoid serious doubt the rule is the same. The justification for this rule of restrictive construction is found in a presumption that in the absence of clear meaning of a statute's language and reasonably unambiguous legislative history the Congress has not intended to change or clarify existing law in excess of its constitutional powers. This presumption rests on the doubtful hypothesis that no legislative body would intend to pass a statute which would be invalid. Further support is found in the fact that a large segment of congressmen are lawyers by training, more likely therefore to have been aware of constitutional limitations. The presumption may appear to be especially appropriate when the Court is dealing with a statute curtailing First Amend-

107 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 30, 57 S.Ct. 615 (1937). The Court’s willingness to construe in order to save was not always evident prior to 1937. Chief Justice Waite in striking down a federal criminal enactment had, in 1875, announced that the Court was without power to add saving words of limitation to an overly broad statute because to do so would amount to usurpation of the legislative function. United States v. Reese, 92 U.S. 214 (1875). The view of the Reese case greatly influenced constitutional decision in subsequent years. E.g., Trade Mark Cases, 100 U.S. 82 (1879); United States v. Harris, 106 U.S. 629, 1 S.Ct. 601 (1882); Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883); Baldwin v. Franks, 120 U.S. 678, 7 S.Ct. 636 (1887); James v. Bowman, 190 U.S. 127, 23 S.Ct. 678 (1903); Illinois Central R.R. v. McKendree, 203 U.S. 514, 27 S.Ct. 153 (1906); Butts v. Merchants Co., 230 U.S. 127, 33 S.Ct. 964 (1913). However, during the same period of time, there was indication that the extreme view of the Reese case was gradually gaining disfavor and that the Court was beginning to believe it should as a matter of discretion restrictively construe whenever reasonably possible. E.g., Presser v. Illinois, 116 U.S. 252, 6 S.Ct. 580 (1886); Hooper v. California, 155 U.S. 648, 15 S.Ct. 207 (1895); Knights Templars’ Indemnity Co. v. Jarman, 187 U.S. 197, 23 S.Ct. 108 (1902); United States v. Delaware & Hudson Co., 213 U.S. 366, 29 S.Ct. 527 (1909); The Abbey Dodge, 223 U.S. 166, 32 S.Ct. 310 (1912). In the period 1913-1937, the positivism of the Reese case gave way to self-restraint as expressed in the Jones-Laughlin case. Compare Bowman v. Continental Oil Co., 256 U.S. 642, 41 S.Ct. 606 (1921); Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S.Ct. 619 (1926); Crowell v. Benson, 285 U.S. 22 at 65, 52 S.Ct. 285 (1932) (dissenting opinion), with United States v. Jin Fuey Moy, 241 U.S. 394, 36 S.Ct. 658 (1916); Baender v. Barnett, 255 U.S. 224, 41 S.Ct. 271 (1921); Linder v. United States, 268 U.S. 5, 45 S.Ct. 446 (1925); Missouri Pacific Ry. Co. v. Boone, 270 U.S. 466, 46 S.Ct. 341 (1926); United States v. La Franca, 282 U.S. 568, 51 S.Ct. 278 (1931); Crowell v. Benson supra; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 57 S.Ct. 816 (1937). One of the purposes of this article is to suggest that the pendulum continued to swing after 1937, and has now, at least in First Amendment cases, apparently reached the extreme opposite of the Reese view: “It is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution.” See Dennis v. United States, 341 U.S. 494 at 501, 71 S.Ct. 857 (1951).

Although the Court will accept a state court construction of a state statute, it is uncertain what the Court will do when faced with a state statute which has not been restrictively construed in prior state court proceedings. See Thornhill v. Alabama, 310 U.S. 91, 60 S.Ct. 736 (1940) (statute construed as written and issue decided); Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397 (1948) (cause remanded); Garner v. Los Angeles, 341 U.S. 716, 71 S.Ct. 909 (1951) (restrictive construction by state courts assumed and issue decided).


109 For example, more than one-half of the 81st Congress’ membership was legally trained. U.S. News, Nov. 26, 1948, p. 11:3.
ment freedoms, for the legislators in drafting the law may be supposed to have held basic liberties in high esteem.\textsuperscript{110}

Yet there are factors which go far to discredit the presumption. For one thing, the legislature's consideration of a statute's validity may in fact have been insubstantial because the problem was contemplated by few, if any, of those who seriously analyzed the measure. Whatever consideration the statute's validity did receive may have been superficial if the legislators saw no substantial problem, or thought that the function of ascertaining constitutionality is exclusively one for the judiciary. Even if the matter was thoroughly considered by many, the conclusion may erroneously have been that there was no serious doubt of validity—or, in the alternative, that despite a serious doubt the statute as written were better enacted and the final responsibility passed to the Court.\textsuperscript{111} In addition, a high regard for basic liberties may have been seriously watered down by the pressures of politics or the strain of crisis.\textsuperscript{112} Moreover, where the text and context of a statute clearly militate against a narrow interpretation, a restrictive construction conspicuously departs from the logical basis of this rule of avoidance.

By the start of the 1951 term, the Court had made such departures when confronted with the three constitutional issues prominent in modern free speech cases. In \textit{United States v. CIO},\textsuperscript{113} the Union and its President were indicted for making expenditures from the funds of the Union for the publication of an editorial in the \textit{CIO News}, a periodical regularly published by the Union, urging members of the organization to vote for a particular candidate in a special congressional election held in Maryland. The contention of the Government was that such activity was a violation of section 304 of the Taft-Hartley Act\textsuperscript{114} amending section 313 of the Federal Corrupt Practices Act. The relevant language of the section is as follows:

\begin{quote}
"It is unlawful for ... any corporation ... or any labor organization to make a contribution or expenditure in connection with
\end{quote}


\textsuperscript{113} 335 U.S. 106, 68 S.Ct. 1349 (1948).

any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for.

Both the Government and the CIO conceded that the activities were covered by the act. A Congressional Joint Committee to survey the operation of the Labor Law agreed that the CIO action was in direct violation of the act. Most important, legislative history indicated the same thing. The district court held the provision invalid, on the ground that the CIO activities were protected by the First Amendment. On appeal, the Supreme Court by a majority of five held that the CIO expenditures were not within the prohibition of the statute. Justice Reed, writing for the Court, recited the obligation resting on the Court to take care, in construing congressional enactments, to interpret them so as to avoid a serious question of constitutionality. Justice Frankfurter in concurrence adopted the narrowing construction even though he was of the opinion that the point had not been raised by counsel. Justice Rutledge, concurring on other grounds, stated that the restrictive construction by the Court in the light of the language of the statute and the legislative history amounted to abdication of the judicial function.

In CIO v. Douds, the Court restrictively construed section 9(h) of the Taft-Hartley Act in order to avoid the constitutional issue of overbreadth. Section 9(h) reads:

“No investigation shall be made by the [National Labor Relations] Board . . . and no complaint shall be issued . . . unless there is on file with the Board an affidavit . . . by each officer of such labor organization . . . of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.” (emphasis added.)

It was argued inter alia that the "belief" provision was so broadly worded that it might be applied to persons protected in their beliefs by the Constitution; for example, one who believes in the overthrow by

115 16 U.S. LAW WEEK 3327, 3328-29 (1948).
violence of any government which has become unduly oppressive, even if that government has evolved in the course of time from the present United States Government. Chief Justice Vinson, writing for the Court, adverted to the rule of restrictive construction, and concluded that the "legislative purpose" required that the belief provision be read to apply only to "those persons [and organizations] whose beliefs strongly indicate a will to engage in political strikes and . . . direct action . . . who believe in violent overthrow of the Government as it presently exists under the Constitution as an objective, not merely a prophecy." In making this saving interpretation, the Chief Justice made no reference to the plain meaning of the words nor did he refer to legislative history, which indicates Congress intended the meaning which would ordinarily be attributable to the words used. In dissent from this part of the Court's opinion, Justice Frankfurter, devoted advocate of self-restraint, observed that "what Congress has written does not permit such a gloss nor deletion of what it has written," and declared the belief provision void.

In Dennis v. United States, the Court upheld the conviction of the top eleven Communist leaders who had been indicted under section 3 of the Smith Act for conspiring to violate sections 2(a)(1) and 2(a)(3) of the act. Sections 2 and 3 read:

"Sec. 2 (a) It shall be unlawful for any person—
(1) to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government;
(2) with the intent to cause the overthrow or destruction of any government in the United States to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, de-

110 Id. at 407.
120 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947. Sec. 9(h) as it was reported to the House and as it was originally passed by the House and Senate included, in addition to the present language concerning belief, language which substantially embodied the gist of the Court's subsequent interpretation. The section then declared also against a union officer who "by reason of active and consistent promotion or support of the policies and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party." Id. at 18, 63. The quoted language was deleted by the Conference Committee, and that committee's draft became law. H.R. Rep. No. 510, 80th Cong., 2d sess. 12 (1948).
121 339 U.S. 382 at 415, 422, 70 S.Ct. 674 (1950). The basis for his dissent was that the belief provision was vague. For the close tie between the defenses of vagueness and overbreadth, see pp. 273-277 infra.
sirability, or propriety of overthrowing or destroying any govern-
ment in the United States by force or violence;

(3) to organize or help to organize any society, group or as-
sembly of persons who teach, advocate, or encourage the over-
throw or destruction of any government in the United States by
force or violence; or to be or become a member of, or affiliate with,
any such society, group, or assembly of persons, knowing the pur-
poses thereof.

(b) . . .

Sec. 3. It shall be unlawful for any person to attempt to com-
mit, or to conspire to commit, any of the acts prohibited by the
provisions of this title.” (emphasis added.)

The defendants argued that these sections were unconstitutional,
since they proscribe speech even in the absence of the traditional “clear
and present danger” of the substantive evil which Congress was attempt-
ing ultimately to prevent. As Chief Judge Hand pointed out, “literally,
they make criminal the fulminations of a half crazy zealot on a soapbox,
calling for an immediate march upon Washington.” A fortiori it is
apparent that the sections also purport to prohibit other argument and
exhortation also protected by the Constitution, even when the advocate
isrationallymotivatedandisnotonthesandbox.

This argument stressing the wide scope of the statute could have
been met simply enough by squarely rejecting the defense of over-
breadth. Since a majority of the Court thought the act as applied was
constitutional, the case could have been concluded without more, and
consideration of other, invalid applications would have been postponed
until actual cases brought such issues before the Court. However,
perhaps for the reasons suggested elsewhere in this article, the Court
was unwilling to take this stand. Instead, the Chief Justice, in an
opinion subscribed to by three other Justices, announced that he would
construe the statute to proscribe only activities which create a “clear
and present danger.” So construed, the statute is of course not overbroad.

By employing the technique of restrictive construction, the Chief
Justice accomplished at least two things: (1) he avoided a definitive
ruling on the delicate question of standing to assert the defense of over-
breadth, although his opinion seems implicitly to recognize such stand-
ing; and (2) he insured that the Smith Act will never be struck
down for unconstitutionality, even if it is applied to the zealot on the

124 United States v. Dennis, (2d Cir. 1950) 183 F. (2d) 201 at 214, affd. Dennis v.
125 See p. 283 supra.
soapbox. The zealot will be acquitted because his conduct falls outside the bar of the act, not because the act is unconstitutional. Thus the Chief Justice has virtually eliminated the possibility that the top Communist leaders will some day be regarded as martyrs having suffered conviction under a statute which was later held unconstitutional.

In these paragraphs, however, this restrictive construction of the Smith Act in terms of the act's constitutional limits is of interest not so much for its own sake as for the fact that it unnecessarily caused the second restrictive construction of the Dennis case. Having construed the statute to prohibit only those activities which could be constitutionally proscribed, without having carefully defined those activities, the Chief Justice was faced with the argument that the statute as construed was unconstitutionally vague. He met this argument by interpreting sections 2(a)(1) and 2(a)(3) to require, as an element of guilt, "an intent to overthrow the Government of the United States by force and violence as speedily as circumstances would permit." Partly because the jury had found that the defendants had such an intent, the Chief Justice rejected the defense of vagueness. The merits of this ruling, and the precise ground on which it was placed, need not divert our attention here. The point to be noted here is that this second restrictive construction cannot be rationally reconciled with the language of the statute. Even section 2(a)(2), which is the only section dealing with this sort of "intent" omits any reference to the speed with which the circumstances might permit overthrow. In the face of the explicit "intent" clause in section 2(a)(2), one cannot fail to notice that all of the sections with which the Court was dealing [§§2(a)(1) and 2(a)(3) read into §3] omit any comparable reference to an intent to overthrow the Government, whether speedily or otherwise. In fact, these sections designate other, quite different, mental conditions as essential elements of the crimes created.

Made in disregard of the plain meaning of the statutory language as well as the history behind the language, without logical justification, solely in respect of a policy of self-restraint, the Court's recent narrowing constructions represent judicial conduct which is highly objectionable.

126 Legislative history appears to throw no light on the meaning of the Smith Act, other than to suggest that the legislators meant the normal meaning of the words used. See 76th Cong., H.R. Rep. No. 994, 1st sess. (1939); No. 2683, 3d sess. (1940); S. Rep. No. 1154, 1st sess. (1939); Nos. 1721, 1796, 2683, 3d sess. (1940).

127 341 U.S. 494 at 499.

128 See note 103 supra.

129 Sec. 1 of the Smith Act which makes unlawful attempts to impair the loyalty of members of the Armed Forces also includes an "intent" clause.
able. Consider the influence on congressional drafting technique. If exactness in the use of words is a virtue, and striving for exactness virtuous, an impetus away from the desired end is engendered by unreasonable restrictive construction. The result may be that broad and ill-defined statutes will become the rule and narrowly drawn statutes, covering in as specific a manner as possible the evils to be curbed, will be the exception. 180 This state of affairs could come about easily as the Congress is encouraged to look to the Court for delimitation of statutes drawn in an excessively broad manner. Justice Frankfurter has written:

"In the keeping of the legislatures perhaps more than any other group is the well being of their fellow men. Their responsibility is discharged ultimately by words. . . . 181 But what courts do with legislation may in turn deeply affect what Congress will do in the future." 182

The prospect of overly broad statutes should give the Court pause in applying the canon of restrictive construction. Suppose a criminal statute is so broadly phrased that it purports to impose penalties on conduct protected by the First Amendment. Is it far-fetched to say that in the statute itself are embodied elements of coercion (e.g., the apprehension of official displeasure, prosecution, and possibly conviction) sufficient to deter expression constitutionally protected? 183 The argument that the individual should feel unrestrained because of his immunity from official interference with constitutionally protected speech overlooks the factor that determining what is constitutionally protected before the Supreme Court has spoken is extremely difficult. One may not be willing to risk criminal penalties in the event he should be mistaken. Even if penalties were to be avoided, the stigma, as well as the expenditure of time, money and effort, which attend criminal proceedings may serve to suppress legitimate expression until there would be no likelihood of prosecution. If the effectiveness of the expression deferred depends on timeliness, there is a total loss to society.

While some uncertainty as to the constitutionality of official action may be inevitable until there is a determination by the Supreme Court,

180 A recent statute affecting free speech which contains some broadly worded sections is the Internal Security Act of 1950, 64 Stat. L. 987, 50 U.S.C. (Supp IV, 1951) §781. Further encouragement of broadly drawn laws results when the invalid hypothetical applications of a statute as construed are "separated" from the valid applications. See pp. 271-286 supra.


182 Id. at 545.

183 See Borchard, "Challenging 'Penal' Statutes by Declaratory Action," 52 Yale L.J.
the Court could encourage carefully and specifically drawn statutes by limiting the use of the canon of restrictive construction to those cases in which the statute is genuinely ambiguous, despite the efforts of the draftsmen. Uncertainty produced by unnecessarily broad enactments would be circumvented, and Congress, however reluctantly, would be induced to perform the legislative function which the Constitution allocates to the legislature. Unreasonable restrictive construction is especially difficult to justify when it fails to clarify, prospectively, the uncertainty characteristic of an overbroad or vague statute. For example, when the Congress unquestionably has passed an excessively broad statute and the purpose of the restrictive construction is to exclude the activity of the defendant from the reach of the statute, as in United States v. CIO, the effect of the restrictive construction is only to assure liberty for the particular activity practiced by the particular defendant, for the statute otherwise remains in force as written.\[134\] By invalidating the statute in its entirety, the Court could at least eliminate for the future the deterrent effect of the statute on substantially dissimilar activities protected by the Constitution. On balance, the continued uncertainty occasioned by the failure of the Court to pass on the validity of an excessively broad statute would seem to outweigh the benefit derived from this type of narrowing construction, at least when the statute deters activities protected by the First Amendment. Similarly, where the purpose of the restrictive construction is to exclude from the proscriptions of a vague statute activity which is not accompanied by improper motive, as in Dennis, the uncertainty attendant upon the vague statute is in no way abated;\[135\] the zealot on the soapbox, like the Communist leaders, may intend to march on Washington "as speedily as circumstances permit." Even more objectionable is the situation where the purpose of the restrictive construction is to exclude constitutionally protected activity of hypothetical defendants from the scope of a definite and overbroad statute, and the effect of the restrictive construction is to compound uncertainty. If, as in Dennis, such a statute is construed to proscribe only those activities which might be constitutionally punished and they are not carefully defined, not only

445 at 451 et seq. (1943). Cf. "It would be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214 at 221 (1875).

134 See United States v. Painters' Local Union #481, (2d Cir. 1949) 172 F. (2d) 854, 49 Col. L. Rev. 1152 (1949).

does the doubt remain, unmitigated, as to what activities may be validly curtailed, but also, the statute having been rendered indefinite, there is no statutory standard by which individuals may determine what activities in fact are prohibited, and therefore subject to prosecution.

The altered presumption of constitutionality affecting statutes challenged under the First Amendment may in part be responsible for the recent performances of the Court. Under the "clear and present danger" rule, the chances that a statute will be upheld in its application to instant or to hypothetical defendants if the issue of constitutionality is met are certainly decreased. The doubt of validity hovering over the Court is increased and the incentive to avoid the issue is enhanced. Thus the very preferment which has prompted the Court to formulate the "clear and present danger" rule may be somewhat frustrated by improper use of the canon of restrictive construction.

Reappraisal of this canon of avoidance by the Court, at least in its application to statutes germane to the First Amendment, might well commence with a consideration of a recent case dealing with the construction of the Federal Food, Drug and Cosmetic Act. Justice Black, writing for the Court, admonished that in construing a statute the Court should first attempt to ascertain the meaning of the act by examining its language and legislative history, and, having determined its meaning, pass on to the questions of constitutionality. He added that a restrictive interpretation should not be made merely because giving effect to the intention of Congress might require the Court to face a question of validity. Although Justice Black does not explicitly commit himself as to the appropriate procedure to be followed when the question of interpretation is found to be reasonably in doubt despite the efforts of the draftsmen, a fair surmise is that he would then seriously consider a restrictive construction. In paying heed to this Justice's suggestion, the Court would serve notice that the drafting of statutes carries with it the responsibility of marking their limits so far as language and policy permit. Society would not be too demanding if it looked to the Court to encourage the legislative draftsmen to discharge their responsibility with an optimum of care and understanding.

137 Nothing was said about a congressional direction that a restrictive construction shall be made, when necessary to uphold a statute. See p. 296 infra.
CONCLUSION

Since it is the discretion of the Court and not the command of the Constitution which is crucial in the judicial attitude toward statutory overbreadth, congressional efforts to influence that discretion are significant. Illustrative of such efforts is section 1(b) of the Internal Security Act of 1950, which provides:

"Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." 188

It is submitted that this novel "restrictive construction" clause should be regarded as evidence supporting the presumption underlying the rule of restrictive construction, i.e., unless otherwise indicated by relevant language and statutory history, the intent of the legislature was not to enact a law which could be unconstitutionally applied. This article's suggestions with regard to the rule of restrictive construction, and the defense of overbreadth as well, find their strength in the policy considerations which favor narrowly and definitely drawn statutes affecting First Amendment liberties. If legislative bodies are persuaded by the wisdom of these considerations to the extent that they enact reasonably narrow and definite legislation, there will be no occasion for the Court to adopt any of these suggestions. If the legislators are not so persuaded, the Court should not deem itself bound by a legislative direction that these policy considerations should also be disregarded or minimized by the judiciary. Without some judicial assistance in the effort to persuade legislators in this matter incalculable damage to the citizens' freedom to express their ideas may result. If the Court succumbs to the direction of section 1(b) or similar provisions, and without other justification undertakes to determine by interpretation the boundaries of overbroad enactments, it will be exercising a judgment which ought to belong to the legislature. One cannot say that the Court in recent years has acted in a manner which would have prompted the insertion of section 1(b) into the Security Act. Congress may have precipitated what has been long overdue—a revaluation by the Court of some of its rules of avoidance.