
OVERBREADTH AND LISTENERS' RIGHTS

I. INTRODUCTION

According to the conventional understanding of standing doctrine, an individual cannot raise legal challenges unless she can show an injury to a legally protected interest.¹ The doctrinal origins of this so-called injury-in-fact requirement are said to lie in the Article III reference to “cases or controversies.”² This explanation, however, can make the doctrine seem obscure and technical, whereas the basic idea is actually quite intuitive. Put simply, the doctrine ensures that individuals can only raise concerns that are both real and their own.³ Just as one’s everyday complaint can fall flat if the subject is “none of your business,” a legal complaint will fall flat if it is not based on one’s own legal entitlements. The standing inquiry is, in a sense, the legal equivalent of asking, “What’s it to you?”

Despite some intuitive appeal, the conventional rule against asserting the rights of others appears to come with a panoply of exceptions so extensive that it calls the rule into question entirely. The Supreme Court has permitted third parties to assert the legal rights of others who are their customers,⁴ clients,⁵ patients,⁶ jurors,⁷ and even voters.⁸

¹ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring “an invasion of a legally protected interest”); cf. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100–01 (N.Y. 1928) (“What the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right . . . [T]he commission of a wrong imports the violation of a right . . . Affront to personality is still the keynote of the wrong.”).

² See U.S. CONST. art. III, § 2. In addition to an injury-in-fact, standing is also said to require causation and redressability. See *Lujan*, 504 U.S. at 560–61.

³ Cf. STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* 13 (2006) (“[W]hen you demand that someone move his foot from on top of yours, you presuppose an irreducibly second-personal standing to address this second-personal reason.”).

⁴ See, e.g., *Craig v. Boren*, 429 U.S. 190, 191–97 (1976) (allowing vendor standing to challenge on equal protection grounds an Oklahoma law that prohibited the sale of beer to males under age 21, but to females only under age 18); *Barrows v. Jackson*, 346 U.S. 249, 254–60 (1953) (allowing standing for a white woman selling land to challenge a racially restrictive covenant).

⁵ See *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 720–21 (1990) (holding that an attorney resisting disciplinary proceedings for receiving contingent fees could assert the constitutional rights of his clients); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (allowing standing for a law firm to assert its clients’ Sixth Amendment rights as a ground for its own entitlement to remuneration).

⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (allowing a doctor standing to raise the constitutional rights of married persons seeking birth control).

⁷ See *Powers v. Ohio*, 499 U.S. 400, 410–16 (1991) (granting a criminal defendant standing to assert the rights of prospective jurors not to be peremptorily challenged on the basis of race).

⁸ See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (allowing, without commenting on third-party standing, the claim of candidate George W. Bush to assert the equal protection rights of Florida voters).

All of these cases, however, are united by two features: (1) the rights violation injures the third party at least indirectly, and (2) the party whose rights are violated faces at least some impediment to raising the challenge.⁹ So, while these cases raise exceptions to a general prohibition on third-party standing, they do pass the intuitive “what’s it to you?” test.

In this light, a more perplexing apparent exception to normal standing doctrine is the First Amendment overbreadth doctrine. When a statute proscribes constitutionally protected speech, a party whose speech the statute forbids may level a constitutional challenge against the statute even if the party’s own speech could constitutionally be prohibited.¹⁰ In other words, speakers can challenge a statute on the basis that it would be impermissible as applied to others, not themselves. This form of third-party standing is especially perplexing for three reasons. First, overbreadth appears to be a procedural rule that is unique to a particular substantive area of law, namely the First Amendment. Second, whereas other cases of third-party standing involve at least an indirect injury to the complaining party, it is not clear that a party making an overbreadth challenge suffers any injury — after all, the party’s conduct could have been covered even by a permissible statute. Third, overbreadth cases uniquely seem to involve hypothetical rights violations, not actual rights violations of non-present parties.¹¹

Because overbreadth appears to be an ad hoc exception in tension with normal standing principles, scholars have understandably sought to reinterpret the doctrine in a manner compatible with the idea that one only has standing to challenge violations of one’s own legal rights.¹² Such accounts focus on a right not to be subjected to punishment on the basis of an unconstitutional rule of law. This Note adopts a different approach to the same problem. Because of the overbreadth doctrine’s unique presence in the First Amendment context, this Note focuses on the distinctive First Amendment rights associated with an open marketplace of ideas. According to this account,

⁹ See, e.g., *Powers*, 499 U.S. at 414–15 (noting the significant practical barriers to prospective jurors asserting their own rights); *Craig*, 429 U.S. at 192 (noting that Craig, a formerly underage male, had since become 21 and that his challenge was nonjusticiable as moot); *Barrows*, 346 U.S. at 257 (noting that it would be “difficult if not impossible” for black potential buyers to challenge state court enforcement of a racially restrictive covenant).

¹⁰ See, e.g., *New York v. Ferber*, 458 U.S. 747, 767–69 (1982).

¹¹ See Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 424 (1974) (“[O]verbreadth attacks involve both the application of the challenged law to the claimant and a different, hypothetical application of the law to third parties. Quite different from this sort of third party claim is an assertion of *jus tertii* — a litigant’s claim that a single application of a law both injures him and impinges upon the constitutional rights of third persons.”).

¹² See, e.g., Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

individuals can challenge overbroad statutes in the First Amendment context because they have a right to receive open discourse from others. That is, First Amendment overbreadth derives from a party's rights as a listener, not as a speaker. This approach is admittedly not the Supreme Court's avowed justification for the overbreadth doctrine, but it explains the doctrine in a more systematic way that preserves the core intuitive idea that one cannot complain without receiving an injury oneself.

This Note proceeds as follows. Part II outlines the overbreadth doctrine and three approaches to explaining the doctrine in relation to traditional standing principles. Part III describes an alternative approach based on the rights of the listener. This approach blends the benefits of the prior academic accounts of the overbreadth doctrine and links the doctrine to the particular features of substantive First Amendment values.

II. TRADITIONAL ACCOUNTS

The Supreme Court first suggested that traditional standing principles might be different in the First Amendment context in *Thornhill v. Alabama*.¹³ The case involved an Alabama statute that made it a crime for anyone to "go near to or loiter about" any business in order to influence others not to deal with that business or to picket a business for the purpose of "hindering, delaying, or interfering with or injuring" the business.¹⁴ The defendant was convicted on a charge generally tracing the wording of the statute.¹⁵ Despite the State's contention that the defendant "may not complain of the deprivation of any rights but his own,"¹⁶ the Court determined that an inquiry into the particular conduct of the defendant was not required in order to sustain the defendant's constitutional challenge. In describing why the statute was appropriately evaluated on its face, the Court explained:

Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. . . . [The] threat [of censorship] is inherent in 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 constitution-

¹³ 310 U.S. 88 (1940).

¹⁴ *Id.* at 91.

¹⁵ *Id.* at 92.

¹⁶ *Id.* at 96.

ally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him.¹⁷

As a result, the Court concluded that the unique demands of the First Amendment required a different rule than other contexts. As the Court put it, “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.”¹⁸

Since *Thornhill*, the Court has continued to invoke the idea that the First Amendment creates a unique requirement that statutes be evaluated on their face.¹⁹ Even those who have not yet been charged may use overbreadth as a basis for an anticipatory challenge.²⁰ Although the Supreme Court has characterized the overbreadth doctrine as “strong medicine”²¹ and has fashioned some limitations on the doctrine,²² the doctrine remains a unique feature of First Amendment litigation.

A. *The Prophylactic Approach*

According to the traditional explanation, overbreadth doctrine is a prophylactic rule that protects against the chilling effects created by statutes that appear to prohibit both constitutionally protected and constitutionally unprotected speech. Even if such a statute could be narrowed to apply only to unprotected speech, its apparent prohibition on protected speech — though constitutionally unenforceable — could deter such speech. Thus, an overbroad statute may chill constitutionally protected speech.

The Supreme Court has consistently referred to this chilling effect in explaining the overbreadth doctrine. In *Thornhill*, the Court noted, “It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the dan-

¹⁷ *Id.* at 97–98.

¹⁸ *Id.* at 98.

¹⁹ See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (“We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.”).

²⁰ See, e.g., *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755–59 (1988).

²¹ *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

²² See *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989) (plurality opinion) (finding that an overbreadth challenge is unavailable once a statute has been amended or repealed); *Bates v. State Bar*, 433 U.S. 350, 380 (1977) (suggesting that the overbreadth doctrine does not apply in the context of commercial speech); *Parker v. Levy*, 417 U.S. 733, 759–61 (1974) (finding that the policies underlying the overbreadth doctrine “must be accorded a good deal less weight in the military context,” *id.* at 760).

ger to freedom of discussion.”²³ In *Village of Schaumburg v. Citizens for a Better Environment*,²⁴ the Court cited this chilling effect as the basis for its apparent First Amendment exceptionalism:

In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.²⁵

In *Massachusetts v. Oakes*,²⁶ Justice O'Connor's plurality opinion was especially blunt in stating that the doctrine was based on this chilling effect: “Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. An overbroad statute is not void *ab initio*, but rather voidable, subject to invalidation notwithstanding the defendant's unprotected conduct out of solicitude to the First Amendment rights of parties not before the court.”²⁷ These statements are typical.²⁸ The conventional understanding of the overbreadth doctrine is as a procedural prophylactic against chilling. What is appealing about this explanation for the overbreadth doctrine is that the justification straightforwardly links up with the values behind the First Amendment. Overbreadth protection is based on the idea that constitutionally protected speech carries “transcendent value to all society.”²⁹

In addition to providing a prophylactic against chilling speech, the overbreadth doctrine is sometimes said to provide a preventative defense against inconsistent or discriminatory enforcement of a broad statute.³⁰ This idea, however, seems to derive primarily from the fact that overbreadth is often associated with the related First Amendment concept of vagueness.³¹ A statute need not be vague to be overbroad.³²

²³ *Thornhill*, 310 U.S. at 97.

²⁴ 444 U.S. 620 (1980).

²⁵ *Id.* at 634.

²⁶ 491 U.S. 576 (1989) (plurality opinion).

²⁷ *Id.* at 584 (plurality opinion).

²⁸ See, e.g., *New York v. Ferber*, 458 U.S. 747, 768–69 (1982); *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965).

²⁹ *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

³⁰ See *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940) (“The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.”); see also *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757–69 (1988); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987); Fallon, *supra* note 12, at 884–85, 897.

³¹ It may, of course, be true that vagueness is especially troubling in the First Amendment context because a vague statute has the potential to be overbroad. See Jeffrey M. Shaman, *The First Amendment Rule Against Overbreadth*, 52 TEMPLE L.Q. 259, 263 (1979).

³² Cf., e.g., *City of Chicago v. Morales*, 527 U.S. 41, 72 (1999) (Breyer, J., concurring) (discussing the relationship between overbreadth and vagueness).

— even a precisely worded statute may have some impermissible applications and other permissible applications. But the invocation of inconsistent or discriminatory enforcement does suggest the same argumentative thrust. The basic idea is that protections will be offered to some speech that is not constitutionally covered in order to ensure that all constitutionally covered speech is protected.

Insofar as injury-in-fact is a genuine constitutional demand of Article III, this understanding of the overbreadth doctrine as a prophylactic exception to normal standing requirements seems somewhat inscrutable. Given the stringency with which the Court ordinarily applies Article III requirements, it would be strange to think that in the overbreadth context the Court will simply overlook the fact that the complaining party is not asserting an injury to his or her own legal rights. The problem is especially pressing if one views standing doctrine as tracking the moral concepts of rights, injury, and complaint.³³ Insofar as standing provides a legal manifestation of the more basic idea that one can only complain about one's own injuries, the idea that courts can fashion exceptions for the sake of advancing particular values or objectives seems especially unappealing. Moreover, if overbreadth is simply a judge-made doctrine for the purpose of advancing certain goals, then it can just as easily be subject to judge-made cut-backs.³⁴ In short, the weakness of the prophylactic account is that it makes overbreadth the result of balancing considerations rather than a First Amendment entitlement.

It is useful to contrast the chilling effects approach with another area in which the Court has created a prophylactic rule to protect constitutional values — the exclusionary rule. Some commentators have argued that the exclusionary rule is analogous to overbreadth doctrine. For example, Professor Fallon has noted that the exclusionary rule may be considered similar to overbreadth doctrine insofar as it does not exist to vindicate a personal right of criminal defendants but rather exists to deter the constitutional violations of others.³⁵ But this analogy ignores an important formal difference. The exclusionary rule

³³ Cf. DARWALL, *supra* note 3, at 99 (“The very ideas of wrong and moral obligation, therefore, are intrinsically related to the forms of second-personal address that . . . help constitute moral accountability. . . . There can be no such thing as moral obligation and wrongdoing without the normative standing to demand and hold agents accountable for compliance.”).

³⁴ See Fallon, *supra* note 12, at 870.

³⁵ *Id.* (“The Fourth Amendment exclusionary rule is similar in substance and effect. In challenging the introduction of evidence obtained through an unreasonable search or seizure, a defendant does not assert a personal right to the exclusion of probative evidence, but appeals to a judge-made doctrine developed to deter violations of others’ constitutional rights. When prophylactic theories of First Amendment overbreadth are located against this backdrop, the issue is not whether prophylaxis is constitutionally permissible, but whether it is desirable, and, if so, what shape prophylactic rules ought to take and what implications they ought to have.” (footnotes omitted)).

is a remedy for the violation of a right *of the defendant* — namely, the defendant's Fourth Amendment right to be free from unreasonable searches. In other words, the exclusionary rule does not allow a defendant to raise the rights of others, but rather affords defendants whose own rights have been violated an especially strong remedy for prophylactic reasons. In fact, even in the Fourth Amendment context, defendants are not permitted to raise the violations of others' rights³⁶ — even if doing so might have a prophylactic effect. The prophylactic account of overbreadth, in contrast, does not suggest that the doctrine provides strengthened protection for a right of the defendant that was already present. Rather, the overbreadth doctrine appears to give First Amendment litigants the ability to raise the constitutional rights of others, even when their own rights have not been violated. This would be a substantial deviation from normal standing principles.

B. Valid Rule Approach: Monaghan

Given the prophylactic account's uncomfortable fit with traditional doctrines of standing, it should be no surprise that alternative accounts of the overbreadth doctrine have attempted to tether the doctrine to an individual right of the party asserting overbreadth. If successful, such an approach would resolve overbreadth's apparent tension with the rule against third-party standing³⁷ — the litigant would not be asserting the rights of others, but rather his own rights.

Professor Henry Monaghan has offered the most thorough attempt at providing such an account of the overbreadth doctrine.³⁸ His central analytical move is noting that “a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law.”³⁹ Drawing on this observation, one can view overbreadth cases as simply involving litigants challenging whether the statutes under which

³⁶ See *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (“[T]he question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it.”); see also *Rawlings v. Kentucky*, 448 U.S. 98, 104–06 (1980) (holding that a defendant did not have standing to challenge the search of another party's purse in which the defendant's drugs were located); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 130 (4th ed. 2000) (“[T]he Court [in *Rakas*] explicitly recognized the connection between search and standing analysis. That is, the Court held that standing should depend on whether the police action sought to be challenged is a search (i.e., a violation of legitimate expectations of privacy) *with respect to the person challenging the intrusion*.”).

³⁷ See Monaghan, *supra* note 12, at 3 (“I propose to show that, for the Court at least, overbreadth doctrine does not in fact possess a distinctive standing component; it is, rather, the application of conventional standing concepts in the First Amendment context.”).

³⁸ Monaghan, *supra* note 12.

³⁹ *Id.* at 3.

they are being judged are constitutionally valid rules of law.⁴⁰ That is, an overbreadth litigant is asserting his own constitutional right — the right not to be judged according to an unconstitutional rule — and not the rights of third parties.

This move is appealing not only because it construes the overbreadth doctrine in a way that is compatible with conventional standing principles, but also because it resonates with the intuitive sense of the dynamic behind an overbreadth challenge. The overbreadth challenger is, at the core, simply arguing that the statute in question is unconstitutional and therefore no law at all. That is, an overbreadth challenge incorporates — in a way that the prophylactic account cannot fully capture⁴¹ — the idea that enforcing the statute would be wrong to the claimant.⁴² In summary, the virtue of the valid rule approach is its rights-based character — by focusing on a legal entitlement of the litigant, the approach squares with traditional rules of standing and with the rights-like feel of the overbreadth challenge.

Unfortunately, Monaghan's analytically elegant move — positing a right not to be judged according to a constitutionally invalid rule — is not without difficulties. To begin with, it does not appear that parties have a general right not to be judged under a statute unless that statute is constitutionally valid. In fact, the rule of *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.*⁴³ suggests precisely the opposite. The case involved a state statute requiring railroads to settle all claims for lost or damaged freight within a certain period of time. When the railroad company failed to settle a claim, the state court assessed a penalty. The railroad argued that the statute was unconstitu-

⁴⁰ Others have suggested a similar analytical move. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-27, at 1023-24 (2d ed. 1988); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 848 (1970) ("As a theoretical matter the claimant is asserting his own right not to be burdened by an unconstitutional rule of law, though naturally the claim is not one which depends on the privileged character of his own conduct.").

⁴¹ Contrast an overbreadth claim with a claim under the exclusionary rule. A claim under the exclusionary rule is not based on the idea that it would be wrong to the criminal defendant to have illegally obtained but probative evidence introduced. Rather, the criminal defendant is simply the beneficiary of a rule that is deemed socially optimal. *But see* Herring v. United States, 129 S. Ct. 695, 706-07 (2009) (Ginsburg, J., dissenting) ("The Court states that the exclusionary rule is not a defendant's right; rather, it is simply a remedy applicable only when suppression would result in appreciable deterrence that outweighs the cost to the justice system. . . . Others have described 'a more majestic conception' of the Fourth Amendment and its adjunct, the exclusionary rule." (citations omitted) (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting))).

⁴² Cf. *Osborne v. Ohio*, 495 U.S. 103, 123-26 (1990) (holding that, although the statute was not overbroad, it would be a violation of the defendant's due process rights if the state were not required to prove all the elements that made the statute not overbroad); *Bd. of Trs. v. Fox*, 492 U.S. 469, 485 (1989) (characterizing overbreadth doctrine as "a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional").

⁴³ 226 U.S. 217 (1912).

tional because, as written, it required the settlement of even extravagant claims.⁴⁴ The Court, however, refused to consider applications of the statute to other cases not before it:

Of course, the argument to sustain the contention [that the statute is unconstitutional] is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid.⁴⁵

In other words, the *Yazoo* rule seems to reject any general principle like that invoked by the valid rule approach. As the Court put it in *United States v. Raines*,⁴⁶ “one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.”⁴⁷ Thus, the difficulty for the approach is explaining the unique applicability of the overbreadth doctrine to the First Amendment context.

Monaghan’s answer is that what is unique to the First Amendment is not some ability to assert the rights of others, but rather the level at which legal rules are evaluated. When a statute is severable, a court will ordinarily sever any of its invalid applications and leave intact the permissible applications. And the *Yazoo* case makes clear that state statutes will be presumed to be severable. Monaghan argues that what is special about the First Amendment is merely that this presumption of severability does not apply.⁴⁸ Severability is especially inappropriate in the First Amendment context, Monaghan argues, because “as a matter of substantive First Amendment law, the state bears the duty to make precisely [the] showing” that “a constitutionally sufficient rule has been applied.”⁴⁹

Despite this effort, Monaghan’s account still does not entirely explain the unique contours of the First Amendment overbreadth doctrine. Most notably, Monaghan’s approach in some ways merely pushes the ad hoc First Amendment exceptionalism back a level. Although it alleviates the concern that overbreadth doctrine circumvents normal injury requirements, it begs the question of *why* the First Amendment should involve a different approach to severability. There are more

⁴⁴ *Id.* at 219.

⁴⁵ *Id.* at 219–20.

⁴⁶ 362 U.S. 17 (1960).

⁴⁷ *Id.* at 21.

⁴⁸ Monaghan, *supra* note 12, at 29 (“The requirement of an acceptable, contextually specific construction ordinarily will mean that the relevant constitutional principles must be sufficiently elaborated by the state court to ensure that the statute’s reach is sufficiently constrained. An elaboration requirement leaves little scope for application of the *Yazoo* separability ‘presumption’ in the First Amendment context.” (footnotes omitted)).

⁴⁹ *Id.* at 30.

technical difficulties as well. First, even if the First Amendment does demand a more precise elaboration of the constitutionally sufficient rule that is being applied than other contexts do, it is not clear why this requirement would entitle a state court defendant to more than a remand.⁵⁰ Second, Monaghan's approach cannot explain the fact that overbreadth is used as a sword as well as a shield.⁵¹ Overbreadth can be a tool for anticipatory facial challenges in which claimants do not yet face sanctions,⁵² a point that cannot be explained if overbreadth derives simply from the right to be free from unconstitutionally applied sanctions.

C. *The Valid Rule Approach: Fallon*

Developing Monaghan's basic line of thought, Professor Fallon has offered a variation of the valid rule approach that attempts to respond to the difficulties facing Professor Monaghan's theory. The original problem arises because the overbreadth doctrine seems to violate the basic requirement that a complainant suffer an injury to his or her own rights. The prophylactic approach, in a sense, bites the bullet, accepting that the doctrine is an exception that advances certain other values. Monaghan's valid rule approach, in contrast, attempts to alleviate the tension by reconceptualizing overbreadth as involving a right of the complainant. The primary difficulty with this approach, however, is that it fails to explain why overbreadth applies uniquely to the First Amendment context. Professor Fallon has attempted to supplement Monaghan's approach by rejecting the idea that overbreadth challenges are unique.⁵³ While this analytic move is in one sense simply support for the valid rule approach, in another sense it is a third option — it responds to the apparent tension between overbreadth and standing neither by biting the bullet nor by reconceptualizing overbreadth, but rather by reconceptualizing standing. By viewing over-

⁵⁰ See Fallon, *supra* note 12, at 873–74 (“In cases in which state courts have failed to formulate a constitutionally valid rule of law when applying a statute to a defendant, it would seem perfectly proper under Monaghan’s view for the Supreme Court to vacate and remand the case for the state court, now provided with a corrected understanding of what federal law requires, to try again to formulate a constitutionally adequate rule of law under which the defendant’s conduct would be prohibited. . . . This being so, it is hard to see why a litigant has a constitutional right to have her case dismissed because the state court erred in its judgment about what the First Amendment allows, any more than there is a constitutional right to have a case dismissed due to an erroneous jury instruction. . . . In short, if all that is involved is a right not to be sanctioned under an unconstitutional rule of law, Monaghan has no convincing explanation of why the Court, in overbreadth cases, typically declares statutes invalid and orders prosecutions dismissed.”).

⁵¹ See *id.* at 872–73.

⁵² See, e.g., *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988).

⁵³ See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

breadth as merely one example of various facial challenges afforded by particular substantive constitutional tests, the approach seeks to dissolve the idea that overbreadth is an exception in need of unique explanation.

This third approach develops naturally out of recent scholarship suggesting that facial challenges are not the rare idiosyncrasies that they were previously thought to be.⁵⁴ Proponents of this idea argue that facial challenges do not represent an exceptional and distinct form of litigation, but instead are rather widespread,⁵⁵ or even the norm.⁵⁶ The basic idea is that the Constitution protects citizens against certain forms of rules being applied to them⁵⁷ and that, as a result, constitutional challenges regularly seek to invalidate rules rather than specific governmental actions. If this general view about constitutional challenges is correct, then overbreadth is not unique in providing a test for constitutional validity that implicates all applications of a statute.⁵⁸

Professor Fallon builds off of this line of scholarship to argue that all challenges involve the application of a law to the challenger, and that so-called “facial” challenges are simply those challenges in which the particular substantive test places the entire statute under scrutiny. As Professor Fallon puts it, “when a court upholds a constitutional challenge, the nature of the test that it applies will determine whether the statute is found unconstitutional solely as applied, in part, or in whole.”⁵⁹ In other words, every challenge is a claim that the rule of law being applied is invalid, and facial challenges result whenever the particular test for invalidity would implicate not merely this particular application of the statute, but also all other applications. For example, if the test for invalidity is whether the statute was enacted with an impermissible purpose, then finding the statute invalid on this basis would implicate all instances of its application. Similarly, if the Constitution requires that a statute be narrowly tailored, then a finding of invalidity in one case would also implicate any other application of the

⁵⁴ See generally Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 421–56 (1998).

⁵⁵ See Dorf, *supra* note 54, at 282–83 (“[T]he Court has enforced numerous substantive constitutional norms by presuming that unconstitutional applications cannot be severed from constitutional ones. The Court’s failure to expressly recognize that in so doing it has permitted facial challenges outside the First Amendment context does not diminish the effects of its actions.”).

⁵⁶ See Adler, *supra* note 54, at 12 (“The essential function of constitutional courts is to assess rules . . . and to repeal or amend those rules that are moral failures.”).

⁵⁷ *Id.*

⁵⁸ See Isserles, *supra* note 54, at 364 (arguing that, contrary to appearances that would make First Amendment overbreadth seem exceptional, the Court has not adopted a rule that “prescribes an application-specific method of determining constitutional invalidity”).

⁵⁹ Fallon, *supra* note 53, at 1339.

statute. In such cases, a court cannot sever invalid from valid applications of a statute because the invalidity necessarily infects every application.

For Fallon, overbreadth is one such substantive constitutional test. That is, the First Amendment requires that statutes not be overbroad, just as the Fourteenth Amendment requires that some statutes be narrowly tailored. For this reason, one cannot sever valid from invalid applications; overbreadth infects an entire statute. Thus, even defendants whose speech might not be constitutionally protected can raise overbreadth as an argument that the entire statute is invalid.

Although Fallon's explication of facial and as-applied challenges is compelling as a general matter, it does not thereby provide an explanation of First Amendment overbreadth. First, it is not clear that overbreadth operates to invalidate all applications in the way that Fallon's other examples do. When, for example, a statute impermissibly classifies people on the basis of race or gender, it injures everyone who is so classified — even those who might fall into the targeted classification if permissible neutral criteria were used.⁶⁰ The injury inheres in the symbolic effect of the very use of race or gender.⁶¹ Thus far, Fallon's approach seems correct — certain constitutional tests invalidate all applications of a statute because they are testing for a constitutional defect that would implicate the rights of anyone against whom the statute is applied.⁶² But overbreadth is not, at least superficially, analogous. As normally understood, overbreadth is not itself a violation of someone's rights in the way that race-based classification would be. In fact, overbreadth is not even an independent substantive test for invalidity. It must be coupled with another test concerning which applications of a rule are permissible. For example, one cannot assess whether an obscenity statute is overbroad unless one has an antecedent standard for what counts as unprotected and protected speech. It is for this reason that the Court has consistently viewed overbreadth as a First Amendment anomaly,⁶³ despite the fact that it is hardly alone in

⁶⁰ See, e.g., *Heckler v. Mathews*, 465 U.S. 728 (1984) (finding that a man did have standing to challenge the provision of larger benefits to women than similarly situated men under the Social Security Act despite the fact that if the law were invalidated the benefit level for men would not be raised, because the plaintiff's claim was based on a right not to be classified on the basis of sex without sufficient justification).

⁶¹ See *id.* at 739 ("[D]iscrimination itself . . . can cause serious noneconomic injuries . . .").

⁶² One might say that although Fallon appears to be correct, he actually inverts the order of explanation. It is certainly true that some tests invalidate a rule in all of its applications. But this total invalidation results because these tests correctly identify statutes that would constitute rights violations in any application. The primary question is whether a rights violation would occur, not what the test says. The test exists by virtue of the rights it is protecting, and not vice versa.

⁶³ See, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that

producing facial invalidity. Thus, whatever the merits of Fallon's theory generally, it does not explain First Amendment overbreadth.

Second, even if Fallon were correct that overbreadth could be explained as simply a substantive test for First Amendment invalidity, there is still a need for an explanation of why the substantive test operates as it does.⁶⁴ If the original puzzle was why overbreadth cases should be treated differently from *Yazoo*, noting that overbreadth is a different substantive area of law does not resolve the matter. A frontal attack on transsubstantive standing principles ignores the fact that standing doctrine tracks some intuitive ideas about who is morally entitled to lodge complaints about particular issues. For example, the result in *Yazoo* seems to reflect correctly the sense that the railroad company cannot escape its liability to its customer merely by pointing to other hypothetical applications of the statute. And if other cases are to be treated differently, one wants a principled explanation. Why, for example, should a clear case of child pornography be excused merely by pointing to other hypothetical applications of the statute?⁶⁵ This Note attempts to provide an explanation for why, in the First Amendment context, a statute with some invalid applications is tainted for everyone.⁶⁶

III. LISTENERS' RIGHTS

The central claim of this Note is that individuals challenging a statute as overbroad are asserting rights of their own — in particular, the First Amendment rights of a listener. The basic idea is that the First Amendment protects open and undistorted discourse. As a result,

[the particular Act at issue] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." But see Fallon, *supra* note 53, at 1369 ("[T]he most engaged Supreme Court Justices appear to believe that *general*, trans-doctrinal principles should determine whether statutes are subject to invalidation on their faces. But that shared assumption is mistaken.").

⁶⁴ See Fallon, *supra* note 53, at 1348 (noting that explanations of the particular tests are still required and that "the central questions are when or why (i) the relatively full specification of a statute should be demanded at the point of application and (ii) if the statute as so specified fails the applicable test, the subsequent, case-by-case specification of the statute and separation of valid from invalid subrules should be prohibited").

⁶⁵ See *New York v. Ferber*, 458 U.S. 747 (1982) (holding that a statute regulating child pornography was not overbroad and that the Court thus did not need to examine hypothetical applications of the statute).

⁶⁶ In this important sense, this Note is not incompatible with the view that there is a constitutional right not to be subjected to punishment under an invalid rule. This Note contends, however, that any such principle would still require a further explanation for the unique way that overbroad statutes are invalidated in the First Amendment context. This Note may be seen as providing an explanation for why anyone can complain against any invalid subrule of a speech-inhibiting statute.

when a statute sweeps in constitutionally protected speech, it is not only those who would engage in such speech who are injured, but also all those who would benefit from hearing the undistorted discourse. Although this account may strike some readers as counterintuitive, it actually combines the best elements of existing approaches to yield a theory of overbreadth that is more consistent with the values underlying First Amendment jurisprudence.

A. The Right to Open Discourse

The Supreme Court has frequently remarked that the First Amendment protects open discourse itself, not just speakers. At a general level, the United States Reports are filled with references to the idea that the First Amendment represents “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁶⁷ More particularly, the Court has described the First Amendment’s goal of open discourse as not just an aspiration, but also a right of the citizenry: “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences That right may not constitutionally be abridged”⁶⁸ Similarly, in holding that the First Amendment protected the wholly private consumption of expressive materials, the Court declared, “It is now well established that the Constitution protects the right to receive information and ideas.”⁶⁹ And the Court has explicitly acknowledged that constitutional protection for speech means protection for both poles of communicative channels: “[T]he protection afforded is to the communication, to its source and to its recipients both.”⁷⁰ It is the claim of this Note that the Court’s consistent recognition of a right to receive information provides a ready answer to the question of why citizens have standing to challenge speech-affecting statutes in a way that they cannot challenge ordinary statutes.

The idea that the First Amendment protects listeners as well as speakers is also a familiar one in the First Amendment literature as well. Even very different conceptions of the core values behind free speech share the sentiment that free speech protects a right of the citizenry to receive undistorted discourse. According to one line of scholarship, the very aim of the First Amendment is to protect the ability of the citizenry to receive an open and diverse flow of information.

⁶⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁶⁸ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁶⁹ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also* *Martin v. City of Struthers*, 318 U.S. 141, 143 (1943) (“This freedom [of speech and press] . . . necessarily protects the right to receive [information].”).

⁷⁰ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

Most famously, Professor Alexander Meiklejohn argued that the First Amendment aims to protect democratic self-government by ensuring that all viewpoints be heard.⁷¹ More recently, Professor Cass Sunstein has taken up this torch, describing the First Amendment as articulating a “concern for ensuring the preconditions for deliberation among the citizenry.”⁷² And Professor Owen Fiss has similarly argued that the First Amendment protects speech because “it is essential for collective self-determination.”⁷³ But the view that the First Amendment protects listeners as well as speakers is not limited to the more “collectivist”⁷⁴ theories of free speech.⁷⁵ In fact, one of the primary ways that the First Amendment protects the autonomy of individual citizens is by ensuring that the government cannot select among viewpoints for them.⁷⁶ On such a view, open and free public discourse is among the individual rights of citizens because it is “a way of enabling common citizens to become aware of the issues before them and of the arguments on all sides and thus to pursue their ends fully and freely.”⁷⁷ That is, the First Amendment’s protections for autonomy are manifested in the rights of listeners as an integral part of the guarantee of freedom of the mind.⁷⁸ On this view, an individual has rights as a listener because she has a right that the government not decide what messages are appropriate for him or her.⁷⁹

⁷¹ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

⁷² Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 314 (1992); *see also* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

⁷³ OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996); *see also* Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413 (1986) (suggesting that the First Amendment is a “guarantee that . . . the public will hear all that it must”).

⁷⁴ *See generally* ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995).

⁷⁵ Although this account draws on the idea that the First Amendment protects open discourse, it does not suggest anything about how this value should be balanced against claims of individual autonomy. In this sense, the approach is agnostic between the competing accounts of which First Amendment value is *primary*. All that is required is the recognition that the First Amendment protects the audience as well as the speaker.

⁷⁶ *See* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204, 209 (1972).

⁷⁷ FISS, *supra* note 73, at 3.

⁷⁸ *See* CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 95–102 (2007) (“Perhaps my physical freedom can be restrained for the good of others or even for my own good, but government must not claim the authority to coerce what judgment I make on those restraints.” *Id.* at 96.); *see also id.* at 101 (“Governments violate these constitutionally protected liberties [of mind]: by punishing people who say what government does not want them to say to people it does not want them to say it to . . . ; by punishing people for receiving forbidden messages; or, more subtly and gently, by making it harder to send or hear certain messages just because government does not like the message.”).

⁷⁹ Note that this point provides a possible explanation for the different treatment that overbreadth has received in commercial contexts. Although the limitation may not survive the Court’s more recent ratcheting up of protections for commercial speech, the Supreme Court has

Insofar as the First Amendment protects a general right of the citizenry to open and undistorted discourse, such a right is an appropriate basis for standing. In contexts outside the First Amendment, the Court has explicitly recognized that a lack of information may constitute an injury-in-fact sufficient for standing. In *FEC v. Akins*,⁸⁰ the Court held that the plaintiffs had standing on the basis of “their inability to obtain information” after the FEC had failed to require organizational disclosures regarding membership, contributions, and expenditures in accord with the Federal Election Campaign Act of 1971.⁸¹ In *Public Citizen v. Department of Justice*,⁸² the Court found standing where plaintiffs were denied information under the Federal Advisory Committee Act despite the fact that many other citizens might have been similarly situated.⁸³ And in *Havens Realty Corp. v. Coleman*,⁸⁴ the Court held that alleging an injury to a “right to truthful housing information” was a sufficient basis for standing.⁸⁵

held that overbreadth doctrine does not apply in the context of commercial speech. See *Bates v. State Bar*, 433 U.S. 350, 381 (1977); see also *Waters v. Churchill*, 511 U.S. 661, 670 (1994) (plurality opinion); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496–97 (1982). The general rationale for this limitation, it is thought, is that commercial speech is less likely to be chilled because it is motivated by financial incentives. See *Bates*, 433 U.S. at 381 (“Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected.” (citation omitted)). Insofar as these features of commercial speech mean that an overbroad statute will not distort the flow of commercial information, the present account can easily incorporate them into its analysis.

But there is a further rationale that can be offered here as well. Commercial actors such as corporations are certainly important speakers, see, e.g., *Citizens United v. FEC*, 130 S. Ct. 876 (2010), but they are not necessarily important listeners. There is a plausible claim that corporations and other commercial actors should receive First Amendment protection for their own expressive activities, but need not also receive protections as listeners. The protection afforded to listeners may be viewed as a more “purely personal” protection, as it is more directly associated with the freedom of the mind. Cf. *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 26 (1986) (Rehnquist, J., dissenting) (arguing that negative free speech rights should not be extended to corporations); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978) (“Certain ‘purely personal’ guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.” (citation omitted)). Thus, if the basis for overbreadth standing is that the litigant has had his or her First Amendment rights as a listener impinged, there may be an additional reason for thinking this standing does not extend to corporations.

⁸⁰ 524 U.S. 11 (1998).

⁸¹ *Id.* at 21.

⁸² 491 U.S. 440 (1989).

⁸³ See *id.* at 449–50.

⁸⁴ 455 U.S. 363 (1982).

⁸⁵ See *id.* at 374.

The issue is no different when the flow of information is mandated by the Constitution. In First Amendment cases concerning particularized communications, the Court has consistently granted standing to parties other than those against whom a restriction on speech is being enforced. Specifically, the Court has granted standing to parties who are only the recipients of communication. In *Lamont v. Postmaster General*,⁸⁶ the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad.⁸⁷ In *Procunier v. Martinez*,⁸⁸ the Court reasoned that censorship of prison inmates' outgoing mail infringed the rights of the non-inmates to whom the correspondence was addressed, making it unnecessary to address the First Amendment rights of the inmates themselves.⁸⁹ And in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁹⁰ the Court granted standing to a consumer group to challenge a regulation on advertising on the basis of its claim that the restriction impeded its ability to receive information.⁹¹ As the Court explained in that case, "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees."⁹² Tying overbreadth doctrine to the rights of speech recipients, as this Note suggests, would harmonize with the view that First Amendment standing is not limited to potential speakers.

Some readers may be tempted to object at this point that even if this account can be made to work, it is simply too inelegant — too rigged up — to provide an actual explanation for overbreadth. After all, the criminal defendant is on trial for his or her own speech, so what she can listen to seems like an extraneous consideration. But this argument is mistaken. A litigant's motives for challenging a statute need not correspond to the reasons why the statute is invalid.⁹³ The First Amendment's protections for open discourse are relevant not be-

⁸⁶ 381 U.S. 301 (1965).

⁸⁷ *Id.*

⁸⁸ 416 U.S. 396 (1974).

⁸⁹ *Id.* at 408–09. It should be noted that the Court did attempt to dodge the "difficult questions of the so-called 'right to hear' and third-party standing" by noting that the case involved "a particular means of communication in which the interests of both parties are inextricably meshed." *Id.* at 409. Given that most communication, almost by definition, meshes the interests of speaker and listener, it is not entirely clear how meaningful this caveat can be.

⁹⁰ 425 U.S. 748 (1976).

⁹¹ *Id.* at 756–57.

⁹² *Id.* at 757 (footnote omitted).

⁹³ For example, a criminal defendant challenging a peremptory strike of a juror is likely more concerned with his or her own chances of succeeding at trial than with principles of nondiscrimination. *Cf. Powers v. Ohio*, 499 U.S. 400, 402 (1991) ("[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race."). Similarly, a criminal defendant who seeks the exclusion of evidence is likely more concerned with avoiding punishment than with rectifying an injury to his or her privacy.

cause they are actually what concerns a defendant subjectively, but rather because they vest in the defendant an entitlement to complain when they are violated. The remedy may be sought for different reasons than those for which the remedy is granted, but this does not change the fact that any listener is entitled to seek that remedy.⁹⁴

In this sense, the prophylactic approach and the valid rule approach each turn out to be in part correct. The present account, like the chilling effects approach, traces the overbreadth doctrine to the fact that the public discourse is impaired by overbroad restrictions on speech. The weakness of the chilling effects approach is that it fails to link the overbreadth doctrine to any right of the litigant. The present account, rather than understanding overbreadth as an exception that is created to advance particular values, ties the doctrine to the First Amendment rights of citizens. In this sense, the present account shares the virtues of the valid rule approach by tethering the overbreadth doctrine to a personal right of the party complaining. But this account, unlike the valid rule approach, is based on the particular values of the First Amendment. Finally, this approach is in some ways simply a specific manifestation of Fallon's general idea that standing principles depend on the substantive constitutional provisions being invoked. But unlike Fallon's approach, this account attempts to explain — rather than posit — the fact that overbroad statutes are invalid in all applications and therefore subject to facial challenge.⁹⁵

B. Overbreadth and Prudential Standing

One response to this account is to balk at the fact that it would suggest that all listeners have standing to challenge overbroad statutes. If each potential listener is injured by an overbroad statute, then why is it that only those who face potential sanctions under an overbroad statute may challenge the statute? Does this account not prove far too much?

This Note accepts the perhaps surprising conclusion that, constitutionally speaking, all citizens have standing to challenge a statute that

⁹⁴ In this sense, the comparison to the exclusionary rule may usefully be reintroduced. It was argued above that the exclusionary rule does not grant criminal defendants a new right for prophylactic reasons. Instead, it protects certain values by giving those whose rights have been violated a strong remedy. Similarly, the analysis of this Note suggests that overbreadth does not create any new right, but rather just provides a potent remedy — one that even those who are not focused on the values behind that remedy may invoke.

⁹⁵ For Fallon, facial challenges arise because a particular substantive constitutional test would invalidate a statute in all of its applications. But there remains a question of why any given constitutional test should invalidate a statute in all its applications. This Note attempts to explain why overbroad statutes are invalid in all applications — namely because they are always a transgression against listeners.

distorts the public discourse. This is not to deny, however, that only some individuals can actually challenge any given overbroad statute. Insofar as not everyone can sue over overbroad restrictions on speech, the present account claims that these limitations are prudential rather than constitutional. An individual who faces criminal sanctions simply provides a suitably adverse plaintiff.⁹⁶

The crucial point here is that not all those who are injured within the scope of the Constitution are actually granted standing to sue. In particular, the Court imposes various prudential limitations to prevent those who are not adverse parties or those with merely generalized grievances from having standing.⁹⁷ If any ordinary citizen were to sue on the basis of an injury to his or her rights as a listener, such a suit would normally be in violation of the prudential limitation on generalized grievances. Moreover, there would be no way to ensure that such a citizen would provide the zealous advocacy for the claim that truly adverse interests ensure. For this reason, ordinary citizens cannot raise overbreadth challenges to just any speech restriction. So long as a party faces a criminal prosecution, however, the party will be sufficiently adverse.⁹⁸ Insofar as the limitation on who may challenge a re-

⁹⁶ See *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

⁹⁷ That the prohibition on generalized grievances is a prudential rather than constitutional limitation is not without some dispute. Compare *Massachusetts v. EPA*, 127 S. Ct. 1438, 1452–58 (2007), and *FEC v. Akins*, 524 U.S. 11, 23 (1998), with *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575–78 (1992). See generally Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 679–94 (2007) (comparing *Lujan* and *Akins*). Given Justice Kennedy's willingness to allow Congress to recognize new forms of injury in *Lujan*, see 504 U.S. at 580 (Kennedy, J., concurring), there seems to be good reason to think that the current Court's understanding of the prohibition on generalized grievances is at least partially prudential. More importantly, the decision in *Akins* makes very clear that, whatever the nature of the prohibition generally, an individual's inability to obtain information, even if shared by all, is a sufficient injury for constitutional standing. This latter proposition is all that is required for the argument in this Note.

⁹⁸ It is worth noting a potential counterargument here. If an injury to the right to listen is a type of injury sufficient for the purposes of constitutional standing, it may seem odd that the Supreme Court has indicated that an overbreadth challenge is unavailable where a defendant has successfully undertaken an as-applied challenge. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). If other applications of the statute at issue injure the party as a listener, then the Court should not stop with the as-applied challenge. The injury to the right to listen would persist. The existence of a second discrete injury might seem to distinguish the overbreadth context from other situations in which the Court has resolved a case based on one constitutional argument without considering another. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574–75, 578–79 (2003) (resolving the case on substantive due process grounds and declining to address the equal protection challenge). But once an as-applied challenge is resolved, the plaintiff is no longer any different than any other citizen. That is, the party no longer provides a uniquely adverse plaintiff and may then be viewed as offering simply a generalized grievance. In this sense, a successful as-applied challenge is similar to any other context in which a plaintiff's success on one claim may

striction on information is merely prudential, Congress can expand standing in this realm more easily than elsewhere. And this is precisely the case — Congress has had little difficulty in granting statutory standing for individuals seeking to receive information.⁹⁹ The claim of this Note is merely that ordinary citizens could have standing within the Constitution — everyone has a right as a listener that is implicated.

C. Substantiality and Narrowing

It is only one of several explanatory benefits of the present account that it meshes nicely with the Court's increased willingness to grant statutory standing in cases involving access to information. That is, in addition to the obvious benefits of tying the overbreadth doctrine to unique First Amendment concerns, as the prophylactic approach does, while also locating it in a right of the litigant, as the valid rule approach does, the present account also provides potential explanations for more specific features of the overbreadth doctrine.

First, the present account provides a tidy explanation for overbreadth's substantiality requirement — the rule that an overbreadth challenge will only succeed where the statute is "substantially" overbroad.¹⁰⁰ The nature of this requirement can seem a bit mysterious, especially as the Court has resorted to enigmatic language of proportionality to explain it.¹⁰¹ From the rights-based perspective of the valid rule approach, the requirement seems inexplicable — if overbreadth derives from an entitlement to be subject only to rules that do not have invalid applications, then it is hard to see why the scope of the invalid consequences should matter. Even from the consequentialist perspective of the prophylactic approach, the balancing inquiry that the requirement seems to involve has been described as having "an irreducibly ad hoc quality."¹⁰²

undermine standing on another ground by making it moot. For support for the idea that overbreadth works in this way, see *Board of Trustees v. Fox*, 492 U.S. 469 (1989), in which the Court held that the success of an as-applied challenge to some applications of a statute did not bar an overbreadth challenge to other applications as long as the party had a particular interest in both sets of applications, *id.* at 484–86.

⁹⁹ See, e.g., *Akins*, 524 U.S. at 19–26; *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 448–51 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372–75 (1982).

¹⁰⁰ See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 112–14 (1990); *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting) (recognizing that the Court had "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is . . . implicit in the doctrine").

¹⁰¹ See, e.g., *Osborne*, 495 U.S. at 112 (holding that the substantiality of a statute's overbreadth should be "judged in relation to the statute's plainly legitimate sweep" (quoting *Broadrick*, 413 U.S. at 615)).

¹⁰² Fallon, *supra* note 12, at 895.

The listeners' rights approach can offer some insight here. If the overbreadth challenger has standing because she, along with other citizens, has suffered an injury to her right to receive undistorted discourse, then the doctrine will apply only if there is enough distortion to constitute an injury. If a statute is so minimally overbroad that it has not materially interfered with the free flow of information, then a citizen will not have suffered a violation of her First Amendment right to receive information. That is, the substantiality requirement can be understood as based on the idea that the overbreadth doctrine is only implicated when a statute sweeps in enough speech to disrupt citizens' receipt of open discourse.

Second, the present account provides a unique explanation for how a subsequent narrowing construction affects an overbreadth challenge. In *Dombrowski v. Pfister*,¹⁰³ the Court suggested, albeit in dicta, that after a narrowing construction is given to a statute, the statute can then be applied to conduct that occurred before the narrowing construction was articulated: "Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants."¹⁰⁴ From the prophylactic view, this rule might seem problematic. If the goal is to prevent a chilling effect, a rule that allows the state simply to correct its errors and apply the corrected prohibition retrospectively would provide little protection. As Professor Fallon puts it, "The problem [with the *Dombrowski* approach] is that prophylactic overbreadth must have some higher degree of potency to affect the thought and action of state legislatures and state courts in the desired way."¹⁰⁵ From the perspective of the valid rule approach, the *Dombrowski* rule fares little better. If the statute constitutes an invalid rule in toto, then it is not clear why a subsequently promulgated new rule could be applied retroactively. The new rule would seem to have been created *ex post facto*. To put the point another way, the *Dombrowski* rule would seem to call into question the view that statutes are not to be viewed as severable into subrules in the First Amendment context.

From the perspective of the listeners' rights approach, however, the *Dombrowski* rule makes sense. An individual can raise an overbreadth challenge so long as no narrowing construction has been offered because this means that the overbroad statute is injuring the right of all citizens to receive communication. That is, so long as there is no narrowing construction, the injury persists and so too does the

¹⁰³ 380 U.S. 479 (1965).

¹⁰⁴ *Id.* at 491 n.7 (citations omitted).

¹⁰⁵ Fallon, *supra* note 12, at 899.

standing. When, however, a narrowing construction has been offered, the injury, and with it the standing, dissolves. The individual may be subject to punishment under this newly narrowed rule because overbreadth did not protect the party's action, but rather protected a different right — one that is no longer at issue. Put simply, this account is uniquely positioned to explain what the Supreme Court has suggested is the case, namely that overbreadth challenges are available only while the speech is being chilled.

IV. CONCLUSION

The puzzle of overbreadth is how to square it with the seemingly reasonable standing doctrine that parties can only sue based on the violation of their own rights. This principle of standing in a sense provides a legal mechanism for posing the flat-footed but commonplace challenge, "What's it to you?" In a case like *Yazoo*, for example, if the railroad company points to hypothetical applications of the statute, one intuitively wants to reply in precisely this way: "So what? What's it to you? That's not what's going on in this case."

The question, therefore, is why the First Amendment should be any different. The answer, according to this Note, is that in the context of the First Amendment, the question "What's it to you?" admits of a special answer. The First Amendment gives all citizens a right to an open and undistorted flow of information. Whenever speech is suppressed, all citizens have a stake in the matter. Part of what this means is that all citizens have a right against overbroad statutes restricting expression.