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State Court Rewriting of Overbroad Statutes

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> "Excessive judicial revision of an overbroad statute may lead to vagueness problems because 'the statutory language would signify one thing but, as a matter of judicial decision, would stand for something entirely different. Under those circumstances, persons of ordinary intelligence reading the law could not know what it actually meant.' "[1]

> "In responding to the felt necessities of the time[2] and the stated or perceived needs of the public, the legislature must draft legislation whose tentacles of proscription do not exceed constitutional commands. Neither the trial court nor this Court should graft onto the challenged statutes judicial limitations that will not be apparent to the citizenry. After all, citizens should regulate their behavior according to the plain meaning of precisely drafted statutes, not according to their guesses about saving judicial construction."[3]

I. INTRODUCTION: OVERBREADTH AND THE PROBLEM OF FEDERALISM

A law is unconstitutionally overbroad under the First Amendment if it regulates substantially more speech than the Constitution allows to be regulated,[4] and, with some exceptions,[5] if a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others.[6] This judge-made procedural rule, known as the Overbreadth Doctrine, was adopted in its current form by the Supreme Court in Broadrick v. Oklahoma.[7] The Overbreadth Doctrine holds that those defendants whose speech is not constitutionally protected can nonetheless move to facially invalidate the law on behalf of third parties whose speech may be chilled by the law in question.[8] The doctrine turns the unprotected

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[1] *People v. Marquan M.*, 19 N.E.3d 480, 487, (N.Y. 2014) (alterations omitted) (quoting *People v. Dietze*, 549 N.E.2d 1166, 1169 (N.Y. 1989)).
[2] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1882)
[3] *Cinema I Video, Inc. v. Thornburg*, 351 S.E.2d 305, 331 (1986) (Becton, J., dissenting)
[4] *See Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973). *See also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).
[5] The second prong of the overbreadth rule has been called into question recently. *See* U.S. v. Stevens, 559 U.S. 460, 473 n. 3 (2010) (disagreeing with the dissenting opinion of Alito, J., that "because there has not been a ruling on the validity of the statute as applied to Stevens, our consideration of his facial overbreadth claim is premature"). For most of its history, however, the overbreadth doctrine has been heavily disfavored if not outright barred in as applied challenges. *See United States v. Williams*, 553 U.S. 285, 293 (2008); *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999) (noting that the overbreadth doctrine should only be employed as "a last resort," *i.e.*, when an as applied challenge would not succeed).
[6] *See Broadrick*, 413 U.S. at 614.
[7] 413 U.S. 601 (1973).
[8] *See id.*

speaker into a proxy for unknown citizens whose would-be protected speech is potentially chilled and who would thus never have the opportunity to come before the Court.

Like most constitutional doctrines, overbreadth analysis is not required by any plain reading of the Constitutional text.[9] Nor can it be implied from the original understandings of the framers.[10] It is a prophylactic common law rule designed to give effect to a core constitutional provision, based on modern understandings of that provision. In that respect, the Overbreadth Doctrine is analogous to the Fourth Amendment's exclusionary rule (which gives effect to the Warrants Clause) and the Fifth Amendment's *Miranda*[11] rule (which gives effect to the Self-Incrimination Clause).[12]

However, overbreadth analysis is different from these other prophylactic doctrines in that it is fundamentally concerned with written statutes. The exclusionary rule and the *Miranda* rule, of course, simply restrict the actions of individual state actors. Written statutes raise the issue of statutory interpretation, which are governed by the rules of federalism.

State courts are not bound by the Supreme Court on issues of overbreadth.[13] In our federalist system, state supreme courts get the final say on the meaning and interpretation of their

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[9] *See* U.S. Const. Am. I ("Congress shall make no law…abridging the freedom of speech…)

[10] *See generally* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that the framers understood the First Amendment to, at most, prohibit prior restraint, and that nearly all First Amendment case law since 1919 is a radical departure from that original understanding).

[11] Miranda v. Arizona, 384 U.S. 436 (1966).

[12] *See Overbreadth and Listeners' Rights*, 123 Harv. L. Rev. 1749, 1754 (2010) ("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"); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 870 (1991) (The Fourth Amendment exclusionary rule is similar in substance and effect").

[13] *See* Fallon, *supra* n. 12, at 861-862. Fallon observes that "[a] fundamental premise of constitutional federalism holds that state law is what the state courts say it is. Thus, whether a state statute actually is overbroad, whether it means what it seems to say or something less than that, is a state law question on which state courts have the last word. Moreover, a related deep premise of constitutional federalism affirms that state courts not only can, but should, offer narrowing constructions of state statutes to confine their reach within constitutional bounds. This premise reflects a sort of federalistic quid pro quo. Asked of the states is a conscientious effort to shape their law to federal constitutional requirements. Accorded to the states is the flexibility to develop state law through a legislative/judicial partnership, in which the legislature can leave it to the state courts to dot its i's, cross its t's, and excise its constitutional excesses." *Id*.

states' statutes, and so the United States Supreme Court cannot permanently facially invalidate a state statute on overbreadth grounds.[14] If the Supreme Court strikes down a state law as overbroad, that law is not stricken from the books but rather enters a state of limbo until and unless the state supreme court sufficiently narrows its interpretation of the law.[15] In other words, "[w]hat an 'invalidated' statute means is a state law question; and whether the state court can and should change its interpretation in light of a Supreme Court overbreadth holding is also a state law question."[16]

To make matters worse, the Court's 1991 ruling in Osborne v. Ohio[17] implicitly invited states to craft artificial narrowing constructions.[18] Shortly after that case was decided, one concerned author argued that "unless clear legislative intent can be discerned, state courts should invalidate overbroad speech laws rather than attempt to narrow them."[19] Sixteen years later, it is not yet clear whether courts have heeded that advice, or whether that concern was well-founded.[20]

How often do state courts engage in such artificial narrowing of state statutes? Are there any similarities in how they engage in such narrowing? And even if the practice is widespread,

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[14] *See id*.
[15] *See* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 382 (2002).
[16] Fallon, *supra* n. 12, at 854.
[17] 495 U.S. 103 (1990).
[18] *See* Christopher P. Lu, *The Role of State Courts in Narrowing Overbroad Speech Laws After Osborne v. Ohio*, 28 Harv. J. on Legis. 253, 255 (1991) (noting that "hidden" in the Osborne decision is an implicit invitation to state courts to engage in substantial narrowing of overbroad speech laws).
[19] *Id.* at 254.
[20] It might be argued that, due to declaratory judgment statues in most states, state court rewriting of overbroad statutes is not a problem. *See Dombrowski v. Pfister*, 380 U.S. 479, 491(1965). After all, the ability of protected speakers to bring a declaratory judgment action should avert the chilling effect on its own. While this may be technically true, it just begs the question of whether there should exist an overbreadth doctrine in the first place, including at the federal level. It says nothing about the specific issue of state court narrowing. After all, there is a federal declaratory judgment statute as well. Hence, the particular problem of state court narrowing of overbroad statutes remains.

should we care? To date, there has been no nationwide comparative survey of such cases. A nationwide study of state court narrowing would be essential to determining how widespread this problem is, and whether it is even a problem in the first place.

In Part II of this Article, I present the findings of a fifty-state survey of state court narrowing of overbreadth decisions.[21] The results of that survey can be found in Appendices A and B. Appendix A summarizes the rules of statutory interpretation of overbroad statutes for each states. In all, there 21 states where judicial rewriting has occurred in at least one case that is still verified as good law. Such rewriting occurs according to a remarkably similar pattern: the court purports to follow the "legislative intent," but broadly and artificially construes that intent in a way that renders it meaningless.[22] An analysis of these cases reveals that worst offenders in this category are California and Massachusetts. The remaining 29 states, meanwhile, have never engaged (or no longer permit) artificial narrowing of overbroad statutes.[23] Meanwhile, the states whose courts are most faithful in applying the overbreadth doctrine—New York and Georgia—represent a gold standard whose example should be followed by others. These states not only engage in an honest analysis of a statute's overbreadth, but actively follow Supreme Court precedent about what sorts of statutory language qualifies as overbroad. Many states in this category are not as well-behaved as New York and Georgia, in that they are quite flexible in how they craft saving constructions—just not in a way that can be described as rewriting the statute. I conclude Part II by explaining why—in light of the findings of my survey—state court narrowing of overbroad statutes is problematic. I do this in part by drawing on Appendix B,

[21] *See* Appendix A, *infra*, for the complete results of this survey, as well as the methodology used to construct it.
[22] *See*, *e.g.*, *Pacific Legal Foundation v. Brown*, 624 P.2d 1215 (Cal. 1981); *In re Kay*, 464 P.2d 142 (Cal. 1970) (in bank); *State ex rel. The Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Winkler* 777 N.E.2d 320, 322 (Ohio App. 2002).
[23] See Part II.B.1.ii, *infra*.

which compiles various data points to show that state courts which do rewrite overbroad statutes hear approximately 56-59% more overbreadth cases than states which do not rewrite overbroad statutes. The implication here is that the judiciary's willingness to rewrite overbroad statutes leads to intentionally lazy or poor drafting by the legislature, because those legislatures know they can always depend on the courts to save overbroad laws.

In Part III, I conclude by offering a solution to the problem of artificial state court narrowing of overbroad statutes. I propose an alternative view of the overbreadth doctrine, which I call the "constitutionalist view" of overbreadth—which stands in contrast to the current "federalist" view. Under the constitutionalist view, a Supreme Court determination that a statute is overbroad would become a determination about whether the Free Speech Clause covers an ordinary citizen's reasonable interpretation of that statute, not whether it covers the actual/proper meaning of the statute as construed by the state's highest court. The standard of what counts as an "ordinary citizen's reasonable interpretation" would be a question for the U.S. Supreme Court, analogous to other reasonableness standards found throughout constitutional law. Determinations of overbreadth would therefore be rooted in constitutional law and not statutory interpretation. A state supreme court would therefore be bound by that determination under the Supremacy Clause. In other words, the question of whether a state law is too broad is not a question about statutory interpretation; it is a question about constitutional interpretation.

My proposed "constitutionalist view" is inspired by the New York and Georgia approaches to overbreadth analysis.[24] As articulated by those states' highest courts, the key concern motivating the overbreadth doctrine is not the authoritative interpretation of the statute, but rather whether an ordinary individual would reasonably read the statute in a way that chills

[24] See Part II.B, *infra*.

his/her protected speech.[25] Such a reasonableness test, as with other reasonableness tests found throughout constitutional law, should be considered part of the core content of the right. The state court's actual interpretation of the statute, while certainly authoritative, ought to be irrelevant; it is the ordinary citizen's reasonable interpretation that should matter. After all, the core purpose of the overbreadth doctrine is to avoid a chilling effect on protected speech; how an ordinary citizen will reasonably interpret the wording of a statute is far more important than how a state court authoritatively construes it. In fact, the ability of state courts to concoct saving constructions actually catalyzes the chilling effect, because under such a regime no citizen can ever be sure that a state court will not narrow its interpretation in the future. A constitutionalist view of overbreadth would solve this chilling problem by removing the doctrine from the realm of statutory interpretation and placing it in the hands of pure constitutional law.

II. STATE COURT NARROWING OF OVERBROAD STATUTES: A 50-STATE SURVEY

As a theoretical matter, any determination that a state statute is overbroad by the United States Supreme Court has no permanent effect. The Supreme Court cannot actually strike an overbroad state law from the books, because a state court could (potentially) always craft a narrowing construction if it chooses. This stems from a core requirement of federalism: federal courts must respect state court constructions of state laws as authoritative. In fact, many state supreme courts have largely interpreted this inherent limitation on the doctrine as an invitation to

[25] Fallon also observes that the chilling effect is more closely related to how the citizen construes the statute than how a state court construes it. "Able only to guess how a state court might respond, a citizen may hesitate before engaging in constitutionally privileged activity." Fallon, *supra* n. 12, at 862. Though, ultimately, he is not bothered by this inconsistency. His motivation is to show that the Overbreadth Doctrine is not nearly as "strong medicine" as it is made out to be, and that this is a good thing. *Id*.

artificially craft narrow constructions of state statutes,[26] when instead they should be conducting their own faithful overbreadth analysis.

To be clear, this does not mean that every state engages in artificial narrowing of overbroad statutes. Nor does it mean that states which do engage in artificial narrowing always do so. A fifty-state survey on state court narrowing of overbroad statutes reveals a broad range of ways in how state courts respond to overbreadth challenges. This section presents the most important findings of that survey. The complete results of the survey, as well as the methodology used for it, can be found in Appendix A.

In this Section, I sort states into two categories. The first category comprises states whose courts rewrite state statutes contrary to the intent of the legislature and/or plain meaning of the text.[27] Some states are more candid about their willingness to rewrite statutes than others. But nearly all of these states purport to follow legislative intent, while broadly construing that legislative intent to their convenience. Common escape devices include "the intent of the legislature was to enact a valid law,"[28] or "the intent of the legislature was for this court to uphold the law as constitutional,"[29] which of course are limitless standards. Also, most of these states are inconsistent in the way their courts rewrite laws. Sometimes, a court in one of these jurisdictions chooses to faithfully uphold the meaning of the text or specific intent of the

[26] *See*, *e.g.*, *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) "The Court recently recognized the continued validity of Justice Harlan's words in *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). The statutes at issue are sufficiently limited, both by their terms and by common sense, to pass constitutional scrutiny." *Id.*

[27] *See* Appendix A, *infra*. This category includes Alabama, Alaska, California, Florida, Idaho, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, Ohio, Rhode Island, South Dakota, Tennessee, Washington, and Wyoming.

[28] *See*, *e.g.*, *Kay*, 464 P.2d at 150 (arguing that the "[l]egislature intended to enact a valid statute" and will rewrite the statute accordingly to save it from overbreadth) (cited as justification for rewriting state statutes by *People v. Morera-Munoz*, 210 Cal.Rptr.3d 409, 415–16 (Cal. App. 2016), *review denied* (Feb. 22, 2017), and *People v. Chandler*, 332 P.3d 538 (Cal. 2014)); *Jansen v. State ex rel. Downing*, 137 So.2d 47, 48 (Ala. 1962) (citing the presumption that the legislature intended to enact a valid and constitutional law, and will rewrite the statute to save it).

[29] *See*, *e.g.*, *Planned Parenthood of Kansas v. Nixon*, No. 0516-CV25949, 2005 WL 3707407, at *4 (Mo. Cir. Ct. Nov. 18, 2005) ("It is presumed that the General Assembly would not pass laws in violation of the constitution").

legislature;[30] other times, that same court creates an artificial saving construction.[31] The moral of the story here is that the rewriting of statutes is a policy choice.

The second category includes states whose courts do not permit rewriting of overbroad statutes.[32] Courts in these states either 1) construe statutes according to the plain meaning of the text and a faithful reading of legislative history, or 2) confine themselves to the plain meaning of the text without considering legislative history. This divide between legislative purpose and pure textual analysis does not matter for purposes of overbreadth analysis: there are legitimate arguments on both sides about how statutes might be reasonably construed.[33] The point here is that all of these states play by the rules, and do not invent artificial narrowing constructions to rescue statutes from overbreadth. A few even focus on a "reasonableness" approach interpretation, and peg that reasonableness to the mindset of an ordinary citizen rather than emphasize the "authoritative" construction by the court.[34]

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[30] *See*, *e.g.*, *State v. Muccio*, 890 N.W.2d 914, 919–20 (Minn. 2017) ("We begin by interpreting the statute to determine its meaning. We then address whether the statute prohibits speech that the First Amendment protects. We conclude that the statute is overbroad because it regulates some protected speech, and so we analyze whether that overbreadth is substantial. For the reasons discussed below, we hold that the statute's regulation of protected speech is not substantial and therefore the statute does not violate the First Amendment on its face").

[31] *See*, *e.g.*, *Matter of Welfare of S. L. J.*, 263 N.W.2d 412, 419 (Minn. 1978); *State v. Benjamin*, No. A16-0104, 2017 WL 163715, at *5 (Minn. App. Jan. 17, 2017) ("We resolve the case before us today by assuming without deciding that the S.L.J. narrowing construction does apply to expressive conduct because, even on that assumption, a disorderly-conduct conviction may be based on conduct that has no "inextricable link" to a protected message"); *but see State v. Machholz*, 574 N.W.2d 415, 420 (Minn. 1998). See also State v. Benjamin, No. A16-0104, 2017 WL 163715, at *5 (Minn. Ct. App. Jan. 17, 2017) ("We resolve the case before us today by assuming without deciding that the S.L.J. narrowing construction does apply to expressive conduct because, even on that assumption, a disorderly-conduct conviction may be based on conduct that has no "inextricable link" to a protected message.")

[32] *See* Appendix A, *infra*. States that do not rewrite overbroad statutes include Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

[33] In fact, this debate between legislative purpose and the meaning of the text is a common fault line in the war between liberals and conservatives over statutory interpretation. This debate has been covered extensively in the literature, and I will certainly not attempt to resolve it here. The point is that they both are commonly accepted forms of statutory interpretation.

[34] *See*, *e.g.*, *Marquan M.*, 19 N.E.2d at 487 (quoting *Dietze*, 549 N.E.2d at 1169).

I conclude this section by highlighting some of the problems revealed by state court rewriting of overbroad statutes, in light of the findings of this survey.

A. States that Rewrite Overbroad Statutes

In this section, I examine those states whose courts rewrite overbroad legislation. Such re-writing often follows a pattern. First, the court will explicitly declare the statute unconstitutional as facially overbroad. Second, the court will cite Supreme Court precedent for the proposition that state courts can create artificial saving constructions to rescue overbroad statutes. Third, the court will simply re-write the statute by adding its own language to that statute—sometimes candidly, other times in a deceptive way. Fourth, having rewritten the statute, the state court will declare it no longer overbroad, and thus unconstitutional. Finally, having found the statute constitutional, the state will deny the defendant's facial challenge to the law.

Often times, in such cases, the Court will purport to be follow the "intent of the legislature."[35] Make no mistake: in these cases, the court is not actually following the intent of the legislature except in a broad and convenient way. For instance, these states frequently assume that the legislature intended to enact a "valid" or "constitutional" law—which of course is a meaningless standard.[36] Another artificial approach to legislative intent is purporting to uphold the "general legislative policy despite the specific intent of the legislature in drafting the statute." Under this escape device, the Court essentially asks "Would the legislature want us to strike

[35] *See*, *e.g.*, *Jansen*, 137 So.2d at 48 (citing the presumption that the legislature intended to enact a valid and constitutional law, and so the court can rewrite the statute to save it). The Illinois Supreme Court construes statutes artificially and disregards specific legislative history, favoring instead a broader presumption "that the legislature did not intend to create absurd, inconvenient, or unjust results." *People v. Hunter*, 986 N.E.2d 1185 (Ill. 2013).
[36] *See*, *e.g.*, *Right to Choose v. Byrne*, 91 N.J. 287, 311, 450 A.2d 925 (N.J. 1982) (The power to rewrite legislation exists because the court "begins with the assumption that the legislature intended to act in a constitutional manner").

down the law?"[37] Note that this question fundamentally different from asking "Is the law actually constitutional?

1. California

I begin with California because it is by far the most candid state when it comes to judicial rewriting of legislation to negate overbreadth.[38] Many other states take a similar approach to California's but are not as articulate about the way they narrow overbroad statutes. The current California rule, articulated in 1995 but cited as recently as 2014 (and by lower Courts in 2017),[39] is that courts "may reform—i.e., "rewrite"—a statute in order to preserve it against invalidation under the Constitution, when [the court] can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute."[40] California tends to apply this rule across all fields of law, but explicitly recognizes First Amendment overbreadth as a primary area of judicial rewriting.

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[37] *See*, *e.g.*, *Low v. State*, 580 N.E.2d 737, 740 (Ind. App. 1991) ("We may give a narrow construction to statutes to save them from nullification if the construction does not establish a new or different policy basis . . . .").

[38] *See Ventas Fin. I, LLC v. California Franchise Tax Bd.*, 165 Cal. App. 4th 1207, 1224, 81 Cal. Rptr. 3d 823, 836 (Cal. App. 2008) ("The power of judicial reformation has typically been exercised in three categories of cases: '(i) cases concerning procedural safeguards required by the First Amendment and/or principles of procedural due process; (ii) cases concerning classifications underinclusive under the equal protection clause; and (iii) cases concerning otherwise vague or overbroad criminal statutes'"); *see also Kopp v. Fair Pol. Practices Com.*, 11 Cal. 4th 607, 644–45, 905 P.2d 1248, 1271–73 (Cal. 1995) ("In numerous other cases we have similarly reformed partly overbroad or vague statutes—and in doing so imposed what amounts to a judicial reformation of the statutory terms") (citing *City of Los Angeles v. Belridge Oil*, 42 Cal.2d 823, 832-833, 271 P.2d 5 (Cal. 1954) (in bank); *Kay*, *supra*; *In re Bushman*, 1 Cal.3d 767, 773, 463 P.2d 727, 83 Cal.Rptr. 686 (Cal. 1970); *Morrison v. State Board of Education*, 1 Cal.3d 214, 225, 232-233, 461 P.2d 375, 82 Cal.Rptr. 175 (Cal. 1969); *Barrows v. Municipal Court*, 1 Cal.3d 821, 827-828, 464 P.2d 483, 83 Cal.Rptr. 819 (Cal. 1970); *In re Cox*, 3 Cal.3d 205, 223, 474 P.2d 992, 90 Cal.Rptr. 24 (Cal. 1970); *Braxton v. Municipal Court*, 10 Cal.3d 138, 151, 514 P.2d 697, 109 Cal.Rptr. 897 (Cal. 1973); *Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal.3d 582, 598-599, 557 P.2d 473, 135 Cal.Rptr. 41 (Cal. 1976); *People v. Freeman*, 46 Cal.3d 419, 424, 758 P.2d 1128, 250 Cal.Rptr. 598 (Cal. 1988)).

[39] See *Property Reserve, Inc. v. Superior Court*, 168 Cal.Rptr.3d 869, 916 (Cal. App. 2014) (Blease, Acting P.J., dissenting), *rev'd* 375 P.3d 887, 204 Cal.Rptr.3d 770 (Cal. 2016).

[40] *Kopp*, 905 P.2d at 1251; *In re Marriage of Burkle*, 135 Cal.App.4th 1045, 1068 (Cal. App. 2006) (citing *Kopp*, *supra*).

A recent ruling may help illustrate the process by which California courts artificially narrow overbroad statutes. In *People v. Chandler*,[41] the California Supreme Court rewrote an attempted criminal threat statute to require proof that "the defendant had a subjective intent to threaten and that the intended threat under the circumstances was sufficient to cause a reasonable person to be in sustained fear,"[42] even though the Court admitted that no such requirement could be reasonably construed from the text or the legislative history.[43]

> To avoid substantial First Amendment concerns associated with criminalizing speech, we construe the offense of attempted criminal threat to require proof that the defendant had a subjective intent to threaten *and* that the intended threat under the circumstances was sufficient to cause a reasonable person to be in sustained fear. Accordingly, when a defendant is charged with attempted criminal threat, the jury must be instructed that the offense requires not only that the defendant have an intent to threaten but also that the intended threat be sufficient under the circumstances to cause a reasonable person to be in sustained fear.[44]

The Court, in other words, was quite candid about why it construed the statute this artificial way: to avoid overbreadth problems. In fact, adding an intent scienter requirement when the legislative history and/or the plain meaning of the text—does not give one is one of the most common forms of state court rewriting of overbroad statutes.[45] Of course, Courts add scienter

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[41] 60 Cal.4th 508, 332 P.3d 538 (Cal. 2014).
[42] Cal. Penal Code § 422.
[43] *Chandler*, 332 P.3d at 539 ("For the reasons below, we hold that the crime of attempted criminal threat requires not only proof of a subjective intent to threaten but also proof that the intended threat under the circumstances was sufficient to cause a reasonable person to be in sustained fear.")
[44] *Id.* at 548-549 (emphasis in the original).
[45] *See*, *e.g.*, *Commonwealth v. Jones*, 471 Mass. 138, 28 N.E.3d 391, 396 (Mass. 2015) (reading in a scienter requirement to a child sex abuse statute where there was none to avoid overbreadth); *City of Montgomery v. Zgouvas*, 953 So. 2d 434, 442–44 (Ala. Crim. App. 2006) (rewriting an overbroad criminal statute by adding a specific intent requirement); *State v. Morton*, 91 P.3d 1139, 1141 (Id. 2004) ("To defeat a challenge of overbreadth, the conduct to be prohibited must, as written or authoritatively construed, be adequately defined by the applicable state law; the prohibition must be limited to works that visually depict sexual conduct by children below a specified age; the category of "sexual conduct" proscribed must be suitably limited and described; and, criminal responsibility may not be imposed without some element of scienter on the part of the defendant"); *Helton v. State*, 624 N.E.2d 499, 508–09 (Ind. App. 1993) (artificially construing a Gang Statute to require that "the active member with guilty knowledge also have a specific intent or purpose to further the group's criminal conduct) (cited by *Jackson v. State*, 634 N.E.2d 532, 536 (Ind. App. 1994)); *Wegner v. State*, 928 So. 2d 436, 439 (Fla. Dist. Ct. App. 2006) ("We can discern no legislative intent to dispense with a knowledge or mens rea element in section 847.0135(2)(d). Therefore, based upon the offense charged in the information in this case, we construe the statute as requiring knowledge by the accused that the person from whom or about whom he has received the computer transmissions is a minor").

requirements all the time when the legislative history and purpose reasonably indicate that the "omission of the element of intent in a statute, for example, may be explained by the fact that such culpability is so fundamental to criminal liability that the legislature must have assumed its requirement was obvious."[46] But there is something different—and far more troubling—about a court writing in a scienter requirement *in spite* of the legislative history for the sole purpose of saving the statute from overbreadth invalidation.[47] Such rewriting stands in strong tension with bedrock principles of criminal law like fair notice,[48] the rule of lenity and the legality requirement. Of course, those principles are not actually violated in the instant cases, because the defendant in such overbreadth cases already has the requisite scienter—the very fact that his speech is not protected anyway is precisely why he is allowed to challenge the statute as overbroad. And it is certainly less problematic for a court to *add* a scienter requirement into a statute rather than *remove* one.[49] But there is still something alarming about a court being able to rewrite a statute so that it includes a scienter requirement, from the perspective of future would-be defendants whose speech is otherwise protected. Such would-be speakers can no longer rely on a reasonable interpretation of a statute that would potentially cover their speech; they must

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[46] *See*, *e.g.*, Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. 335, 380 (2005).

[47] *See id.* at 380-381.

[48] There is a "fair notice doctrine" in the overbreadth realm, but as I will show in this Article, state courts do not respect it. *See*, *e.g.*, *In re Chmura*, 461 Mich. 517, 541, 608 N.W.2d 31, 43 (Mich. 2000) (citing *Osborne*, 495 U.S. at 115-122). "[In Osborne,] the Court held in the criminal context that a state court may adopt a narrow construction of a statute in response to an overbreadth challenge and then apply the statute, as construed, to past conduct. The defendant must, however, have had notice, i.e., 'fair warning,' that his conduct was criminal…Further, the defendant must have been convicted under the statute as it was subsequently construed, not as it was originally written…Applying Osborne by analogy to the disciplinary context, we conclude that respondent had notice that he was subject to discipline for knowingly or recklessly using forms of public communication that were false. Canon 7(B)(1)(d) provided that a candidate for judicial office 'should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false....' The phrase 'knows or reasonably should know is false' encompasses known false statements and those made with reckless disregard for their truth or falsity. Accordingly, respondent had 'fair warning' that his alleged conduct was prohibited by the Code of Judicial Conduct." *Id.*

[49] *See* Robinson, *supra* n. 47, at 398 ("To eliminate intent would be 'a feat of construction [that would] radically... change the weights and balances in the scales of justice,' and would cause "a manifest impairment of the immunities of the individual") (alterations in the original) (quoting *Morissette v. U.S.*, 342 U.S. 246, 263 (1952)).

change their behavior to conform with the looming threat of a state court artificial narrowing construction of that statute. The likely result is a chilling effect—the very thing the overbreadth doctrine was designed to avert.

In a 2017 case, *People v. Morera-Munoz*,[50] the Court of Appeal for the First District was even more explicit in its willingness to overlook the plain meaning of the text and legislative history, in order to give effect to the broader legislative purpose.[51] In that case, the court was confronted with a potentially overbroad highway patrol statute which read, in part: "No person shall give, either orally or in writing, information to a peace officer while in the performance of his duties under the provisions of this code when such person knows that the information is false."[52] In construing the statute, the Court wrote in a materiality provision, citing the "mandatory presumption [that] the Legislature intends to enact a valid statute," despite clear evidence in the legislative history that the "bill would make it unlawful for a person knowingly to give any false information to a peace officer on duty, whether or not it related to and materially affect[ed] the officer's duties under the Vehicle Code."[53]

California courts frequently cite *In re Kay*[54] for the proposition that they are free to rewrite overbroad laws. In that case, the California Supreme Court found overbroad a criminal statute which had made it a crime for anyone to "willfully disturb any lawful meeting." After finding that this language would clearly penalize protected First Amendment activity, the court wrote into the statute a requirement that the defendant "substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit

[50] 210 Cal. Rptr. 3d 409 (Cal. App. 2016), review denied (Feb. 22, 2017).
[51] *See id.* at 423.
[52] *Id.* at 415.
[53] *Id*. at 415–16
[54] *In re Kay*, 464 P.2d 142 (Cal. 1970) (in bank);

rules for governance of the meeting, of which he knew, or as a reasonable man should have known."[55] The Court, in other words, added in its own elements to the crime, including a scienter requirement, to save it from overbreadth. Other commonly cited cases include rewriting the elements of a "breach of peace" ordinance,[56] a teaching license ordinance,[57] and a statute criminalizing the disruption of "orderly operation of a college campus."[58]

Under the California rule, the court may not substitute its own policy judgements for the legislature's, but it may absolutely rewrite the statute as it sees fit to give effect to those broad policy judgements.[59] Such policy judgments include the argument that the legislature intended to pass a constitutional law,[60] which of course is a meaningless standard that places virtually no limitations on the court's ability to rewrite the statute.[61]

The high water mark of judicial candor regarding state court rewriting of overbroad statutes is *Kopp v. Fair Policy Practices Commission*.[62] In that case, the California Supreme Court proudly noted that "we have similarly reformed partly overbroad or vague statutes—and in doing imposed what amounts to a judicial reformation of the statutory terms."[63] The court then surveyed over twenty cases in which it rewrote overbroad statues—a majority of them due to

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[55] *Id.* at 150.
[56] *See Bushman*, *supra* (rejecting claim that the statute's language was overbroad and criminalized protected speech under the First Amendment, by artificially construing the text "to mean disruption of public order by acts that are themselves violent or tend to incite others to violence").
[57] *See Morrison*, *supra* ("The Education Code provided for revocation of a teaching license, on a showing of 'any act involving moral turpitude.' We found the term overbroad because it implicated protected privacy interests, and in order to preserve the statute, we construed it to "denote immoral or unprofessional conduct or moral turpitude of the teacher which indicates unfitness to teach") (cited by *Kopp*, 905 P.2d at 1292).
[58] *See Braxton*, *supra* (artificially construing a penal statute "to permit exclusion from the campus only of one whose conduct or words are such as to constitute, or incite to, a substantial and material physical disruption incompatible with the peaceful functioning of the academic institution and of those upon its campus").
[59] [A] court may reform—i.e., "rewrite"—a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute.'" *Ventas*, 81 Cal. Rptr. 3d at 836.
[60] "We must, however, presume that the Legislature intended to enact a valid statute." *Kay*, 464 P.2d at 150.
[61] *See U.D. Registry, Inc. v. State*, 50 Cal. Rptr. 3d 647, 663 (2006), *as modified on denial of reh'g* (Nov. 29, 2006)
[62] 905 P.2d 1248 (Cal. 1995) (in bank).
[63] *Id.* at 1272.

First Amendment overbreadth. The court noted that while it might be possible to distinguish some cases from others (for instance, those where the court disregarded language versus those where the court substituted or added new language), "[i]n all practical effect in all of these cases we 'rewrote' each statute in order to preserve its constitutionality."[64] It is important to note, however, that California justifies this practice in part by purporting to follow legislative intent—though it construes legislative intent in an artificial and broad way. "We…reject the view that a court lacks authority to rewrite a statute in order to preserve its constitutionality…The guiding principle is consistency with the Legislature's…intent.[65] However, whether the enacting body would have preferred such a reformed version of the statute to invalidation of the statute is an artificially broad construction of legislative intent.[66]

2. Massachusetts

Massachusetts also frequently engages in the rewriting of overbroad statutes in an overt and candid way. As recently as 2015, in *Commonwealth v. Jones*,[67] its Supreme Court noted that artificial narrowing of admittedly overbroad statutes was not only permissible, but necessary and desirable. In that case, the court upheld the conviction of a defendant, under a criminal statute that criminalized providing a child under 14 with pornographic materials, but did not specify a scienter requirement.[68] The court determined that the statute was overbroad because it did not

[64] *Id.* at 1273; *see also id.* at 1284 ("When legislative…intent regarding policy choice is clear, a revision that effectuates that choice is not impermissible merely because it requires insertion of more words than it removes").
[65] Id. *at 1251.* In that case, the Court actually refused to rewrite the overbroad statute, because it was not consistent with the policy preferences of the legislature. But that is a far cry from saying the court engaged in judicial restraint.
[66] Justice Werdegar, in her concurring opinion, expressed similar concerns about broadly construing legislative intent to rewrite overbroad statutes. *Id.* at 1293 (Werdegar, J., concurring) ("I join fully in Chief Justice Lucas's lead opinion. I write separately to emphasize that rewriting of statutes and initiatives to salvage their constitutional validity, while within our authority, is a task to be undertaken sparingly and cautiously.…[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them…[R]espect for the limitations of the judicial role demands we refrain from exercising the extraordinary power to rewrite an unconstitutional law.").
[67] 28 N.E.3d 391 (Mass. 2015).
[68] *See id.* at 396.

specify a scienter requirement, and then narrowed the statute accordingly to eliminate the overbreadth issue. "In determining whether to construe the statute prior to amendment to require such knowledge, we apply two principles of statutory construction. First, a statute is to be construed where fairly possible so as to avoid constitutional questions. Second, where First Amendment rights are at issue, we presume that some form of scienter is to be implied in a criminal statute even if not expressed."[69]

This built on prior decisions, dating back as early as 1966 when the Massachusetts Supreme Court decided *Commonwealth v. Corey*.[70] In that case, the court explicitly overruled the state legislature by crafting a new scienter requirement that defied the explicit legislative intent of the statute.[71] The Court upheld the conviction of a defendant for recklessly providing obscene materials to a minor, under a statute that used a broader "strict liability" standard prohibited by the First Amendment.[72] The court acknowledged that the Legislature had the authority to define specify levels of intent, but also recognized that "a different situation is presented when the legislation is in an area where First Amendment rights are involved."[73] Specifically, the court held that the First Amendment requires at least a recklessness standard as to whether the child was a minor, "to avoid the hazard of self-censorship of constitutionally protected material."[74] Accordingly, the court created a narrowing construction of the statute, re-writing it to require at least recklessness as to whether the child was a minor.[75]

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[69] *Id.* (citing *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 69 (1994)).
[70] 221 N.E.2d 222 (Mass. 1966).
[71] *See id.* at 223-24.
[72] *See id.*
[73] *Id.* at 224.
[74] *Id.*
[75] *See id.*

3. Other States that Rewrite Overbroad Statutes.

In addition to California and Massachusetts, many other states broadly define legislative intent in order to rewrite unconstitutional statutes.[76] For instance, the rule in Ohio is that the Court has an "obligation" to create an a saving construction to avoid overbreadth, as long as this can be done "without departing too far from what the legislature sought to accomplish or what the statute itself can convey to a reader. Such saving constructions must be reasonably attributed to the legislature with reasonable fidelity to the legislature's words and apparent intent."[77] ("Too far" is the key phrase here.) As a technical matter, Ohio does not explicitly say that it will "rewrite" a statute, only that it will adopt a narrow saving construction. But the difference here is a matter of candor. In practice, Ohio courts are quick to add or remove language from a law under the guise of mere statutory interpretation.

In a 2002 case, an Ohio appellate found overbroad and then rewrote an "expungement statute."[78] The statute was designed to remove from the public record allegations of criminal conduct against minors who have been acquitted after trial. The statute did not create an exception for information that would be particularly valuable to the public, which the Court found to be a First Amendment violation.

> We agree that unless given a saving construction, R.C. 2953.52 is not sufficiently tailored to protect the public's right of access to court proceedings guaranteed not only by the First Amendment but also by Section 11, Article I, and Section 16, Article I, of the Ohio Constitution (the Ohio "Open Courts Clause"). Rather than strike down the statute, however, we conclude that R.C.2953.52 is amenable to a saving construction that protects the public's right of access as well as the government's needs and Roach's privacy interests.[79]

[76] See Appendix A, *infra*.
[77] *State v. Butterfield*, 874 P.2d 1339, 1348 (1994).
[78] Ohio Rev. Code § 2953.52.
[79] *Winkler*, 777 N.E.2d at 322.

In other words, rather than strike down the law as facially overbroad, the Court wrote an exception into the statute thus saving it from constitutional invalidity.

Washington also follows this approach of rewriting statutes under the guise of a "saving construction" or "narrowing construction." Consider *State v. Johnson*,[80] a 2006 case in which that state's Supreme Court rewrote a bomb threat statute so that it only applied to true threats. "Here," the Court admitted, "the statute reaches a substantial amount of protected speech. For example, threats made in jest, or that constitute political statements or advocacy, would be proscribed…Accordingly, the statute must be limited to apply to only true threats.[81]

Florida also rewrites statutes to avoid invalidity under the overbreadth doctrine, in a way that approaches the level of candor seen in California.[82] That state's Supreme Court believes it has a "duty to save Florida statutes from the constitutional dustbin whenever possible," and has "done so regularly" by "rewriting" statutes.[83] In one case, for instance, the Florida Supreme Court artificially construed a hate crimes statute to only apply to bias-motivated crimes.[84] Of course, the Court reasoned that rewriting the statute in this way was consistent with legislative intent broadly construed, because it was presumed that the legislature wanted to enact a valid law.

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[80] 127 P.3d 707 (2006).
[81] *Id.* at 711–12 (citing *State v. Kilburn*, 84 P.3d 1215 (Wash. 2004) (en banc); *State v. Williams*, 26 P.3d 890 (Wash. 2001) (en banc))
[82] "Narrowing constructions are within the Court's discretion whenever it is possible to limit the statute to what is constitutional, and the statute as so limited is complete in itself and consistent with…legislative intent." *State v. Stalder*, 630 So. 2d 1072, 1077 (Fla. 1994) (citing *Garden v. Frier,* 602 So.2d 1273 (Fla.1992); *Waldrup v. Dugger,* 562 So.2d 687 (Fla.1990); *Firestone v. News–Press Publishing Co.,* 538 So.2d 457 (Fla.1989)).
[83] *Doe v. Mortham*, 708 So. 2d 929, 934 (Fla. 1998) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 (1995); *State v. Stalder*, 630 So.2d 1072 (Fla. 1994) (rewriting Florida's hate crimes statute via narrowing construction); *Firestone v. News-Press Publ. Co.,* 538 So.2d 457, 459-60 (Fla. 1989) (artificially construing Florida's polling place statute); *State v. Elder*, 382 So.2d 687 (Fla. 1980) (crafting an artificial narrowing interpretation of Florida's anonymous phone call statute)).
[84] *See Stalder*, *supra* (holding, via artificial narrowing construction, that the "hate crimes statute applies only to bias motivated crimes and, when so read, is constitutional").

In some cases, a state court will add long and convoluted provisions of text to a statute.[85] In *Holton v. State*,[86] for instance, the Supreme Court of Alaska rewrote a penal law that criminalized acts "which cause or tend to cause, encourage or contribute to delinquency."[87] Despite a finding that an honest reading of the text was overbroad,[88] the statute was artificially construed as prohibiting speech only if it advocated "imminent lawless action" and "would be likely to produce such action," and such statutory provision, when so construed, was not unconstitutionally overbroad.[89] Of course, this language draws from the United States Supreme Court's test from *Brandenburg v. Ohio*.[90] This was a convoluted attempt to conform the statute

[85] *See*, *e.g.*, *Chmura*, 608 N.W.2d at 43 ("Accordingly, we hold that Canon 7(B)(1)(d) is facially unconstitutional [due to overbreadth]…Today, we [therefore] narrow Canon 7(B)(1)(d) to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false. We therefore amend Canon 7(B)(1)(d) to provide that a candidate for judicial office: "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false."); *Winkler*, 777 N.E.2d at 322 ("We agree that unless given a saving construction, R.C. 2953.52 is not sufficiently tailored to protect the public's right of access to court proceedings guaranteed not only by the First Amendment but also by Section 11, Article I, and Section 16, Article I, of the Ohio Constitution (the Ohio "Open Courts Clause")…Rather than strike down the statute, however, we conclude that R.C.2953.52 is amenable to a saving construction that protects the public's right of access as well as the government's needs and Roach's privacy interests. Such a construction requires that the trial court weigh all three factors and consider, particularly in a case of public importance, whether the articulated privacy interests of the person seeking expungement are sufficient to deny the public's presumptive right of access to court proceedings and records."); *State v. Manzanares*, 272 P.3d 382, 402 (Id. 2012) (Horton, J., concurring in part and dissenting in part) (rewriting the recruitment provision of a gang statute) ("The majority evidently shares my view that the Recruiting Provision does not require that the accused cause another (the "recruit") to become a criminal gang member. Rather, the majority describes the Recruiting Provision as requiring that the recruit "actively participate" in either: (1) the criminal gang's commission of a predicate offense; or (2) making commission of a predicate offense one of the criminal gang's "primary activities." However, the statutory definition of "criminal gang" does not provide for such a narrow construction of the Recruiting Provision"); *id.* at 401 ("Unlike the majority, I am unable to discern the link between the phrase "actively participate" and criminal activity in the statutory scheme").

[86] 602 P.2d 1228 (Ak. 1979).

[87] *See id.* (Statute, which criminalized acts "which cause or tend to cause, encourage or contribute to delinquency," was construed as prohibiting speech only if it advocated imminent lawless action and would be likely to produce such action, and such statutory provision, when so construed, was not unconstitutionally overbroad); *see also Anderson v. State*, 562 P.2d 351, 353–54 (Alaska 1977) (We construe the words 'lewd or lascivious act . . . upon or with the body of a child' to require physical contact of the child's body by the adult or by some instrumentality controlled by the adult").

[88] "As the parties here agree, unless the bomb threat statute is given a limiting instruction so that it proscribes only true threats, it is overbroad…. We construe RCW 9.61.160 to avoid an overbreadth problem by limiting it to true threats." *State v. Johnston*, 127 P.3d 707, 711 (2006).

[89] *Holton*, 602 P.2d at 1234.

[90] 395 U.S. 444 (1969).

to First Amendment standards, because it was presumed that the Alaska legislature did not intend to enact an unconstitutional law.

Other states that at least occasionally engage in some form of judicial rewriting of overbroad statutes include (but are not limited to) Alabama,[91] Idaho,[92] Illinois,[93] Indiana,[94] Maine,[95] Michigan,[96] Minnesota,[97] and New Jersey.[98] For a complete list, refer to Appendix A.

[91] *See Butler v. Alabama Judicial Inquiry Comm'n*, 802 So. 2d 207, 218 (Ala. 2001). "The language in the latter clause of Canon 7B. (2) prohibiting the dissemination of 'true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person' is unconstitutionally overbroad because it has the plain effect of chilling legitimate First Amendment rights…We [therefore] narrow Canon 7B.(2) to provide that a candidate for judicial office shall not disseminate demonstrably false information concerning a judicial candidate or an opponent "with 'actual malice'—that is, with knowledge that it [is] false or with reckless disregard of whether it [is] false or not." *Id.*

[92] *See State v. Poe*, 88 P.3d 704, 725 (Id. 2004) ("We have construed Idaho Code § 18–6409 and invalidated one part of it to eliminate overbreadth so that it conforms to the opinions of the United States Supreme Court interpreting the First Amendment); *Manzanares*, 272 P.3d at 402 (rewriting a gang statute's "Recruiting Provision" as requiring that the recruit "actively participate in either: (1) the criminal gang's commission of a predicate offense; or (2) making commission of a predicate offense one of the criminal gang's primary activities" despite the original text and legislative history containing no such language).

[93] *See People v. Sanders*, 696 N.E.2d 1144, 1148 (Ill. 1998) (reading out language from a hunting statute requiring an "intent to dissuade").

[94] *See Helton*, 624 N.E.2d at 508–09 (artificially construing a Gang Statute to require that "the active member with guilty knowledge also have a specific intent or purpose to further the group's criminal conduct); *Indiana Prof. Licensing Agency v. Atcha*, 49 N.E.3d 1054, 1064 (Ind. App. 2016) (upholding a state administrative agency's artificial construction of a regulation so that it only applied to deceptive commercial speech).

[95] *City of Portland v. Jacobsky*, 496 A.2d 646, 659 (Me. 1985) (reading out a viewpoint discriminatory provision in a local ordinance to avoid overbreadth invalidation).

[96] *See Chmura*, 608 N.W.2d at 43 (reading in an "actual malice" standard into a rule regulating judicial conduct) ("Accordingly, we hold that Canon 7(B)(1)(d) is facially unconstitutional…Today, we narrow Canon 7(B)(1)(d) to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false").

[97] *See S. L. J.*, 263 N.W.2d at 419 ("Since the statute does not satisfy the definition of "fighting words," it is unconstitutional on its face…[However], we can uphold its constitutionality by construing it narrowly to refer only to "fighting words").

[98] *See Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137, 1149–50 (N.J. 1998) (noting that in cases of overbreadth and vagueness, the court "has the power to engage in 'judicial surgery,' construing the statute in a constitutional way," including the power "to excise a constitutional defect or engraft a needed meaning."); *Chamber of Commerce v. Election Law Enforcement Comm'n*, 411 A.2d 168 (N.J. 1980) (rewriting a statute regulating election financing reporting to eliminate overbreadth); *Borough of Collingswood v. Ringgold*, 331 A.2d 262 (N.J. 1975) (rewriting ordinance requiring prior registration of canvassers and solicitors to door-to-door activity on private property)

4. Conclusions: State Court Narrowing is Problematic

In light of the findings of my survey, we can see that state court rewriting of overbroad statutes is problematic in two ways.

i. Inconsistent Application Could Lead to a Chilling Effect

First, there is the matter of inconsistency. The ability of courts to pick-and-choose when to rewrite overbroad statutes injects uncertainty into the marketplace of ideas, potentially creating the very chilling effect that the overbreadth doctrine was designed to prevent.[99] Nearly every state that engaged in judicial rewriting of overbroad statutes has outright refused to rewrite an overbroad statute in at least one other case. [100]

Minnesota is one such state. Consider *In the Matter of the Welfare of S. L. J.*[101] In that case, the Minnesota Supreme Court overturned the conviction of a minor who had been convicted under a disorderly conduct statute for shouting "fuck you pig" at a police officer. [102] To avoid overbreadth invalidity, the court artificially construed the statute, so that it only applied to "fighting words."[103] The Minnesota Supreme Court was quite explicit that it was rewriting the statute. "Although [the statute] clearly contemplates punishment for speech that is protected under the First and Fourteenth Amendments, we can uphold its constitutionality by construing it narrowly to refer only to 'fighting words.'"[104]

[99] As one judge has noted, "[e]xcessive judicial revision of an overbroad statute may lead to vagueness problems because the statutory language would signify one thing but, as a matter of judicial decision, would stand for something entirely different. Under those circumstances, persons of ordinary intelligence reading [the law] could not know what it actually meant." *Marquan M.*, 19 N.E.3d at 487 (N.Y. 2014) (quoting *Dietze*, 549 N.E.2d at 1169) (internal quotation marks omitted).
[100] See Appendix A, *infra*.
[101] 263 N.W.2d 412 (Minn. 1978).
[102] See id. *at* 419.
[103] *Id*.
[104] *Id.*

S.L.J. remains cited as good law in Minnesota,[105] but courts apply it inconsistently as a matter of preference. In State v. Machholz,[106] the Minnesota Supreme Court refused to artificially narrow a harassment statute so that it only included fighting words. In that case, the defendant had been convicted under a harassment statute for shouting homophobic things while riding his horse through a gay pride parade on National Coming Out Day.[107] After finding that the harassment statute was overbroad because it clearly covered expressive activity, the Court refused to narrowly construe the harassment statute so that it only applied to fighting words.[108] There is no way to distinguish *Machholz* from *S.L.J.*, except perhaps that, for policy reasons, the Court did not want to invalidate this particular harassment statute for overbreadth (or did not want to overturn the conviction of this particular defendant). Both statutes clearly covered protected speech; the only issue was whether the Court chose to rewrite the statute.

The bottom line is that these states will sometimes choose to rewrite overbroad statutes, and at other times will refrain from doing so; it is simply a matter of choice. Such inconsistency is inherently problematic. Allowing courts to pick-and-choose when to rewrite overbroad statutes injects uncertainty into the marketplace of ideas, creating the very chilling effect that the overbreadth doctrine was designed to prevent.

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[105] *See Benjamin*, 2017 WL 163715, at *5 (citing the *S.L.J.* narrowing construction as good law); *cf. State v. Muccio*, 890 N.W.2d 914, 919–20 (Minn. 2017). ("We begin by interpreting the statute to determine its meaning. We then address whether the statute prohibits speech that the First Amendment protects. We conclude that the statute is overbroad because it regulates some protected speech, and so we analyze whether that overbreadth is substantial. For the reasons discussed below, we hold that the statute's regulation of protected speech is not substantial and therefore the statute does not violate the First Amendment on its face.")

[106] 574 N.W.2d 415, 420 (Minn. 1998).

[107] *See id.* at 420.

[108] *See id.*

ii. Judicial Rewriting Leads to Poor/Lazy Drafting of Legislation

Second, the data confirms that when Courts show a willingness to rewrite overbroad statutes, they invite lazy or overaggressive drafting by legislatures who know that the courts can bail them out if need be. This was an oft-cited criticism of the Court's ruling in *Osborne*. Particularly controversial was Justice White's remark, on behalf of the majority, that

> Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes as they might otherwise be. But a similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the court. This is so primarily because the legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth.[109]

More recently, the highest state courts in Texas and New York have already said as much, as justification for why they do not rewrite overbroad statutes.[110] In his law review article published shortly after the *Osborne* case was decided, Christopher Lu observed that

> [t]he reasoning of Osborne seems strangely at odds with Justice Scalia's opinion in [Massachusetts v.] Oakes, a case decided less than one year earlier. Oakes stands for the proposition that legislators should not be absolved from sloppy drafting by having a chance to amend a statute after it is challenged in court. The Osborne majority states, without citing any authority, that legislators will be deterred from such careless drafting by the fear that courts will invalidate, rather than narrow, an overbroad statute. This reasoning is unrealistic. Given the political nature of judges in most states, there is always the possibility of collusion between judges and legislators."[111]

The data from my survey validates this concern. Since 1992, i.e. the year after Osborne v. United States was decided, states which engage in artificial narrowing/rewriting have heard far more

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[109] Osborne, 495 U.S. at 121.

[110] *See Ex parte Thompson*, 442 S.W.3d 325, 339–40 (Tex. Crim. App. 2014) ("We may not rewrite a statute that is not readily subject to a narrowing construction because such a rewriting constitutes a serious invasion of the legislative domain and would sharply diminish the legislature's incentive to draft a narrowly tailored statute in the first place.")

[111] Lu, *supra* n. 18,at 259-260; *see also* SULLIVAN & FELDMAN, CONSTITUTIONAL LAW 1290 (18th ed., 2017) (questioning Justice White's reasoning in *Osborne*, and strongly implying that it does not make any sense).

overbreadth cases (per capita) than states which refuse to rewrite.[112] This indicates that legislatures in those depend heavily on their courts to bail them out.

Twenty five years later, we can see that this concern was warranted. According to the results of my 50-state survey, the data for which can be found in Appendix B, states whose courts rewrite overbroad statutes hear approximately 56%-59% more overbreadth cases, depending on the methodology used to calculate the number.[113] To arrive at this conclusion, I pegged the number of cases that mention overbreadth in each state to the population of that state (under the presumption that larger states hear proportionally more cases). Each state was then accorded an "overbreadth factor" based on that ratio. I then averaged the overbreadth factors for states that rewrite statutes and for states that do not rewrite statutes, and compared them. The numbers are even more striking when we look at states whose population is over 6 million (under the assumption that smaller states are more likely to have anomalous results).[114] I summarize those results below:

State	Rewrites Statutes?	Overbreadth Factor (Cases per million residents)
California	Y	15.9
Florida	Y	7.0
Illinois	Y	8.5
Ohio	Y	19.4
Michigan	Y	19.6
New Jersey	Y	7.7
Washington	Y	34.2
Massachusetts	Y	10.5
Indiana	Y	6.5
Tennessee	Y	6.8

[112] See Appendix A, *infra*. Relatively small states which engage in judicial rewriting of overbroad statutes have actually heard more cases than large states.

[113] See Appendix B, *infra*.

[114] This appears to be true based on the data. Smaller states—whether their courts rewrite statutes or not—were far more likely to hear more overbreadth claims, though I am not sure why.

Missouri	Y	5.2
Texas	N	9.6
New York	N	4.5
Pennsylvania	N	5.7
Georgia	N	4.5
North Carolina	N	3.3
Virginia	N	6.0
Arizona	N	8.0

Why are overbreadth cases far more likely to be heard in states whose courts are willing to rewrite overbroad statutes? One natural conclusion is that, in those state courts where judicial rewriting occurs, legislatures are more likely to craft laws that are in fact overbroad, because they know their courts can always craft an artificial saving construction if need be. As a result, overbreadth issues are more likely to come before the court in those states. Of course, this is not the only possible conclusion, but it is certainly worth considering.

This conclusion is even more fitting when we consider another factor, which should drive the numbers in the other direction. Recall that the very point of overbreadth analysis is to turn the defendant into a proxy for would-be protected speakers whose speech has been chilled. If defendants know that a state is prone to rewriting statutes to avoid overbreadth, those defendants (or rather, their attorneys) might be less likely to raise an overbreadth challenge in the first place. In other words, state rewriting of overbroad statutes renders the doctrine potentially toothless, because it eliminates the incentive for defendants to raise such a challenge in the first place. The data, however, does not bear this out. On the contrary, states courts which engage in rewriting are *more* likely to hear overbreadth cases, for the reason stated above (i.e. because state legislatures depend on them to bail them out).

B. States that Do Not Rewrite Overbroad Statutes

While many states routinely rewrite statutes to avoid overbreadth, a majority of states consistently apply the overbreadth doctrine in good faith. These states do so in at least one of two ways: 1) by faithfully applying the legislature's intent by examining both the plain meaning of the statutory text and the legislative history; or 2) by focusing exclusively on the plain meaning of the statutory text, and utilizing canons of construction to fill in any gaps.

Two states in particular, New York and Georgia, apply the overbreadth doctrine especially faithfully, in a way that resembles my own "constitutionalist view" of overbreadth.[115] Other states are generally reasonable in the way they apply the doctrine, but still take advantage of various escape devices to avoid findings of overbreadth.[116] Such escape devices cannot be

[115] *See*, *e.g.*, *People v. Tansey*, 593 N.Y.S.2d 426, 437 (N.Y. Sup. Ct. 1992) ("A sound application of these principles requires that I examine whether section 250.20 is susceptible of a constitutionally sound construction; one that is implicit in its language and manifest purpose. In this regard, requiring that the disclosures which the statute proscribes to be narrowly read so that the phrase "discloses such information" targets only disclosures made in order to obstruct, impede, or prevent such interception, would be consistent with the manifest purpose of the statute and would maintain its effectiveness"); *People v. Aboaf*, 187 Misc. 2d 173, 184, 721 N.Y.S.2d 725, 733–34 (N.Y. Crim. Ct. 2001) ("Moreover, the statute is capable of a reasonable limiting construction…As its history indicates, the anti-mask law was enacted originally to prohibit wearing masks in order to prevent identification during lawless activity. Construing section 240.35[4] so as to prohibit the wearing of masks "for no legitimate purpose" is consistent with this purpose."); *Scott v. State*, 788 S.E.2d 468, 474 (Ga. 2016) (adding in a mens rea element to a criminal statute only after concluding that it was required by a "common sense" reading of the text) ("Under our well-established rules of statutory construction, we presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would"), reconsideration denied (July 25, 2016), cert. denied, 137 S.Ct. 1328 (Mem) (2017).

[116] For instance, while Kansas courts will not rewrite overbroad statutes, there is nonetheless a heavy presumption in favor of constitutionality so long as the narrowing construction is reasonable in light of the plain meaning of the text or the legislative history "If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond reasonable doubt." *State v. Gile*, 321 P.3d 36 (Kan. App. 2014). Louisiana follows a similar rule: narrowing constructions are permitted, but they must be plausible and not artificial, based on actual legislative intent or the plain meaning of the statute. *See State v. Muschkat*, 706 So.2d 429, 434 (La. 1998) ("While we recognize our duty to interpret statutes in a manner consistent with our state and federal constitutions, we may only preserve a statute by a constitutional construction provided that the saving construction is a plausible one."); *State v. Williams*, 953 So.2d 91, 102–03 (La. 2006) (noting that the court can avoid overbreadth problems "by adopting a narrowing construction of the statute as long as that interpretation remains consistent with the overall purpose behind the legislation.") (internal quotation marks omitted). Hawaii creates narrowing constructions (for overbreadth and otherwise) only when they are reasonable and consistent with legislative intent or the plain meaning of the text. *See State v. Alangcas*, 134 Haw. 515, 524, 345 P.3d 181, 190 (Haw. 2015), as corrected (Feb. 20, 2015) ("Where possible, a penal statute will be read in such a manner as to preserve its constitutionality. To accord a constitutional

properly described as "rewriting" the statute, but they are still less stringent than the New York and Georgia tests.

1. The Constitutionalist Approach to Overbreadth Analysis

i. New York

New York conducts overbreadth analysis via a combination of textual analysis and legislative history. Limiting constructions are faithfully applied and never abused.[117] As required by the New York Court of Appeals, statutory interpretation begins with a textual analysis; if and only if that analysis does not yield an answer may legislative history be considered. Even then, any saving construction rooted in legislative intent must be honest, *i.e.* it "must be one which the court may reasonably find implicit in the words used by the legislature."[118] Unlike the pseudo-legislative intent we see from cases that rewrite statutes,[119] this standard is quite restrictive and effectively forces courts to engage in actual overbreadth analysis. When the New York Court of Appeals says it will construe legislative intent "reasonably," it means it. Under this rule, lower New York courts are not permitted to imply broad legislative policies or simply presume that the legislature meant to enact a valid law.[120] In other words, New York has bound itself to a

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interpretation of a provision of broad or apparent unrestricted scope, courts will strive to focus the scope of the provision to a narrow and more restricted construction. Provisions of a penal statute will be accorded a limited and reasonable interpretation under this doctrine in order to preserve its overall purpose and to avoid absurd results"); *Flores v. Rawlings Co.*, 117 Hawai'i 153, 158, 177 P.3d 341, 346 (Haw. 2008); *State v. McKnight*, 131 Hawai'i 379, 388, 319 P.3d 298, 307 (Haw. 2013).

[117] *See*, *e.g.*, *People v. Pierre-Louis*, 34 Misc. 3d 703, 710, 927 N.Y.S.2d 592, 597 (N.Y. Dist. Ct. 2011) ("[T]he saving construction must be one which the court "may reasonably find implicit" in the words used by the Legislature"); *Marquan M.*, 19 N.E.3d at 487 (N.Y. 2014) (noting that if the court adopted a narrowing construction, "the statutory language would signify one thing but, as a matter of judicial decision, would stand for something entirely different. Under those circumstances, persons of ordinary intelligence reading [the law] could not know what it actually meant") (citing *Dietze*, 549 N.E.2d at 1160)); *Tansey*, 593 N.Y.S.2d at 437; *Aboaf*, 721 N.Y.S.2d at 733–34.

[118] *People ex rel. Morriale v. Branham*, 52 N.E.2d 881 (N.Y. 1943); *see also People v. Finkelstein*, 174 N.E.2d 470 (N.Y. 1961); *People ex rel. Simpson v. Wells*, 73 N.E. 1025 (N.Y. 1905).

[119] See Part II.A, *supra*.

[120] *See Pierre-Louis*, 34 Misc. 3d at 710 (N.Y. Dist. Ct. 2011).

reasonableness test: whether a person of ordinary intelligence reading the law and taking the legislative history into account would know what it actually meant.[121] More importantly, New York cites United States Supreme Court precedent as persuasive (if not binding) in the way that it approaches statutory interpretation of potentially overbroad statutes.[122]

A recent example of the New York Court of Appeals' approach to overbreadth is *People v. Marquan M.*[123] In that case, the Court struck found overbroad Albany County's cyberbullying statute. The defendant Marquan M., a minor, had been convicted of cyberbullying other children via social media—an activity which all parties agreed was unprotected and within the state's power to regulate, given the compelling state interest of protecting children.[124] However, M. moved to invalidate the law as facially overbroad, because the plain language of some provisions in the statute went beyond the bullying of children to cover adults too—activity that, by the County's own admission, was clearly protected by the First Amendment.[125] The only issue was whether that provision could be severed from the rest of the law. The County argued it could be, citing the presence of a severability clause and evoking broader notions of legislative purpose; the defendant said severability would be practically impossible, given that the severability clause clearly did not cover all of the protected activity in the statute and that a plain reading of the text clearly indicated the legislature meant to cover the bullying of adults as well.[126]

Writing for the Court, Judge Graffeo found that severability was impossible, reaching her decision by meticulously applying the New York rules for overbreadth analysis. "A First Amendment analysis begins with an examination of the text of the challenged legislation since it

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[121] *See Marquan M.*, 19 N.E.3d at 487.
[122] *See id* (citing Dietze, 549 N.E.2d at 1169 and *Houston v Hill*, 482 US 451, 468-469 (1987)).
[123] 19 N.E.3d 480 (N.Y. 2014).
[124] *See id.* at 487-88.
[125] *See id.* at 487-88.
[126] *See id.*

is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[127] The text of the statute, she noted, could not be clearer. "As written, the Albany County law in its broadest sense criminalizes 'any act of communicating . . . by mechanical or electronic means . . . with no legitimate . . . personal . . . purpose, with the intent to harass [or] annoy . . . another person." On its face, the law covers communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying has on school-aged children."[128]

In other words, the Court distinguished between the actual intent of the legislature and broader notions of "legislative policy"—a clear rejection of the methods used by other states who "rewrite" statutes to avoid overbreadth. Legislative intent, the Judge Graffeo noted, is not the equivalent of asking whether the legislature would want the law struck down, or whether the legislature intended to pass a valid law.

> It is undisputed that the Albany County statute was motivated by the laudable public purpose of shielding children from cyberbullying. The text of the cyberbullying law, however, does not adequately reflect an intent to restrict its reach to the three discrete types of electronic bullying of a sexual nature designed to cause emotional harm to children. Hence, to accept the County's proposed interpretation, we would need to significantly modify the applications of the county law, resulting in the amended scope bearing little resemblance to the actual language of the law. Such a judicial rewrite encroaches on the authority of the legislative body that crafted the provision and enters the realm of vagueness because any person who reads it would lack fair notice of what is legal and what constitutes a crime.[129]

Having found the law overbroad and unseverable, the *Marquan M.* Court refused to rewrite the statute via artificial narrowing construction. "The doctrine of separation of governmental powers

[127] *Id.* at 485 (citing *United States v. Williams*, 553 US 285, 293 (2008)) (internal quotations omitted).
[128] *Id.*
[129] *Id.*

prevents a court from rewriting a legislative enactment through the creative use of a severability clause when the result is incompatible with the language of the statute."[130]

Remarkably, Judge Graffeo also noted that the Court's reluctance to sever the provision was particularly extreme in the First Amendment overbreadth and vagueness contexts. She cited both New York and Supreme Court precedent for the proposition that "special concerns arise in the First Amendment context," i.e. concerns about a chilling effect.[131] "Excessive judicial revision of an overbroad statute may lead to vagueness problems because 'the statutory language would signify one thing but, as a matter of judicial decision, would stand for something entirely different. Under those circumstances, persons of ordinary intelligence reading [the law] could not know what it actually meant.'"[132]

This line is the most important part of the opinion. What the Court did here—and in the other opinions that it cites—is root its rules of statutory interpretation in an objective reasonableness test. Such a test focuses on how an ordinary citizen would read the statute and whether that reading would chill speech. It is also consistent with Henry Monaghan's observation that in the First Amendment context, statutes may not be as prone to severability as they are in other contexts.[133]

Marquan M. and its predecessors identify and rectify the damage that federalism inflicts on the overbreadth doctrine. As I have said, the Supreme Court is powerless to excise an overbroad state statute from the books.[134] Instead of excising the overbroad state statute from the books, the Supreme Court must punt the statute back to the state courts, which are free to narrow

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[130] *Id.* at 486
[131] *Id.* at 487 (citing *Dietze*, 549 N.E.2d at 1169 and *Hill*, 482 US at 468-469).
[132] *Id. (quoting Dietze*, 549 N.E.2d at 1169).
[133] *See* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 29 (1981).
[134] *See* Fallon, *supra* n. 12, at 861-862; Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 382 (2002); Lu, *supra* n. 18, at 259-260.

their interpretation of the state statute in question. [135] Those state courts might narrow their interpretation in a way that still chills speech.[136] Of course, that decision is appealable to the U.S. Supreme Court which may then consider whether that narrow interpretation is overbroad. But any such subsequent determination of overbreadth by the Supreme Court is still subject to further narrowing by the highest state court. Ultimately, the matter is never fully settled and the scope of the statute is never fully certain, because the state court will always have another bite at the apple.[137] The ex-post nature of judge-made law means that the state supreme court could always revise its interpretation of that statute.[138] The uncertainty in and of itself produces a chilling effect—the very thing that the overbreadth doctrine is designed to prevent. The New York Court of Appeals, in respecting and faithfully applying the overbreadth doctrine, cuts off this uncertainty and restores the key function of the doctrine.

The New York Court of Appeals' approach of binding itself to the overbreadth doctrine produces objectively better results than the California approach of selectively applying the overbreadth doctrine. Consistent application of the doctrine produces certainty that courts will not artificially narrow any statutes presently before the court or potentially before the court at a future time. Any uncertainty, meanwhile, would produce a chilling effect even in cases where the court ultimately decides to faithfully apply the doctrine. After all, if a state's courts are inconsistent in applying the overbreadth doctrine, would-be protected speakers have no way of

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[135] See Fallon, *supra* n. 12, at 861-862.
[136] *Id.* ("The premises that underlie this third reason do not come without costs. They not only countenance but invite a 'chilling effect' whenever a statute appears to extend to constitutionally protected conduct. Able only to guess how a state court might respond, a citizen may hesitate before engaging in constitutionally privileged activity. Constitutional litigation is both hazardous and costly").
[137] *See id.* As Fallon observes, "[a]ll that the Supreme Court says when it holds a state statute overbroad, and all that it could say, is that the statute as authoritatively construed by the state courts prior to the Supreme Court's judgment is too sweeping to be enforced through the imposition of civil or criminal penalties. Following the Court's decision, it remains within the discretion of state authorities to seek limiting constructions of the affected statute in state court actions for declaratory judgments." *Id.*
[138] *See id.*

knowing how any case would come out. Their speech would be chilled as a result. To maximize the benefits of the overbreadth doctrine, states should apply it faithfully and rigorously. The New York approach also discourages lazy drafting of state statues, overcoming a common criticism of the *Osborne* decision.[139] Finally, and perhaps most importantly, the New York approach incentivizes defendants to raise overbreadth challenges, thereby protecting would-be protected speakers whose speech is chilled and thus will never have the opportunity to come before the Court. There would be little incentive for Marquan M. raise an overbreadth challenge in California or Massachusetts, whose courts are far more likely to craft an artificial saving construction. Those states' courts forget to recognize the tradeoff: we allow an unprotected defendant to go free because it is the only remedy available to avert a chilling effect on protected speakers. In New York, however, the incentives are properly aligned so that unprotected defendants like Marquan M. have an incentive to invalidate a law, allowing him to serve as a proxy for chilled speakers who did not have the opportunity to come before the court.

New York's focus on an objective reasonableness test breathes life back into the overbreadth doctrine at the state level. By crafting a test based on how the ordinary citizen would interpret the statute, rather than a test based on how a state court may choose to interpret the statute, the Court of Appeals recognizes the purpose behind the doctrine in the first place. It is the ordinary citizen not before the court who is potentially chilled by the statute in question. Any

[139] See Lu, *supra* n. 18, at 259-260. Recall Justice White's oft-criticized observation in *Osborne* that "Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes as they might otherwise be. But a similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the court. This is so primarily because the legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth." 495 U.S. at 121. The New York Court of Appeals is apparently well aware of this criticism, which is why it applies the overbreadth doctrine so faithfully.

court should therefore keep that in mind in cases of overbreadth that require statutory construction.

ii. Georgia

New York is not the only state that applies the overbreadth doctrine in such a rigorous and genuine way. Georgia applies the doctrine faithfully, too, but under a remarkably different set of rules.[140] Rather than prioritize the plain meaning of the text and use legislative history and purpose as a fallback, Georgia employs a strict textualist approach to overbreadth analysis—and other areas of statutory interpretation. Under no circumstances will the Georgia Supreme Court consider legislative history when construing a statute.[141] Instead, it limits itself to various canons of statutory construction when the plain meaning of the text does not yield a clear answer.[142] Legislative intent, in other words, may only be discerned from the text itself.

Georgia's approach to statutory construction in the overbreadth context (and elsewhere) is summarized in the 2017 case *Scott v. State*.[143] In that case, the court contemplated whether to facially invalidate as overbroad a child obscenity statute which criminalized the offense of "obscene internet contact with a child."[144] The defendant Scott argued that the element of "contact" did not include scienter as to whether the victim was under 16.[145] The State countered that a qualifying phrase found elsewhere in the statute ("that is intended to arouse or satisfy the

[140] *See Scott*, 788 S.E.2d at 474 (adding in a mens rea element to a criminal statute only after concluding that it was required by a "common sense" reading of the text). *See also Deal v. Coleman*, 294 Ga. 170, 172–173, 751 S.E.2d 337 (Ga. 2013); *Final Exit Network*, 290 Ga. 508, 511, 722 S.E.2d 722 (Ga. 2012); *State v. Miller*, 260 Ga. 669, 673, 398 S.E.2d 547 (Ga. 1990).
[141] *See Scott*,788 S.E.2d at 469.
[142] *See id.*
[143] 788 S.E.2d 468 (Ga. 2016).
[144] *Id.* at 470.
[145] *Id*.

sexual desire of either the child or the person") modified the element of "contact," thus adding the scienter requirement.[146]

Writing for the Court, Justice Hunstein began by summarizing the Court's approach to statutory interpretation.

> Under our well-established rules of statutory construction, we presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would. In our interpretation of statutes, we thus look to the text of the provision in question, and its context within the larger legal framework, to discern the intent of the legislature in enacting it.[147]

Note the requirement that the Court "view the statutory text in the context in which it appears, and read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would."[148] This is essentially a restatement of New York's reasonableness test. The difference is that Georgia's test is rooted in strict textualist principles while New York thinks that an ordinary reasonable person should consider legislative history when construing a statute. Both of these are reasonableness tests, the difference between them is simply a disagreement about what counts as reasonable. That disagreement is central to an age-old (and still ongoing) debate in the legal community about the proper approach to statutory interpretation, and I will not attempt to resolve it here.

Applying this test to the present case, Justice Hunstein noted that while the plain meaning of "obscene internet contact with a child" seemed overbroad when read in isolation, other

[146] *Id*.
[147] *Id.* at 472.
[148] *Id*.

subsections of the statute clarified its meaning.[149] After considering and rejecting various canons of statutory construction, Justice Hunstein settled on an interpretation rooted in "common sense."

> [A]spects of the structure of subsection (e) (1) and the particular verbiage of the qualifying phrase lead us to reject both the rule of the last antecedent and the series-modifier principle, in favor of a construction under which the qualifying phrase modifies the prohibited "contact" itself: in other words, it is the contact "that is intended to arouse or satisfy the sexual desire of either the child or the person." In reaching this conclusion, we note that the qualifying phrase appears after the list of four enumerated offending content categories. Were we to apply the rule of the last antecedent, we would read the qualifying phrase as modifying only "sadomasochistic abuse." Compared to the other categories in this list—"sexually explicit nudity," "sexual conduct," and "sexual excitement"—this last category is arguably the most egregious—involving "torture" or "flagellation"—and certainly the most narrowly defined.[150]

Having applied the scienter requirement to the element of contact, Justice Hunstein concluded that the statute was not overbroad and thus denied Scott's overbreadth challenge. Note that this is quite different from how other states have read new elements into overbroad statutes.[151] Justice Hunstein's construction can hardly be construed as "artificial." At no point does she fall back on the argument that the legislature clearly meant to enact a valid law.[152] Her construction is meticulous, faithful, and convincing.

Like New York, Georgia cites Supreme Court precedent as persuasive in reaching determinations about whether certain language is overbroad. For instance, Justice Hunstein in

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[149] *Id*.
[150] *Id.* at 473.
[151] *Cf. O'Brien v. Borowski*, 961 N.E.2d 547, 558 (Mass. 2012) ("such a limiting interpretation would effectuate the legislative intent to confine the prohibited speech in the act to constitutionally unprotected speech. Therefore, we narrow the meaning of "fear" under the act to fear of physical harm or fear of physical damage to property."); *Morton*, 91 P.3d at 1141 (Id. 2004) ("To defeat a challenge of overbreadth, the conduct to be prohibited must, as written or authoritatively construed, be adequately defined by the applicable state law; the prohibition must be limited to works that visually depict sexual conduct by children below a specified age; the category of "sexual conduct" proscribed must be suitably limited and described; and, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."); *Helton*, 624 N.E.2d at 508–09 (artificially construing a Gang Statute to require that "the active member with guilty knowledge also have a specific intent or purpose to further the group's criminal conduct) (cited by *Jackson*, 634 N.E.2d at 536).
[152] *Cf. Jansen*, 137 So.2d at 48 (citing the presumption is that the legislature intended to enact a valid and constitutional law, and will rewrite the statute to save it).

Scott cited to the most important federal child obscenity overbreadth cases: *United States v. Williams*,[153] *Ashcroft v. Free Speech Coalition*,[154] and *Reno v. American Civil Liberties Union*.[155] While she ultimately distinguished the present case from those cases, the mere fact that she found it necessary to distinguish them shows that Georgia is overwhelmingly deferential to Supreme Court precedent on issues of overbreadth.[156] Additionally, Justice Hunstein relied on Supreme Court precedent in choosing a rule of statutory construction. She rejected the "rule of the last antecedent" canon of statutory interpretation by citing *Paroline v. Unite States*,[157] in which the U.S. Supreme Court construed a qualifying clause in a manner best according with "common sense."[158] She also cited to *United States v. Bass*,[159] where the U.S. Supreme Court declined to apply rule of last antecedent where its application would be inconsistent "with any discernible purpose of the statute."[160] Other Georgia overbreadth cases cite federal case law in a similarly persuasive way. By citing Supreme Court precedent in determining issues of overbreadth, the Georgia Supreme Court creates uniformity and consistency within its overbreadth decisions.

[153] 553 U.S. 285 (2008).
[154] 535 U.S. 234 (2002).
[155] 521 U.S. 844 (1997).
[156] *See Scott*, 788 S.E.2d at 475 ("In examining the permissible breadth of a statute seeking to curtail various avenues of child exploitation in the digital age, we are, fortunately, not writing on a blank slate"); *see also Williams*, *supra* (overbreadth challenge to federal law criminalizing pandering and solicitation of child pornography); *Ashcroft*, *supra* (overbreadth challenge to federal law criminalizing various forms of actual and "virtual" child pornography); *Reno*, *supra*, (overbreadth challenge to federal statute prohibiting online transmission of "obscene or indecent" messages to recipients under the age of 18).
[157] 34 S.Ct. 1710, 1720 (2014).
[158] *See Scott*, 788 S.E.2d at 473.
[159] 404 U.S. 336, 341 (1971).
[160] *See Scott*, 788 S.E.2d at 473.

2. States which Interpret Overbroad Statutes Honestly but with Reasonable Flexibility

While New York and Georgia represent the high water mark of state overbreadth analysis, a majority of states cannot be fairly accused of "rewriting" overbroad statutes. The other states differ from New York and Georgia in that they do not apply an objective reasonableness standard, and in that they are somewhat flexible in their approach to statutory construction. A comprehensive list of these states may be found in Appendix A. In this Section, I cite a few examples of rules from other states and explain how they are more flexible than the New York and Georgia rules.

Oregon fits into this category. In 1999, its Supreme Court noted that a court may rewrite an otherwise overbroad statute so long as that rewriting is consistent with "the legislature's policy choices, as reflected in the statute's words."[161] This standard straddles the line between rewriting and being faithful to legislative intent. On the one hand, this standard is more restrained than the approach of "upholding any law that the legislature would want to be upheld."[162] On the other hand, it does push the boundaries of legitimate statutory interpretation; it allows the court to artificially construct specific provisions statute, but only based on hard evidence elsewhere in the statute that the legislature's intent would otherwise be undermined.

Texas observes a similar rule.[163] Its courts certainly narrow statutes that might otherwise be overbroad, but they do it in a reasonable way that cannot in any way be described as "rewriting" the statute. The rule in Texas is can be summed up in a 1991 case, which remains

[161] *State v. Rangel*, 977 P.2d 379, 385 (Or. 1999)
[162] *State v. Robertson*, 293 Or. 402, 411–12, 649 P.2d 569, 575–76 (Or. 1982) ("But when such a saving construction cannot be attributed to the legislature with reasonable fidelity to the legislature's words and apparent intent, the statute is invalid as enacted, and it is immaterial whether the particular case in which it is challenged would be immune from a validly drawn law"); *see also State v. Moyer*, 230 P.3d 7 (Or. 2010); *Clear Channel Outdoor, Inc. v. City of Portland*, 262 P.3d 782, 793 (Or. App. 2011).
[163] *See Thompson*, 442 S.W.3d at 339–40; *Olvera v. State*, 806 S.W.2d 546, 553 (Tex. Crim. App. 1991); *Long v. State*, 931 S.W.2d 285, 290 n. 4 (Tex. Crim. App. 1996).

cited as good law to this day: "[A]though [a statute] is impermissibly overbroad on its face, we need not invalidate it if it is susceptible to a narrowing construction *consistent with its language and apparent purpose*."[164] Texas has clarified this rule in subsequent cases, to avoid the misperception that overbroad statutes may be written via artificial narrowing constructions. "[T]he judicial option to avoid overbreadth is not without its limits.... A court may not simply assume the legislative prerogative and rewrite a statute in order to save it if the statute is not readily subject to a narrowing construction."[165] This stands in stark contrast to Massachusetts and California, which seem far more willing to explicitly re-write legislation.[166] But it does not approach the level of New York or Georgia in terms of rigor in faithfully applying the doctrine.

III. CONCLUSION: TOWARDS A CONSTITUTIONALIST VIEW OF OVERBREADTH

In this section, I argue that the New York and Georgia approaches to overbreadth analysis should be used as a template for the rest of the nation. While each individual state would be well-advised to apply the overbreadth doctrine consistently and in good faith, the real solution lies in a new standard to be adopted by the Supreme Court. Specifically, the Court should adopt the objective reasonableness test employed by New York and Georgia.[167] The key concern motivating the overbreadth is not the "proper interpretation of the statute," but rather "whether an ordinary individual would reasonably read the statute in a way that chills his/her protected speech."[168] Such a reasonableness test, as with other reasonableness tests found in constitutional

[164] *Morehead v. State*, 807 S.W.2d 577, 581 (Tex. Crim. App. 1991) (emphasis added).
[165] *Id.* at 581 (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.11[D] at 4-156) (internal quotations omitted).
[166] See Part II.A, *supra*.
[167] See Part II.B, *supra*.
[168] Fallon also observes that the chilling effect is more closely related to how the citizen construes the statute than how a state court construes it. Though, ultimately, he is not bothered by this inconsistency. His motivation is to show that the Overbreadth Doctrine is not nearly as "strong medicine" as it is made out to be, and that this is a good thing. "Able only to guess how a state court might respond, a citizen may hesitate before engaging in constitutionally privileged activity." Fallon, *supra* n. 12, at 862.

law, is part of the core content of the constitutional right. The state court's actual interpretation of the statute, while certainly authoritative, is irrelevant here; it is the ordinary citizen's reasonable interpretation that matters. In other words, the question of whether a state law is too broad is not a question about statutory interpretation; it is a question about constitutional interpretation.

A constitutionalist view would allow the Supreme Court to treat overbreadth more similarly to other prophylactic doctrines. Currently, state courts must apply *Miranda* and the exclusionary rule in their own proceedings.[169] State courts must also respect the Supreme Court's and subsequent interpretations and applications of *Miranda* and the exclusionary rule as particularized to new sets of facts as binding constitutional law[170] (though of course the Supreme Court can clarify and change its own interpretations of *Miranda* and the exclusionary rule). None of this is so for the overbreadth doctrine.[171] State courts are not bound by Supreme Court rulings on overbreadth in any practical way—they can choose when to apply it, and when not to apply it.[172]

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[169] *See Mapp v. Ohio*, 367 U.S. 643 (1961) (ruling that the exclusionary rule is the only practical way to enforce the Fourth Amendment, and that it must be enforced by the states).

[170] This Article adopts David Strauss' view that "prophylactic rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law," and that "constitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate, but that have the same 'prophylactic' character as the *Miranda* rule." David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988) (citing Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* 1048 (1986); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 876-82 (1970)). Overbreadth is one such doctrine, a prime example of constitutional common law. Matthew Adler has also noted that constitutional doctrine is rule-dependent." Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 Harv. L. Rev. 1371 (2000). Henry Monaghan observes that constitutional law inherently has features of judge-made common law; it is composed of rules that cannot be derived by a plain reading of the text, including the Overbreadth Doctrine. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 43 (1975) ("Without debating the wisdom of [the Overbreadth Doctrine] as a matter of judicially formulated common law, I find it difficult to believe that either is a necessary inference from the first amendment").

[171] A central requirement of the doctrine is that upon a determination of substantial overbreadth, the court must strike down the law and let the legislature rewrite it. State courts are not bound by this requirement; they are free to narrow the law as they choose.

[172] *See Dombrowski*, 380 U.S. at 486; *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

A key distinction, of course, is that overbreadth is concerned with written statutes, while the exclusionary rule and *Miranda* rule restrict the actions of individual state actors. Written statutes raise the issue of statutory interpretation. Questions of statutory interpretation are governed by the rules of federalism. Hence, federalism prevents state courts from being bound by the overbreadth doctrine—the Supreme Court cannot bind state courts with a doctrine about how their statutes must be interpreted. The federalist view of overbreadth assumes that the question of whether a law is too broad is a question of statutory interpretation. If we take the federalist view for granted, then the current understanding of the Overbreadth Doctrine makes perfect sense and state courts are free to construct their own narrowing of their states' statutes.

But if we adopt my "constitutionalist" view of overbreadth, the federalism problem disappears. A determination of overbreadth would no longer be a question of statutory interpretation; rather it would revolve around a reasonableness test.

Two implications would follow. First, a Supreme Court determination of overbreadth would definitively strike a state law from the books. The state supreme court would not have the opportunity to narrow its reading of the statute. Currently, state supreme courts are free to narrow their construction of their own states' statutes, theoretically preventing any Supreme Court ruling of state law overbreadth from becoming permanent. Artificial narrowing constructions by the supreme courts of California and Massachusetts, for instance, would be subject to U.S. Supreme Court review. Second, a Supreme Court determination of overbreadth in one case must be respected as persuasive in deciding cases under similar laws and similar sets of facts. Currently, only federal courts must respect binding and persuasive precedents on what constitutes overbreadth; state courts do not accept, even as persuasive reasoning, what sort of

language constitutes overbreadth. In that respect, a constitutionalist approach to overbreadth is more analytically satisfying than the current federalist approach.

IV. APPENDIX A: 50-STATE SURVEY RESULTS

In this Appendix, I present the findings of my 50-state survey on state court narrowing of overbroad statutes.

My methodology consisted of targeted, organized searches on Westlaw. I began with a general search of the terms ["First Amendment" AND "Overbr!"] across all 50 states, which yielded 5,553 results. I then examined the results one state at a time, using further narrowing keywords to identify instances where state courts discussed the prospect of narrowing overbroad statutes. The narrowing keywords which proved most helpful included [rewrite], ["saving constr!"], ["limiting constr!"], and ["constr!"]. As I read through cases, I also would eventually find keywords that proved unique to each state; as an example, New Jersey frequently uses the phrase "judicial surgery" to describe its rewriting of overbroad statutes. Of course, most of the cases I found cited to other cases in that state, which proved useful. Occasionally, I found decisions that cited to other states' cases, which proved enormously helpful.

Within any given search, I typically sorted cases by date, attempting to find the most recent on-point case that summarized the current condition of the doctrine in any given state. If necessary, I would sort by relevance or by citation count. I also found it helpful to KeyCite certain cases.

In the first column, I list the state and the number of overbreadth cases from my initial basic search of ["First Amendment" AND "Overbr!"]. In the second column, I indicate whether that state has engaged in judicial rewriting of overbroad statutes. In the third column, I list the relevant case law construction pertaining to overbreadth analysis in that state.

STATE (#CASES)	REWRITES?	RELEVANT CASE LAW
AL **36**	Y	Alabama occasionally rewrites overbroad statutes. City of Montgomery v. Zgouvas, 953 So. 2d 434, 442–44 (Ala. Crim. App. 2006) (rewriting an overbroad criminal statute by adding a specific intent requirement); Culbreath v. State, 667 So.2d 156 (Ala.Crim.App.1995) (same as previous); Butler v. Alabama Judicial Inquiry Comm'n, 802 So. 2d 207, 218 (Ala. 2001) (artificially narrowing a canon of judicial ethics). See also Jansen v. State ex rel. Downing, 137 So.2d 47, 48 (Ala. 1962) (citing the [p]resumption…that the legislature intended to enact a valid/constitutional law, and will rewrite the statute to save it).
AK **41**	Y	See Holton v. State, 602 P.2d 1228 (Alaska 1979) (Statute, which criminalized acts "which cause or tend to cause, encourage or contribute to delinquency," was construed as prohibiting speech only if it advocated imminent lawless action and would be likely to produce such action, and such statutory provision, when so construed, was not unconstitutionally overbroad). See also Anderson v. State, 562 P.2d 351, 353–54 (Alaska 1977) (We construe the words 'lewd or lascivious act . . . upon or with the body of a child' to require physical contact of the child's body by the adult or by some instrumentality controlled by the adult.")
AZ **51**	N	Arizona refuses to engage in judicial rewriting of overbroad statutes. See In re Nickolas S., 245 P.3d 446, 450 (Ariz. 2011) ("Although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them because doing so would invade the legislature's domain.") (citing First Natl. Bank of Ariz. v. Superior Court of Maricopa Cnty., 541 P.2d 392, 395 (1975)).
AR **18**	N	Arkansas does not rewrite overbroad statutes. Shoemaker v. State, 38 S.W.3d 350, 355 (2001) (finding a "teacher abuse" statute overbroad and vague, and refusing to adopt a narrowing construction). "Were this court to read into the statute a limitation to "fighting words," we would clearly be legislating in order to save the statute. This we will not do. Id. Cf. Bailey v. State, 972 S.W.2d 239, 244 (Ark. 1998) ("The doctrine of facial overbreadth should not be invoked when a limiting construction has been or could be placed on the challenged statute.") (internal quotation marks omitted).
CA **592**	Y	California is very candid about rewriting statutes, and sometimes refers to this process as "judicial reformation." Courts will presume broadly that the "[l]egislature intended to enact a valid statute" and will rewrite the statute accordingly to save it from overbreadth. In re Kay, 1 Cal. 3d 930, 942, 464 P.2d 142, 150 (1970)) (cited as justification for rewriting state statutes by People v. Morera-Munoz, 5 Cal. App. 5th 838, 847, 210 Cal. Rptr. 3d 409, 415–16 (Ct. App. 2016) and People v. Chandler 332 P.3d 538 (2014)). See also Ventas Fin. I, LLC v. California Franchise Tax Bd., 81 Cal. Rptr. 3d 823, 836 (2008) ("The power of judicial reformation has typically been exercised in three categories of cases: "(i) cases concerning procedural safeguards required by the First Amendment and/or principles of procedural due process; (ii) cases concerning classifications underinclusive under the equal protection clause; and (iii) cases concerning otherwise vague or overbroad criminal statutes.") For a comprehensive list of older cases rewriting overbroad statutes, see Kopp v. Fair Pol. Practices Com., 905 P.2d 1248, 1271–73 (1995) ("In numerous other cases we have

		similarly reformed partly overbroad or vague statutes—and in doing so imposed what amounts to a judicial reformation of the statutory terms) (citing City of Los Angeles v. Belridge Oil 271 P.2d 5 (1954); In re Kay 464 P.2d 142 (1970); In re Bushman 463 P.2d 727 (1970), Morrison v. State Board of Education 461 P.2d 375 (1970), Barrows v. Municipal Court 464 P.2d 483 (1970), In re Cox 474 P.2d 992 (1970), Braxton v. Municipal Court 514 P.2d 697 (1973), Associated Home Builders v. City of Livermore 557 P.2d 473 (1976); People v. Freeman 758 P.2d 1128 (1988)))
CO **56**	N	Colorado relies on a combination of plain text meaning and legislative intent to faithfully construe overbroad statutes. "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.... When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." State v. Moulton, 310 Conn. 337, 357, 78 A.3d 55, 68–69 (2013) (When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply). See also Picco v. Voluntown, 295 Conn. 141, 147, 989 A.2d 593 (2010)
CT **69**	N	State V. Roesch, CR94-87735, 1995 WL 356776, at *2 (Conn. Super. June 6, 1995) "The [Connecticut] Supreme Court has consistently held that every statute is presumed to be constitutional and has required invalidity to be established beyond a reasonable doubt." Peck v. Jacquemin, 196 Conn. 53, 64; see also State v. Hernandez, 204 Conn. 377, 385 (noting that "Justices Holmes and Frankfurter have said that the rule is settled 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) (citing State v. Jacquemin, 196 Conn. 53, 64, quoting United States v. Lovett, 328 U.S. 303, 329, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946)) (Frankfurter, J., concurring). Cites U.S. Supreme Court precedent regarding similarly worded statutes as binding and/or persuasive. State v. Skidd, 932 A.2d 416, 426 (Conn. App. 2007) ("Our Supreme Court's decision in State v. DeLoreto, supra, 265 Conn. at 145, 827 A.2d 671, informs our analysis of § 53a–181k (a)(3). The defendant in DeLoreto challenged the constitutionality of one of our breach of the peace statutes, § 53a–181, on the ground that the statute did not limit its prohibition to "threaten[ing] to commit any crime against another person or such other person's property...."…In upholding the constitutionality of the statute, our Supreme Court emphasized that "the First Amendment ... permits a State to ban a true threat) (quoting Virginia v. Black, 538 U.S. at 343, 123 S.Ct. 1536 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.")
DE **22**	N	Construes statues faithfully but flexibly. All doubts are resolved in favor of finding the act constitutional, but such doubts cannot be artificial. Overbreadth cases in Delaware are extremely rare compared with other states. State v. Fantasia Rest. & Lounge, Inc., 2004 WL 483649, at *3 (Del. Super. Mar. 9, 2004). "There is a strong judicial tradition in Delaware which supports a presumption of the constitutionality of a legislative enactment. All doubts are resolved in favor of the challenged legislative act. Where a statute is challenged on the basis of vagueness and overbreadth, the court's first task "is to determine whether the enactment reaches a substantial amount

		of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." United Video Concepts, Inc. v. City of Dover, 93A-10-004, 1994 WL 682321, at *3 (Del. Super. Oct. 31, 1994), aff'd, 660 A.2d 396 (Del. 1995). "Vagueness is a concept that is so closely related to the issue of overbreadth that the two are very often used interchangeably…A statute or ordinance is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by the statute, or if it encourages arbitrary and erratic enforcement." "[C]ourts should avoid reading statutes in ways that create such constitutional infirmities." Newsom v. Biden, CIV.A. 5247-VCS, 2011 WL 835135, at *9 (Del. Ch. Feb. 28, 2011) (citing State v. Baker, 720 A.2d 1139, 1144 (Del.1998) ("[W]here a possible infringement of a constitutional guarantee exists, the interpreting court should strive to construe the legislative intent so as to avoid unnecessary constitutional infirmities.") (quoting Richardson v. Wile, 535 A.2d 1346, 1350 (Del.1988)). Andrews v. State, 930 A.2d 846, 853–54 (Del. 2007) (refusing to read in a scienter requirement to a terroristic threats statute). State v. Huddleston, 412 A.2d 1148, 1156–57 (Del. Super. 1980) (acknowledging "the principle that state court construction of laws touching First Amendment concerns may have a narrowing and saving effect," but referring to such power as "unbridled discretion" and ultimately refusing to construe a statute in an artificial way) See also State v. Snow, No. CRIM.A. 75-06-0040, 1975 WL 170440, at *3 (Del. Com. Pl. Aug. 18, 1975) (noting that in a prior case, "the ordinance before the Court required the alleged loiterer to move three city blocks at the request of any person and the requesting person did not even have to be a police officer. The ordinance in [that prior case] therefore was so broad that no saving construction could be given it. However in the case at bar the statute in question can be narrowly construed. 11 Del. C. § 1321(1) as narrowly construed is constitutional.) See also Town of Smyrna v. Torres, CRIM.A. 13782, 1975 WL 170442, at *1 (Del. Com. Pl. Apr. 4, 1975).
FL **131**	Y	Rewrites statutes, and is candid about doing so. Doe v. Mortham, 708 So. 2d 929, 934 (Fla. 1998) ("[U]nlike the United States Supreme Court, this Court is eminently qualified to give Florida statutes a narrowing construction to comply with our state and federal constitutions. In fact, it is our duty to save Florida statutes from the constitutional dustbin whenever possible.[12] We have done so regularly and with statutes that required far more rewriting than the present sections.[13] Our reading of the Florida statutes today is entirely consonant with McIntyre, wherein the federal Court noted: "We recognize that a State's enforcement interest might justify a more limited identification requirement [than that of the Ohio statute]."") (citing Stalder, 630 So.2d at 1073; Schmitt v. State, 590 So.2d 404 (Fla.1991), L.B. v. State, 681 So.2d 1179 (Fla. 2d DCA 1996); State v. Mitchell, 652 So.2d 473 (Fla. 2d DCA 1995).[7] Richardson v. Richardson, 766 So. 2d 1036, 1041–42 (Fla. 2000). "We also recognize that courts sometimes apply a narrowing construction to a statute to salvage its validity. In State v. Stalder, 630 So.2d 1072 (Fla.1994), for example, we stated: "We note that in assessing a statute's constitutionality, this Court is bound "to resolve all

		doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given *1042 a fair construction that is consistent with the federal and state constitutions *as well as with the legislative intent.*" State v. Elder, 382 So.2d 687, 690 (Fla.1980). Further, "[w]henever possible, a statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place narrowing constructions on acts of Congress, this Court may, under the proper circumstances, do the same with a state statute when to do so *does not effectively rewrite the enactment.*" Firestone v. News–Press Publishing Co., 538 So.2d 457, 459–60 (Fla.1989) (citations omitted)." In one case, a lower court noted that the mere *absence* of legislative intent to the contrary was grounds for the court to construct an artificial saving construction. Wegner v. State, 928 So. 2d 436, 439 (Fla. Dist. Ct. App. 2006) ("We can discern no legislative intent to dispense with a knowledge or mens rea element in section 847.0135(2)(d). Therefore, based upon the offense charged in the information in this case, we construe the statute as requiring knowledge by the accused that the person from whom or about whom he has received the computer transmissions is a minor.") However, Florida courts are not entirely consistent in their willingness to rewrite overbroad statutes, and citing U.S. Supreme Court precedent as persuasive. As with all states that rewrite statutes, this is a matter of convenience and policy preference. So, sometimes Florida courts construe statutes faithfully. See, e.g., Enoch v. State, 95 So. 3d 344, 349–50, 61 (Fla. Dist. Ct. App. 2012) ("Concluding that the overbroad language cannot be excised without essentially eviscerating section 874.11, we are constrained to find it facially unconstitutional.") (citing U.S. Supreme Court precedent in Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574–76, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). See also State v. Catalano, 104 So. 3d 1069, 1081 (Fla. 2012) ("Severing the provision from the statute would expand the statute's reach beyond what the Legislature contemplated. Accordingly, in striving to show great deference to the Legislature, this Court will not legislate and sever provisions that would effectively expand the scope of the statute's intended breadth.")
GA **44**	N	"Under our well-established rules of statutory construction, we presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would." Scott v. State, 788 S.E.2d 468, 474 (2016) (adding in a mens rea element to a criminal statute only after concluding that it was required by a "common sense" reading of the text). Georgia courts also cite Supreme Court precedent as binding and/or persuasive in overbreadth cases. See, e.g., Scott v. State, 788 S.E.2d 468, 475 (2016) ("In examining the permissible breadth of a statute seeking to curtail various avenues of child exploitation in the digital age, we are, fortunately, not writing on a blank slate. See, e.g., United States v. Williams, supra (overbreadth challenge to federal law criminalizing pandering and solicitation of child pornography); Ashcroft v. Free Speech Coalition, supra (overbreadth challenge to federal law criminalizing various

		forms of actual and "virtual" child pornography); Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (overbreadth challenge to federal statute prohibiting online transmission of "obscene or indecent" messages to recipients under the age of 18))
HI **23**	N	Hawaii creates narrowing constructions (overbreadth and otherwise) only when they are reasonable and consistent with legislative intent or the plain meaning of the text. "Where possible, a penal statute will be read in such a manner as to preserve its constitutionality. To accord a constitutional interpretation of a provision of broad or apparent unrestricted scope, courts will strive to focus the scope of the provision to a narrow and more restricted construction. Provisions of a penal statute will be accorded a limited and reasonable interpretation under this doctrine in order to preserve its overall purpose and to avoid absurd results." State v. Alangcas, 134 Haw. 515, 524, 345 P.3d 181, 190 (2015), as corrected (Feb. 20, 2015). See also Flores v. Rawlings Co., 117 Hawai'i 153, 158, 177 P.3d 341, 346 (2008); State v. McKnight, 131 Hawai'i 379, 388, 319 P.3d 298, 307 (2013). State v. Pacquing, 139 Haw. 302, 309, 389 P.3d 897, 904 (2016), reconsideration denied, No. SCAP-14-0001205, 2017 WL 235694 (Haw. Jan. 18, 2017) "The starting point for overbreadth analysis is the determination, through statutory construction, of the meaning and scope of the challenged statute in order to ascertain "whether the enactment reaches a substantial amount of constitutionally protected conduct." Alangcas, 134 Hawai'i at 525, 345 P.3d at 191 (quoting State v. Beltran, 116 Hawai'i 146, 152, 172 P.3d 458, 464 (2007)); see United States v. Williams, 553 U.S. 285, 293, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.")
ID **25**	Y	State v. Poe, 88 P.3d 704, 725 (2004). "We have construed Idaho Code § 18–6409 and invalidated one part of it to eliminate overbreadth so that it conforms to the opinions of the United States Supreme Court interpreting the First Amendment…Therefore, because we have construed the statute to eliminate its overbreadth, we will not reverse Poe's conviction based solely upon his challenge that the statute is facially overbroad.") See also State v. Manzanares, 272 P.3d 382, 402 (2012) (rewriting a gang statute's "Recruiting Provision" as requiring that the recruit "actively participate in either: (1) the criminal gang's commission of a predicate offense; or (2) making commission of a predicate offense one of the criminal gang's primary activities" despite the original text and legislative history containing no such language). In 2012, a dissenting judge was especially critical of the Idaho Supreme Court's willingness to rewrite overbroad statutes. State v. Manzanares, 152 Idaho 410, 430, 272 P.3d 382, 402 (2012) (rewriting the recruitment provision of a gang statute). "The majority evidently shares my view that the Recruiting Provision does not require that the accused cause another (the "recruit") to become a criminal gang member. Rather, the majority describes the Recruiting Provision as requiring that the recruit "actively participate" in either: (1) the criminal gang's commission of a predicate offense; or (2) making commission of a predicate offense one of the criminal gang's "primary activities." However, the statutory definition of "criminal gang" does not provide for such a narrow construction of the Recruiting Provision." Id. "Unlike the majority, I am unable to discern the link between the phrase "actively participate" and criminal activity in the statutory scheme." Id.

		Idaho courts also cite Osborne v. Ohio as an invitation to artificially narrow state statutes. See State v. Morton, 91 P.3d 1139, 1141 (2004). "To defeat a challenge of overbreadth, the conduct to be prohibited must, as written or authoritatively construed, be adequately defined by the applicable state law; the prohibition must be limited to works that visually depict sexual conduct by children below a specified age; the category of "sexual conduct" proscribed must be suitably limited and described; and, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. Ferber, 458 U.S. at 764–765, 102 S.Ct. at 3358, 73 L.Ed.2d at 1127–28. In other words, statutes prohibiting the production or distribution of child pornography must sufficiently narrow the scope of their prohibitions to avoid "criminaliz[ing] an intolerable range of constitutionally protected conduct." Osborne, 495 U.S. at 112, 110 S.Ct. at 1697, 109 L.Ed.2d at 110.
IL **109**	Y	People v. Sanders, 696 N.E.2d 1144, 1148 (1998) (reading out language from a hunting statute requiring an "intent to dissuade") The Illinois Supreme Court construes statutes artificially and disregards specific legislative history, favoring instead a broader presumption "that the legislature did not intend to create absurd, inconvenient, or unjust results." People v. Hunter, 986 N.E.2d 1185 (2013).
IN **42**	Y	On occasion, Indiana courts will artificially rewrite a statute while purporting to follow legislative intent or the plain meaning of the statute. See, e.g., Broadhacker v. City of Indianapolis, 864 N.E.2d 372, 378 (Ind. App. 2007) ("While I am certainly of the opinion that the government can restrict businesses from permitting people to pay to view or participate in live acts containing sex *or* violence *or* sexual violence *or* violent sex, the ordinance at issue herein prohibits *only* a live act containing both sex *and* violence. Inasmuch as we are not in the business of rewriting statutes or ordinances, we must apply this ordinance as drafted." But see the opinion of Sullivan, J., concurring in part and dissenting in part. "I conclude that the Chief Judge does not adhere to his own cautionary advice and in fact does rewrite the ordinance in a seeming attempt to salvage the entirety of the legislation…[I]n my estimation, the Chief Judge takes unwarranted liberties with the language chosen by the City. He engrafts the word "violent" onto the phrase "live sex" acts and then in turn engrafts the word "sex" onto the phrase "violent acts." He does so under the guise of honoring use of the conjunctive "and" between the respective phrases as set forth in the ordinance." Broadhacker v. City of Indianapolis, 864 N.E.2d 372, 378 (Ind. App. 2007) (Sullivan, J., concurring in part and dissenting in part). Indiana Prof. Licensing Agency v. Atcha, 49 N.E.3d 1054, 1064 (Ind. App. 2016), transfer denied, 50 N.E.3d 146 (Ind. 2016) (deferring to a state administrative agency's patently artificial construction of a state regulation so that it only applied to deceptive commercial speech). Low v. State, 580 N.E.2d 737, 740 (Ind. App. 3d Dist. 1991) (We may give a narrow construction to statutes to save them from nullification if the construction does not establish a new or different policy basis and is consistent with legislative intent. State v. Downey, Ind., 476 N.E.2d 121, 123 (1985). Helton v. State, 624 N.E.2d 499, 508–09 (Ind. Ct. App. 1993) (artificially construing a Gang Statute to require that "the active member with guilty knowledge also have a specific intent or purpose to further the group's criminal conduct) (cited by Jackson v. State, 634 N.E.2d 532, 536 (Ind. App. 5th Dist. 1994))

		Indiana courts are not as candid as other states which rewrite state statutes, purporting to follow legislative intent reasonably while pushing the logical limits of what counts as "legislative intent." See, e.g. State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985) "[A] court in reading a statute for constitutional testing, may give it a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent." State v. Kuebel, 241 Ind. 268, 172 N.E.2d 45 (1961).
IO **39**	N	Iowa courts patently refuse to rewrite statutes, including in the overbreadth context. State v. Wedelstedt, 213 N.W.2d 652, 656–57 (Iowa 1973) (finding an obscenity statute overbroad and refusing to adopt a saving construction) ("It is not our function to rewrite the statute…The proper forum for the difficult task of reconstructing Code section 725.3 and our other obscenity statutes is the legislature. Present and future public policy is involved. Modern enlightened legislation is needed. Obscenity is a complex and difficult socio-legal problem…"If changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation.") (citing Snook v. Herrmann, Iowa, 161 N.W.2d 185, 190) (1968) and Consolidated Freightways Corp. v. Nicholas, 137 N.W.2d 900, 905 (1965)) (internal quotation marks omitted). State v. Nail, 743 N.W.2d 535, 542 (Iowa 2007) ("[T]his court should have no role in upsetting this legislative choice") (citing Zomer v. West River Farms, Inc., 666 N.W.2d 130, 133 (Iowa 2003); State v. Wedelstedt, 213 N.W.2d 652, 656–57 (Iowa 1973)). Nail was not a First Amendment overbreadth case but it cited to the 1973 Wedelstedt case for this proposition, which indicates that Wedelstedt, infra, is still good law. While Iowa courts will not craft artificial saving constructions to save statutes, there is nonetheless a heavy presumption in favor of constitutionality so long as the narrowing construction is reasonable in light of the plain meaning of the text or the legislative history. "Challengers to a statute must refute every reasonable basis upon which a statute might be upheld." State v. Nail, 743 N.W.2d 535, 539–40 (Iowa 2007) (internal quotation marks omitted).
KS **46**	N	In the overbreadth context, Kansas courts use a "common-sense interpretation when determining what conduct a statute potentially could prohibit and will not give strained meanings to legislative language through a process of imaginative hypothesizing. State v. White, 53 Kan. App. 2d 44, 58, 384 P.3d 13, 24 (2016) (citing State v. Wilson, 987 P.2d 1060 (1999)). "In other words, courts must construe statutes to avoid unreasonable or absurd results and presume the legislature does not intend to enact meaningless legislation." Id. (citing State v. Turner, 293 Kan. 1085, 1088, 272 P.3d 19 (2012)). Like Iowa, while Kansas courts will not rewrite overbroad statutes, there is nonetheless a heavy presumption in favor of constitutionality so long as the narrowing construction is reasonable in light of the plain meaning of the text or the legislative history "If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond reasonable doubt." State v. Gile, 321 P.3d 36 (Kan. Ct. App. 2014) State v. Williams, 299 Kan. 911, 921, 329 P.3d 400, 409 (2014) (refusing to find a sex trafficking statute as overbroad based on a common sense reading of the statute and a close inspection of the legislative history)

KY **33**	N	Kentucky does not craft artificial narrowing constructions. See Com. v. Ashcraft, 691 S.W.2d 229, 232 (Ky. App. 1985). ("We would have to completely rewrite KRS 161.190 in order to remove constitutionally protected speech from its purview. Such is not the function of this Court.") See also See also Musselman v. Commonwealth, 705 S.W.2d 476, 477 (Ky.1986) ("[C]learly the judiciary lacks power to *add* new phrases to a statute to provide a new meaning necessary to render the statute constitutional.") Stinson v. Com., 396 S.W.3d 900, 903 (Ky. 2013) (refusing to craft a narrowing construction because "when interpreting the statutory scheme, we seek to effectuate the legislature's intent and "[t]he plain meaning of the statutory language is presumed to be what the legislature intended....) (citing Revenue Cabinet v. H.E. O'Daniel, 153 S.W.3d 815, 819 (Ky.2005)). The court went on to say that "[o]nly if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts." Id. See also Shawnee Telecom Res., Inc. v. Brown, 354 S.W.3d 542, 551 (Ky.2011) (citing MPM Financial Group, Inc. v. Morton, 289 S.W.3d 193 (Ky.2009)). Kentucky Registry of Election Fin. v. Blevins, 57 S.W.3d 289, 291 (Ky. 2001) (finding overbroad a statute making it unlawful for an employer to "give out or circulate any statement or report that employees ... have been requested ... to vote for any person ...."). In Blevins, the Court refused to deviate from the obvious legislative intent of the law. "Clearly, the purpose of KRS 121.310(1) is to prevent an employer from coercing his or her employees into voting a certain way. An employer's "request," such as the one made by Blevins, may seem to be nothing more than a polite entreaty made upon his or her employees, or the employer only may intend mild persuasion. But the line between persuasion and coercion is drawn subjectively and depends on one's point of view. Consequently, a penal prosecution cannot proceed based on the perceptions of the recipient of a letter." Id. McGinnis v. Com., 2010-CA-000893-DG, 2012 WL 28684, at *6 (Ky. App. Jan. 6, 2012) (finding that a local ordinance was "undeniably broadly written and its prohibition on all amplified sound on public right-of-ways and spaces for commercial purposes and at all times is constitutionally suspect", but that based on a plain reading of the text it was not overbroad.") Kentucky also hints that Supreme Court precedent as binding/persuasive in similar cases. See Dumas v. Com., 2010-SC-000378-MR, 2011 WL 2112560, at *8 (Ky. May 19, 2011) (finding that a child pornography statute was not overbroad, because the present case was distinguishable from Supreme Court precedent) (distinguishing the instant case from Ashcroft v. Free Speech Coalition 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002)). "[The instant case] is not strictly controlled by the Ashcroft decision because the language of the statute addresses possession of matter portraying *sexual performances by minors,* not virtual representations of minors." Dumas v. Com., 2010-SC-000378-MR, 2011 WL 2112560, at *8 (Ky. May 19, 2011). It is quite telling that the court chose to distinguish Ashcroft, rather than argue (as other states have) that Ashcroft could be ignored because state courts can authoritatively construe their own statutes.

LA **34**	N	Narrowing constructions are permitted, but they must be plausible and not artificial, based on actual legislative intent or the plain meaning of the statute. State v. Muschkat, 706 So.2d at 434 (La. 1998) (finding a criminal drug-traffic loitering statute overbroad because it prohibited clearly protected forms of First Amendment Activity, and also refusing to read a specific intent requirement into the law. "While we recognize our duty to interpret statutes in a manner consistent with our state and federal constitutions, we may only preserve a statute by a constitutional construction provided that the saving construction is a plausible one." Id. See also State v. Williams, 953 So. 2d 91, 102–03 (La. 2006) (noting that the court can avoid overbreadth problems "by adopting a narrowing construction of the statute as long as that interpretation remains consistent with the overall purpose behind the legislation.") (internal quotation marks omitted). State v. Schirmer, 646 So. 2d 890 (La. 1994) (finding a statute "prohibiting political speech within 600 feet of polling place" to be overbroad based on a plain reading of the text, and not considering the issue of adopting a narrowing construction).
ME **6**	N	State v. Events Intern., Inc., 528 A.2d 458 (Me. 1987) (statute regulating charitable solicitations was unconstitutionally overbroad on its face and hence violative of First Amendment) Maine has decided very few cases on the overbreadth issue, and none discuss the possibility of narrowing constructions.
MD **35**	Y	Maryland employs narrowing constructions on occasion, sometimes reasonably and at other times in a way that can only be described as rewriting the statute. See Galloway v. State, 781 A.2d 851, 862 (Md. 2001) ("In short, even if arguably otherwise deficient, § 123 is salvageable because we shall employ a limiting construction to the statute to ensure that it provides a standard of conduct and indicates whose sensibilities are to be offended) (citing Schochet v. State, 320 Md. 714, 729, 580 A.2d 176, 183 (1990) (stating that "[g]eneral statutes ..., which, if given their broadest and most encompassing meaning, give rise to constitutional questions, have regularly been the subject of narrowing constructions so as to avoid the constitutional issues" and providing examples of such cases)). See also Schochet v. State, 580 A.2d 176, 184 (Md. 1990); *Wilson v. Bd. of Sup. of Elections,* 273 Md. 296, 328 A.2d 305 (1974), (rewriting a statute to avoid overbreadth so that the words "public funds" meant "funds of the City of Baltimore" and not state or federal funds); see also *Board of Trustees v. City of Baltimore, supra,* 317 Md. at 97–98, 562 A.2d at 732–733 (construing broad delegation of legislative power language to be advisory only, in order to avoid a serious issue concerning validity) (citations omitted); *Mangum v. Md. St. Bd. of Censors,* 273 Md. 176, 187–192, 328 A.2d 283 (1974) (artificially construing the definition of "obscenity" in a movie censorship law so that it conformed to overbreadth requirements. See also Williams v. State, 2016 WL 3670069, at *8 (Md. Ct. Spec. App. July 11, 2016). "As our predecessors noted, "We cannot assume authority to read into the Act what the Legislature apparently deliberately left out…Therefore, the strongly preferred norm of statutory interpretation is to effectuate the plain language of the statutory text." (citing Howard Contr. Co. v. Yeager, 184 Md. 503, 511, 41 A.2d 494, 498 (1945)). Pack Shack, Inc. v. Howard Cty., 377 Md. 55, 88, 832 A.2d 170, 190 (2003) (finding an adult entertainment zoning ordinance overbroad, and refusing to adopt a narrowing construction despite the urging of a concurring judge).

MA **69**	Y	Massachusetts frequently and candidly engages in artificial rewriting of overbroad statutes. See Commonwealth v. Jones, 471 Mass. 138, 143, 28 N.E.3d 391, 396 (2015) (reading in a scienter requirement to a child sex abuse statute where there was none to avoid overbreadth). See also O'Brien v. Borowski, 961 N.E.2d 547 (2012) ("we have not hesitated to construe statutory language narrowly to avoid constitutional overbreadth") (Citing Commonwealth v. Welch, 825 N.E.2d 1005 (2005) and Commonwealth v. Templeman, 376 Mass. 533, 538, 381 N.E.2d 1300 (1978)). Most alarmingly, Massachusetts justifies such rewriting via an artificially broad approach to legislative intent, presuming in the broadest way possible that the legislature intended to enact a constitutional law—which of course is a conveniently limitless standard. See O'Brien v. Borowski, 961 N.E.2d 547, 558 (Mass. 2012) ("such a limiting interpretation would effectuate the legislative intent to confine the prohibited speech in the act to constitutionally unprotected speech. Therefore, we narrow the meaning of "fear" under the act to fear of physical harm or fear of physical damage to property.")
MI **194**	Y	Michigan courts rewrite overbroad statutes openly and without hesitation. See In re Chmura, 461 Mich. 517, 541, 608 N.W.2d 31, 43 (2000) ("Accordingly, we hold that Canon 7(B)(1)(d) is facially unconstitutional [due to overbreadth]…Today, we [therefore] narrow Canon 7(B)(1)(d) to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false. We therefore amend Canon 7(B)(1)(d) to provide that a candidate for judicial office: "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false.") People v. Cavaiani, 432 N.W.2d 409, 412 (Mich. App. 1988) ("Legislative enactments are cloaked with a presumption of constitutionality. Where a statutory provision would otherwise be unconstitutional, it is the Court's duty to give the statute a narrow construction so as to render it constitutional if such a construction is possible without doing violence to the Legislature's interest in enacting the statute) (citing People v. O'Donnell*,* 127 Mich.App. 749, 757, 339 N.W.2d 540 (1983)) This proposition was cited as recently as 2016, in People of City of Grand Rapids v. Gasper, 888 N.W.2d 116, 120 (Mich. App. 2016), though in that case the court ultimately refused to adopt a narrowing construction. Michigan cites to Osborne v. Ohio for the proposition that it may craft artificial narrowing constructions to save overbroad statutes. In re Chmura, 461 Mich. 517, 544–45, 608 N.W.2d 31, 44–45 (2000) ("In Osborne v. Ohio*,* 495 U.S. 103 (1990), the Court held in the criminal context that a state court may adopt a narrow construction of a statute in response to an overbreadth challenge and then apply the statute, as construed, to past conduct.") See also People of City of Grand Rapids v. Gasper, 314 Mich. App. 528, 536, 888 N.W.2d 116, 120 (2016) Ordinances are presumed to be constitutional "and will be so construed unless the party challenging the statute clearly establishes its unconstitutionality." *Hancock,* 236 Mich.App. at 199, 600 N.W.2d 380. Further, we may apply a narrowing construction to an ordinance if doing so would render it constitutional without harming the intent of the legislative body. See *People v. F. P. Books & News, Inc. (On Remand),* 210 Mich.App. 205, 209, 533 N.W.2d 362 (1995).
MN **85**	Y	Minnesota employs artificial narrowing constructions from time to time. The key case is Matter of Welfare of S. L. J., 263 N.W.2d 412, 419 (Minn. 1978) ("Since the statute does not satisfy the definition of "fighting words," it is unconstitutional on its

		face. Although [the statute] clearly contemplates punishment for speech that is protected under the First and Fourteenth Amendments, we can uphold its constitutionality by construing it narrowly to refer only to "fighting words." Having narrowly construed [the statute], we must now determine whether the words "fuck you pigs" were "fighting words.") (citations omitted). The S.L.J. prerogative to craft an artificial narrowing construction has been cited as recently as 2017. See State v. Benjamin, No. A16-0104, 2017 WL 163715, at *5 (Minn. Ct. App. Jan. 17, 2017) ("We resolve the case before us today by assuming without deciding that the *S.L.J.* narrowing construction *does* apply to expressive conduct because, even on that assumption, a disorderly-conduct conviction may be based on conduct that has no "inextricable link" to a protected message.") See also State v. Hensel, 874 N.W.2d 245, 254–55 (Minn. Ct. App. 2016) (recognizing the prerogative of the court to adopt a narrowing construction, but ultimately refusing to do so because it was not necessary in this particular case). "We are cognizant that some courts, including the district court in this case, have concluded that statutes proscribing disturbances of meetings are overly broad and must be accorded a narrowing construction to survive constitutional scrutiny." Id. On occasion, Minnesota does apply the overbreadth doctrine in good faith. See, e.g., State v. Muccio, 890 N.W.2d 914, 919–20 (Minn. 2017) ("We begin by interpreting the statute to determine its meaning. We then address whether the statute prohibits speech that the First Amendment protects. We conclude that the statute is overbroad because it regulates some protected speech, and so we analyze whether that overbreadth is substantial. For the reasons discussed below, we hold that the statute's regulation of protected speech is not substantial and therefore the statute does not violate the First Amendment on its face.")
MS **31**	N	Mississippi refuses to adopt artificial narrowing constructions of overbroad statutes. This rule dates to 1976, when it decided ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123 (Miss. 1976) (holding that a "statute prohibiting any motion picture establishment owner or operator from exhibiting any obscene, indecent or immoral picture" was overbroad, and refusing to 'authoritatively construe' the statute so as to confine its applicability within constitutional limits.") ABC Interstate Theaters remains good law today. See, e.g., Richmond v. City of Corinth, 816 So. 2d 373, 378–79 (Miss. 2002) ("[A] common sense reading of the statute adequately provides an individual of common intelligence an understanding and notice of what conduct is acceptable or prohibited.") (citing ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123 (Miss. 1976)).
MO **31**	Y	Missouri does rewrite statutes on occasion via artificial narrowing constructions, often under the guise of following legislative intent or the plain meaning of the text. Like other states, it uses the escape device of presuming that the legislature intended to enact a law that was not unconstitutional. See, e.g., Planned Parenthood of Kansas v. Nixon, No. 0516-CV25949, 2005 WL 3707407, at *4 (Mo. Cir. Ct. Nov. 18, 2005). In that case, the court noted that "[a]lthough Planned Parenthood argues that section 188.250 restricts protected speech, it need not be invalidated in its entirety to pass constitutional muster. Instead, it may be upheld by a narrowing construction of the statute's terms "aid" and "assist" to exclude providing information or counseling…A narrowing construction is proper here as all statutes should be upheld to the fullest extent possible…It is presumed that the General Assembly would not pass laws in violation of the constitution…This Court gives the phrase "aid or assist" in section 188.250.1 a narrowed construction so as not to include speech or expressive conduct. As so construed, it does not bar providing information or counseling and does not violate the First Amendment. This narrowing construction is consistent with this Court's understanding that the legislature would seek to regulate

		conduct even if regulation of speech and expressive conduct is barred by the First Amendment. See also National Solid Waste Mgmt. Ass'n v. Dir. of Dept. of Natural Resources, 964 S.W.2d 818, 822 (Mo. banc 1998) and Missouri Ass'n of Club Executives, Inc. v. State, 208 S.W.3d 885, 888 (Mo. banc 2006)). But see State v. Helgoth, 691 S.W.2d 281, 287 (Mo. 1985) (finding a child pornography overbroad and refusing to artificially construe the language). "Because the challenged language, under the construction given to it by the principal opinion, cannot be considered within the realm of child pornography, the state may not regulate the activity consistent with the First Amendment. If the state may not prohibit the dissemination of nonpornographic material, then it may not indirectly stop the dissemination by prohibiting production. It is not enough to say, as the principal opinion does, that "the statute is distinctly conduct, as contrasted with speech," and that there is a distinction between production and dissemination…Such reasoning would have allowed a statute prohibiting James Joyce from writing *Ulysses* or prohibiting the filming of "Last Tango In Paris" or prohibiting Raphael from painting his madonnas with child." Id.
MT **19**	Y	Minnesota rewrites overbroad statutes. See State v. Lance, 222 Mont. 92, 101, 721 P.2d 1258, 1264 (1986) ("Although the statute uses the words "physical confinement or restraint," we construe the word "restraint" to mean a "physical" restraint. The statute does not punish any threat to subject another to some form of mental or psychological restraint. Only threats to subject another to a physical confinement or a physical restraint are punishable.") See also State v. Lilburn, 265 Mont. 258, 875 P.2d 1036, 1040–41 (1994) (finding that Montana's hunter harassment statute was overbroad, but then artificially construing phrase "intent to dissuade" as content-neutral to avoid overbreadth).
NE **17**	N	Nebraska creates narrowing constructions for overbroad statutes, but only when it is reasonable to do so; it does not engage in judicial rewriting. See State v. Kass, 281 Neb. 892, 902–03, 799 N.W.2d 680, 690–91 (2011) ("A statute is susceptible to a narrowing construction when the text or another source of legislative intent identifies a clear line that a court can draw.") In Kass, the court narrowed the language of a child abuse statute, but only after closely examining the legislative history and cross-referencing various provisions of the statute to reach a reasonable conclusion. Id. State v. Hookstra, 638 N.W.2d 829, 837 (Neb. 2002) ("We conclude that the language of the ordinance is susceptible to construction and that the narrowing construction applied by the Court of Appeals was reasonable and appropriate.") (citing See also State v. Edmunds, 211 Neb. 380, 318 N.W.2d 859 (1982); *State v. Hicks,* 225 Neb. 322, 404 N.W.2d 923 (1987); *State v. Evans,* 215 Neb. 433, 338 N.W.2d 788 (1983)). Nebraska courts also frequently cite to U.S. Supreme Court cases as binding or persuasive in the overbreadth context. In fact, the Nebraska Supreme Court has directly compared its own standard for narrowing overbroad statutes to the (very strict) federal standard of "reasonable susceptibility to a narrowing construction." See State v. Kass, 281 Neb. 892, 902–03, 799 N.W.2d 680, 690–91 (2011) (citing the U.S. Supreme Court case of Reno v. Am. Civ. Liberties Union, 521 U.S. 844 (1997) as using a stringent standard similar to its own, with regard to how artificial narrowing constructions should be avoided).
NV	N	In the overbreadth context, Nevada follows the rule that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

26		State v. Castaneda, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010). Nevada appears to follow the reasonable requirement in good faith. See Scott v. First Jud. Dist. Ct., 363 P.3d 1159, 1166 (Nev. 2015) (referencing U.S. Supreme Court precedent as persuasive in concluding that a municipal ordinance prohibiting certain conduct towards police officers was overbroad, and ignoring a plea from a dissenting justice that a limiting construction should be adopted) (citing City of Houston, Texas v. Hill, 482 U.S. 451 (2010) and MGM Mirage v. Nev. Ins. Guar. Ass'n, 209 P.3d 766, 769 (Nev. 2009)). See also Star Ins. Co. v. Neighbors, 138 P.3d 507, 510 (Nev. 2006) ("If a statute is ambiguous, meaning that it is susceptible to differing reasonable interpretations, the statute should be construed consistently with what reason and public policy would indicate the legislature intended.")
NH **21**	Y	State v. Theriault, 960 A.2d 687, 689 (N.H. 2008). ("If a statute is found to be substantially overbroad, the statute must be invalidated unless the court can supply a limiting construction or partial invalidation that narrows the scope of the statute to constitutionally acceptable applications. If, on the other hand, a statute is not substantially overbroad, then whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.) See also Opinion of the Justices, 128 N.H. 46, 509 A.2d 749 (1986) (holding that a proposed hunter harassment bill was overbroad because "critical terms" of the bill were not properly defined)
NJ **68**	Y	New Jersey rewrites overbroad statutes and actually has a nickname for this process: "judicial surgery." Hamilton Amusement Ctr. v. Verniero, 716 A.2d 1137, 1149–50 (1998) (noting that in cases of overbreadth and vagueness, the court "has the power to engage in 'judicial surgery,' construing the statute in a constitutional way," including the power "to excise a constitutional defect or engraft a needed meaning."); see also Chamber of Commerce v. Election Law Enforcement Comm'n, 411 A.2d 168 (1980) (rewriting a statute regulating election financing reporting to eliminate overbreadth); Borough of Collingswood v. Ringgold, 331 A.2d 262 (1975) (rewriting ordinance requiring prior registration of canvassers and solicitors to door-to-door activity on private property) See also State v. May, 362 N.J. Super. 572, 829 A.2d 1106 (App. Div. 2003) (artificially construing a child pornography statute to avoid overbreadth, by limiting the language as encompassing only child pornography depicting real children."); Binkowski v. State, 322 N.J. Super. 359, 378–79, 731 A.2d 64, 74 (App. Div. 1999) ("By narrowing construction of the statute in this way we avoid the possibility of ensnaring a substantial amount of constitutionally protected conduct within the scope of the statute.")
NM **22**	N	New Mexico does not engage in judicial rewriting of overbroad statutes. Bustamante v. De Baca, 895 P.2d 261, 264 (N.M. 1995) ("In construing a statute, this Court considers the statute in its entirety, giving the words their ordinary and usual meaning, and determines whether a reasonable and practical construction can be given to the language of the statute…When a statute's language is unclear, we strive to give it a sensible construction and, if possible, uphold the statute.") (citing Segotta, 672 P.2d at 1131; James M., 806 P.2d at 1067); see also State v. Ebert, 263 P.3d 918, 923 (2011) (refusing to write in a new element to a criminal statute, but concluding that this was not necessary to uphold the law anyway).

NY **87**	N	New York has one of the strictest and most faithful approaches to overbreadth in the union. See People v. Pierre-Louis, 34 Misc. 3d 703, 710, 927 N.Y.S.2d 592, 597 (Dist. Ct. 2011) ("[T]he saving construction must be one which the court "may reasonably find implicit" in the words used by the Legislature.") People v. Marquan M., 19 N.E.3d 480, 487 (N.Y. 2014) (noting that if the court adopted a narrowing construction, "the statutory language would signify one thing but, as a matter of judicial decision, would stand for something entirely different. Under those circumstances, persons of ordinary intelligence reading [the law] could not know what it actually meant") (citing *People v. Dietze,* 549 N.E.2d 1166). The court added: "We conclude that it is not a permissible use of judicial authority for us to employ the severance doctrine to the extent suggested by the County or the dissent. It is possible to sever the portion of the cyberbullying law that applies to adults and other entities because this would require a simple deletion of the phrase "or person" from the definition of the offense. But doing so would not cure all of the law's constitutional ills. People v. Marquan M., 24 N.Y.3d 1, 10, 19 N.E.3d 480, 487 (2014). People v. Tansey, 593 N.Y.S.2d 426, 437 (Sup. Ct. 1992). "A sound application of these principles requires that I examine whether section 250.20 is susceptible of a constitutionally sound construction; one that is implicit in its language and manifest purpose. In this regard, requiring that the disclosures which the statute proscribes to be narrowly read so that the phrase "discloses such information" targets only disclosures made in order to obstruct, impede, or prevent such interception, would be consistent with the manifest purpose of the statute and would maintain its effectiveness." Id. People v. Aboaf, 187 Misc. 2d 173, 184, 721 N.Y.S.2d 725, 733–34 (Crim. Ct. 2001) ("Moreover, the statute is capable of a reasonable limiting construction…As its history indicates, the anti-mask law was enacted originally to prohibit wearing masks in order to prevent identification during lawless activity. Construing section 240.35[4] so as to prohibit the wearing of masks "for no legitimate purpose" is consistent with this purpose.")
NC **31**	N	The current doctrine in North Carolina, which prohibits judicial rewriting of overbroad statutes, can be traced to a 1987 case, Cinema I Video, Inc. v. Thornburg, 351 S.E.2d 305, 331 (N.C. 1986). "The danger of allowing a local censor to impose his or her standard on the public is apparent. So, in responding to the felt necessities of the time and the stated or perceived needs of the public, the legislature must draft legislation whose tentacles of proscription do not exceed constitutional commands. Neither the trial court nor this Court should graft onto the challenged statutes judicial limitations that will not be apparent to the citizenry. After all, citizens should regulate their behavior according to the plain meaning of precisely drafted statutes, not according to their guesses about saving judicial construction. Id. Thornburg remains good law today, and this particular proposition is cited frequently in overbreadth cases. See State v. Fletcher, 782 S.E.2d 926 (N.C. Ct. App. 2016); State v. Howell, 609 S.E.2d 417, 422 (N.C. App. 2005) (finding a child obscenity statute constitutional by distinguishing the present case from Supreme Court precedent, rather than invoke a prerogative to craft an artificial narrowing construction) (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)).
ND **11**	N	As one of the smallest states in the union, North Dakota's body of overbreadth case law is quite small. To date, that state's courts have not engaged in any rewriting overbroad statutes. See State v. Backlund, 672 N.W.2d 431, 435 (N.D. 2003) (reasonably construing a child abuse statute to include a specific intent requirement to

		save it from overbreadth, based on a close examination of legislative history and cross-referencing other portions of the statute).
OH **224**	Y	Ohio rewrites statutes to avoid findings of overbreadth. See State ex rel. The Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Winkler, 777 N.E.2d 320, 322 (Ohio 2002) ("We agree that unless given a saving construction, R.C. 2953.52 is not sufficiently tailored to protect the public's right of access to court proceedings guaranteed not only by the First Amendment but also by Section 11, Article I, and Section 16, Article I, of the Ohio Constitution (the Ohio "Open Courts Clause")…Rather than strike down the statute, however, we conclude that R.C.2953.52 is amenable to a saving construction that protects the public's right of access as well as the government's needs and Roach's privacy interests. Such a construction requires that the trial court weigh all three factors and consider, particularly in a case of public importance, whether the articulated privacy interests of the person seeking expungement are sufficient to deny the public's presumptive right of access to court proceedings and records."); but see State v. Butterfield, 874 P.2d 1339, 1348 (Ohio 1994) (refusing to adopt a narrowing construction).
OK **11**	N	Oklahoma does not artificially construe statutes to save them from overbreadth. This rule dates back as to a 1974 that is still cited as good law today. Conchito v. City of Tulsa, 521 P.2d 1384, 1388 (Okla. Crim. App. 1974) ("In spite of the strong interest in construing the Tulsa ordinance to preserve its validity, we are unable to accept the judicial gloss suggested by the city for two reasons. First, the plain and precise language of the provision makes it impossible to narrow its overly broad scope to the prohibition of 'fighting words' without exceeding the limits of the judicial reshaping of legislative enactments by substantially rewriting the ordinance. We do not confuse the power to construe with the power to legislate.") Gerhart v. State, 360 P.3d 1194, 1198 (Okla. Crim. App. 2015). "In determining the applicability of this statute to Appellant, we are guided by certain rules of statutory construction. These include construing the statute according to the plain and ordinary meaning of its language with the fundamental principle being to ascertain and give effect to the intention of the Legislature as expressed in the statute…When our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance, but must not distort or embellish their plain meaning so that the law may reach them." Id. (internal quotation marks omitted) See also Edmondson v. Pearce, 91 P.3d 605, 639–40 (Okla. 2004), as corrected (July 28, 2004) ("Again, respondents seek to have us construe individual statutory words in isolation, while ignoring related plain language of the provision. To construe § 1692.1(B) as *640 argued by respondents is inconsistent with this Court's longstanding rule of statutory interpretation, which provides "[i]n the interpretation of statutes, courts do not limit their consideration to a single word or phrase in isolation to attempt to determine their meaning, but construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature's intention and will, and attempt to avoid unnatural and absurd consequences.") Conchito v. City of Tulsa, 521 P.2d 1384, 1389 (Okla. Crim. App. 1974) (refusing to artificially construe an ordinance so that it prohibited fighting words).
OR **70**	N	Oregon avoids artificial narrowing constructions of overbroad statutes. State v. Robertson, 293 Or. 402, 411–12, 649 P.2d 569, 575–76 (1982) ("But when such a

		saving construction cannot be attributed to the legislature with reasonable fidelity to the legislature's words and apparent intent, the statute is invalid as enacted, and it is immaterial whether the particular case in which it is challenged would be immune from a validly drawn law.) This proposition from Robertson remains cited as good law today. See State v. Moyer, 230 P.3d 7 (2010); Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782, 793 (Or. App. 2011)
PA **73**	N	Pennsylvania does not artificially narrow statutes via saving constructions. See, e.g., Com. v. Hart, 28 A.3d 898, 911 (Pa. 2011) ("We agree with the Commonwealth that there is no express requirement for a conviction under Section 2910 that the Commonwealth also separately prove that a person who attempts to lure a child into an automobile did so with the purpose of harming the child. Hence, we will not rewrite this statute to supply such an extra component to the Commonwealth's burden of proof…[I]t is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.") (citing Com. v. Wright, 14 A.3d 798, 814 (Pa. 2011) and Commonwealth v. Rieck Investment Corp., 419 Pa. 52, 59–60, 213 A.2d 277, 282 (1965)) See also Com. v. Omar, 981 A.2d 179, 190 (Pa. 2009) (Castille, C.J., concurring) ("Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.") (citation and internal quotation marks omitted).
RI **16**	Y	Rhode Island rewrites statutes to save them from overbreadth. See, e.g., State v. Authelet, 385 A.2d 642 (R.I. 1978) (saving an overbroad statute prohibiting profane swearing by limiting its language to include only fighting words). This proposition was cited as recently as 2016. See State v. Matthews, 111 A.3d 390, 400 (R.I. 2015))
SC **14**	N	South Carolina consistently invokes its prerogative to narrowly construe overbroad statutes, but to date it has not concocted an artificial saving construction. Disabato v. S.C. Ass'n of Sch. Adm'rs, 746 S.E.2d 329, 333 (S.C. 2013) ("The Court presumes that all statutes are constitutional and will, if possible, construe a statute so as to render it constitutional.") (citing Davis v. Cnty. of Greenville, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)). See also Curtis v. State, 549 S.E.2d 591, 597 (S.C. 2001) (noting that "a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt")
SD **16**	Y	As a small state, South Dakota's body of overbreadth case law is small. But it has rewritten an overbroad statute on at least one occasion. See State v. Martin, 674 N.W.2d 291, 300 (S.D. 2003) (artificially construing a child pornography statute so that it did not cover "virtual" child pornography and only actual children). Cf. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
TN **43**	Y	Tennessee has engaged in judicial rewriting of overbroad statutes, though it has not done so recently. Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 528 (Tenn. 1993) (rewriting a child pornography statute so that it only applied "those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17–year–old minor."). Cf. State v. Bonds, 502 S.W.3d 118, 161 (Tenn. Crim. App. 2016), ("Although we sympathize with the State's argument because it is amply apparent that the underlying offenses in this case were gang-related, we refuse to read a nexus requirement into the statute to eliminate its constitutional shortcomings. We respect the General Assembly's efforts to combat the scourge of

		criminal gang activity in our state, but it is not within our authority to rewrite this statute.")
TX **242**	N	The Texas Court of Criminal Appeals (the court of last resort for all criminal matters in Texas) does not adopt artificial narrowing constructions to save overbroad statutes. See Ex parte Thompson, 442 S.W.3d 325, 339–40 (Tex. Crim. App. 2014). "The federal constitution affords the states broad authority to narrowly construe a statute to avoid a constitutional violation. We have held that Texas courts have a duty to employ a reasonable narrowing construction for that purpose. But this Court and the Supreme Court have both held that a narrowing construction should be employed only if the statute is readily susceptible to one. We may not rewrite a statute that is not readily subject to a narrowing construction because such a rewriting constitutes a serious invasion of the legislative domain and would sharply diminish the legislature's incentive to draft a narrowly tailored statute in the first place. We have indicated that a law "is not susceptible to a narrowing construction when its meaning is unambiguous." This statement accords with our longstanding *340 practice of giving effect to the plain meaning of a statute unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended. It also accords with our more recent statements that a statute is ambiguous if the statutory language "is reasonably susceptible to more than one understanding." Id. (citing Olvera v. State, 806 S.W.2d 546, 553 (Tex.Crim.App.1991); Long v. State, 931 S.W.2d 285, 290 n. 4 (Tex.Crim.App.1996).
UT **27**	N	Utah does not rewrite overbroad statutes. See Logan City v. Huber, 786 P.2d 1372, 1377 (Utah App. 1990). "We are well aware of our responsibility to construe statutes and ordinances so as to carry out legislative intent while avoiding constitutional defects….However, we will not rewrite a statute or ignore its plain language in order to reach a constitutional construction...In light of the municipality's use of the expansive term "abusive language" and its express intent to penalize speech that merely annoys, inconveniences, or alarms persons who may not even be its targets, unrestricted by the addressee's likely response, we decline to narrow the scope of Logan City Ordinance 12–8–9(2)(D) under the guise of judicial construction….It is for the municipality, not for this court, to fashion a narrowly drawn ordinance that criminalizes unprotected speech as deemed necessary by city officials." Id. Provo City Corp. v. Willden, 768 P.2d 455, 458 (Utah 1989) (refusing to rewrite an overbroad statute.) "This Court seeks to construe laws so as to carry out the legislative intent while avoiding constitutional conflicts…However, in seeking a constitutional construction, we will not rewrite a statute or ignore its plain intent." Id.
VT **27**	N	Vermont crafts narrowing constructions faithfully, consistent with either legislative intent or the plain meaning of the statute. See, e.g., State v. Green Mountain Future, 86 A.3d 981, 996–97 (Vt. 2013). "Even when adopting a narrowing construction, we must engage in statutory construction to be sure we are not deviating from the intent of the Legislature…A primary method of narrowing a statute by appropriate interpretation is to construe it to create an objective standard. We have done that in cases in which we faced overbreath and vagueness challenges...We do not deviate from the intent of the Legislature by construing the statute before us to create objective standards." Id. See also State v. Read, 680 A.2d 944, 948 (Vt. 1996); State v. Albarelli, 19 A.3d 130 (Vt. 2011); State v. Colby, 972 A.2d 197 (Vt. 2009); State v. Allcock, 857 A.2d 287 (Vt. 2004).
VA **48**	N	Virginia does not rewrite overbroad statutes. See Jaynes v. Com., 666 S.E.2d 303, 314 (Va. 2008) "[C]onstruing statutes to cure constitutional deficiencies is allowed only when such construction is reasonable. Virginia Soc'y for Human Life v. Caldwell, 500 S.E.2d

		814, 816–17 (1998). The construction urged by the Commonwealth is not a reasonable construction of the statute. Nothing in the statute suggests the limited applications advanced by the Commonwealth. If we adopted the Commonwealth's suggested construction we would be rewriting Code § 18.2–152.3:1 in a material and substantive way. Such a task lies within the province of the General Assembly, not the courts. See also Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning."); Virginia Soc. for Human Life, Inc. v. Caldwell, 500 S.E.2d 814, 816 (Va. 1998) ("[U]nder the broader rules of statutory construction available in this Court we "may impose a narrowing construction upon these statutes [only] if [we determine] that such a construction would be correct." In fact, Virginia courts also cite Supreme Court precedent as persuasive (if not binding) in support of this proposition. See Jaynes v. Com., 666 S.E.2d 303, 314 (Va. 2008) ("A statute cannot be rewritten to bring it within constitutional requirements") (citing Reno v. ACLU, 521 U.S. 844, 884–85 & nn. 49–50, (1997); Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)).
WA **230**	Y	Washington crafts artificial narrowing constructions of overbroad statutes. See State v. Johnston, 127 P.3d 707, 711–12 (2006) ("Here, the statute reaches a substantial amount of protected speech. For example, threats made in jest, or that constitute political statements or advocacy, would be proscribed unless the statute is limited to true threats. Accordingly, the statute must be limited to apply to only true threats.") (Citing Kilburn, 151 84 P.3d 1215; Williams, 26 P.3d 890). State v. Pauling, 149 Wash. 2d 381, 391, 69 P.3d 331, 336 (2003). "Here, limiting extortion to threats lacking a nexus between the threat and its objective would restrict application of the law to "inherently wrongful" threats. We therefore disagree with the Court of Appeals and hold that it is unnecessary to strike former RCW 9A.56.130 because we may impose a limiting construction in the form of a requirement that there be a "lack of nexus" that limits its application to only unprotected speech." Interestingly enough, in some cases Washington cites Supreme Court precedent as persuasive (if not outright binding) in overbreadth cases. State v. Strong, 272 P.3d 281, 285 (Wash. App. Div. 3 2012) "But adopting a limiting construction is only appropriate if the statute is readily susceptible to the limiting construction; rewriting a law to conform it to constitutional requirements would constitute a serious invasion of the *213 legislative domain.") (citing *Stevens,* 130 S.Ct. at 1592, *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 884 (1997); *United States v. Nat'l Treasury Emps. Union,* 513 U.S. 454 (1995)).
WV **6**	N	West Virginia does not rewrite overbroad statutes. See Fisher v. City of Charleston, 425 S.E.2d 194, 201–02 (W. Va. 1992) ("Accordingly, we grant the petition for a writ of mandamus and rule that the City of Charleston Zoning Ordinances §§ 18-1-1 and 21-10 are unconstitutionally overbroad in forbidding temporary candidate or political signs, and that the Zoning Board of Appeals erred in denying the petitioner's application. It is up to the Charleston City Council to rewrite a narrowly tailored zoning ordinance dealing with temporary political or candidate signs, in accordance with the provisions set forth in this opinion.")
WI	N	Wisconsin crafts narrowing constructions of overbroad statutes, but in a faithful way that cannot be described as "rewriting." See State v. Bagley, 474 N.W.2d 761 (Wisc.

98		Ct.App.1991) (holding Wisconsin's hunter harassment statute constitutional on facial overbreadth challenge). "[A] court can by a process of judicial construction apply a statute, which appears to sweep too widely on its face, to non-speech related conduct. First, we look to the language of the statute to determine whether on its face it applies to conduct protected by the first amendment. Id. See also City of Milwaukee v. Wroten, 160 Wis. 2d 207, 227–28, 466 N.W.2d 861, 868–69 (1991) ("Additionally, there are cases where an ordinance may on its face appear to sweep too widely, but by a process of judicial construction, a state court might conclude that, on the basis of legislative history and examination of the verbiage, the enactment can be applied constitutionally to nonspeech-related conduct. We know nothing of the legislative history, the particular facts, or societal problems that impelled the passage of the Milwaukee ordinance. We must therefore appraise this ordinance[13] on the basis of its language alone.")
WY **9**	Y	See Weaver v. Shaffer, 290 S.E.2d 244 (W. Va. 1980) (artificially construing a statute prohibiting political activities by civil servants so that it proscribed "only those political activities which the Supreme Court has decided…may constitutionally be proscribed." See also Id. at 253 (Caplan, J., dissenting) ("The Court here is not merely involved in interpreting or construing the statute. The majority clearly has undertaken the task of judicial legislating.") Justice Caplan went on to note that "[t]he legislature, not this Court, is entrusted with the duty of balancing the extent of the guarantees of freedom against the need for orderly management, integrity and competency of classified employees. A wholesale ban on *all* political activity does not meet the standards of precision necessary in drafting restrictions on First Amendment rights. There is no apparent attempt by the legislature to balance a deputy sheriff's right to participate in political expression against the government's interest in maintaining non-political law enforcement. The proper inquiry is a balancing of government needs and private rights. A rewriting of *W.Va.Code*, 1931, 7–14–15(a), as amended, must be based on a detailed determination of what dangers the State seeks to control and of what rights it must guarantee. Such task is a valid exercise of legislative, not judicial, authority. But see In re Neely, 390 P.3d 728, 756 (Wyo. 2017) ("The legislature, not this Court, wrote § 20-1-106(a) and determines who can perform marriages and whether any particular class of officiant is required to do so. It is not appropriate for this Court to attempt to re-write this statute. (citing Horning v. Penrose Plumbing & Heating, Inc., 2014 WY 133, ¶ 18, 336 P.3d 151, 155 (Wyo. 2014) ("We are not at liberty to rewrite a statute under the guise of statutory interpretation or impose a meaning beyond its unambiguous language.") Neely is not an overbreadth case, so it is not safe to say that the Court

V. APPENDIX B: THE RELATIONSHIP BETWEEN JUDICIAL REWRITING AND THE FREQUENCY OF OVERBREADTH CASES

In this Appendix, I present some important empirical findings my 50-state survey on state court narrowing of overbroad statutes. The point of this section was is to figure out whether state courts that rewrite overbroad statutes hear more overbreadth challenges than states that do not rewrite. Put another way, the point was to learn whether any given overbreadth case is more likely to be heard in a state whose courts rewrite statutes versus a state whose courts do not.

To compile this data, I searched the terms ["First Amendment" AND "Overbr!"] across all 50 states since 1992 (the year after Osborne v. Ohio was decided, since the point is to figure out whether that decision has led to legislatures drafting intentionally overbroad legislation under the presumption that the courts will bail them out if need be). I then identified the number of cases in each state, as provided by Westlaw. While this methodology is certainly not precise in that it also captured cases that merely mention the overbreadth doctrine, the presumption is that these imperfections should be relatively smooth across all fifty states.

After counting the number of cases in each state, I then pegged that number to the population in each state according to the 2010 census (again, not precise in that the data goes as back far as 1992, but with the presumption that any imperfections should be relatively minor and smoothed evenly across the fifty states). I called this the "Weighted Average." (i.e. total number of cases divided by total state population). I also compiled a non-weighted average, which does not take state population into account (i.e. [number of cases/population] for each state, added together, divided by the number of states). For that category, however, I eliminated states whose population was under one million, under the presumption that data from the smallest states was more likely to be anomalous.

I present my findings below, ranked first according to whether the state rewrites overbroad statutes, and then according to population.

State	Rewrites Statutes?	Overbreadth Factor (Cases per million residents)	Number of Cases	Population (millions, 2010)
.California	Y	15.9	592	37.3
.Florida	Y	7.0	131	18.8
.Illinois	Y	8.5	109	12.8
.Ohio	Y	19.4	224	11.5
.Michigan	Y	19.6	194	9.9
.New Jersey	Y	7.7	68	8.8
.Washington	Y	34.2	230	6.7
.Massachusetts	Y	10.5	69	6.5
.Indiana	Y	6.5	42	6.5
.Tennessee	Y	6.8	43	6.3

.Missouri	Y	5.2	31	6.0
.Maryland	Y	6.1	35	5.8
.Minnesota	Y	16.0	85	5.3
.Alabama	Y	7.5	36	4.8
.Idaho	Y	15.9	25	1.6
.New Hampshire	Y	16.0	21	1.3
.Rhode Island	Y	15.2	16	1.1
.Montana	Y	19.2	19	1.0
.South Dakota	Y	19.7	16	0.8
.Alaska	Y	57.7	41	0.7
.Wyoming	Y	16.0	9	0.6
.Texas	N	9.6	242	25.1
.New York	N	4.5	87	19.4
.Pennsylvania	N	5.7	73	12.7
.Georgia	N	4.5	44	9.7
.North Carolina	N	3.3	31	9.5
.Virginia	N	6.0	48	8.0
.Arizona	N	8.0	51	6.4
.Wisconsin	N	17.2	98	5.7
.Colorado	N	11.1	56	5.0
.South Carolina	N	3.0	14	4.6
.Louisiana	N	7.5	34	4.5
.Kentucky	N	7.6	33	4.3
.Oregon	N	18.3	70	3.8
.Oklahoma	N	2.9	11	3.8
.Connecticut	N	19.3	69	3.6
.Iowa	N	12.8	39	3.0
.Mississippi	N	10.4	31	3.0
.Arkansas	N	6.2	18	2.9
.Kansas	N	16.1	46	2.9
.Utah	N	9.8	27	2.8
.Nevada	N	9.6	26	2.7
.New Mexico	N	10.7	22	2.1
.West Virginia	N	3.2	6	1.9
.Nebraska	N	9.3	17	1.8
.Hawaii	N	16.9	23	1.4
.Maine	N	4.5	6	1.3
.Delaware	N	24.5	22	0.9
.North Dakota	N	16.4	11	0.7
.Vermont	N	43.1	27	0.6

Y:N **Weighted Average**		13.2:8.3 (States that rewrite hear 59% more overbreadth challenges than states that do not)		
Y:N **Non-Weighted Average (minus states < 1M pop.)**		14.3:9.1 (States that rewrite hear 56% more overbreadth challenges than states that do not)		