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SEPARATION OF POWERS AND THE RULE OF LAW: ON THE ROLE OF JUDICIAL RESTRAINT IN "SECUR[ING] THE BLESSINGS OF LIBERTY"  

by George Anhang*

"[I]n the state of nature there are many things wanting: First, there wants an established, settled, known law . . .

"The legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and to decide the rights of the subject by promulgated, standing laws . . .

"[M]en united into societies that they may have . . . standing rules to bound [them], by which every one may know what is his. To this end it is that men give up all their natural power to the society which they enter into . . . that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature."  

INTRODUCTION

A member of society's certainty of what he or she can and cannot lawfully do is at the heart of the vision of liberty and the rule of law which American political and legal culture has borrowed from John Locke, among others. 3 This Note, building upon dicta in two recent U.S. Supreme Court First Amendment overbreadth doctrine cases — Massachusetts v. Oakes4 and Osborne v. Ohio5 — argues that separation of powers can be seen as a delicate incentive structure which although not insuring this certainty and predictability, helps to promote it.6

1 U.S. CONST. preamble.
3 See, e.g., Rawls, A Theory of Justice (1971); F. Hayek, The Road to Serfdom (1944). For convenience, this Note uses the term "rule of law theory" and this notion of certainty about what one can and cannot do lawfully interchangeably. It is recognized that this notion of certainty is only one element of rule of law theory as a whole. See Rawls, Id. at 235-41.
6 This Note does not purport to prove what the Framers' motives were for building separation of powers into the Constitution. Its main purpose is to show how separation of powers doctrine can be justified by Locke's notions of legal certainty and predictability in society. Nevertheless, the Framers were, by many accounts, deeply influenced by Locke's political philosophy. See, e.g., R. Smith, Liberalism and American
The Note does not attempt to show that this view of separation of powers is the driving force behind all Supreme Court separation of powers opinions. The Note is mainly interested in offering a coherent rationale for separation of powers doctrine. Nevertheless, the Note briefly discusses the two Supreme Court First Amendment overbreadth cases because they contain some of the elements of the view of separation of powers the Note sets forth, and consequently help flesh out the connection between separation of powers and the rule of law. These cases suggest that at least Justice Scalia and perhaps several other U.S. Supreme Court Justices might hold a view of separation of powers which in part resembles the one advanced in this Note.

Finally, the Note argues that there is a close link between its view of separation of powers and Ronald Dworkin's well known conception of the role of the judge. Although Dworkin has only rarely in his writings adverted to separation of powers, and has never attempted to articulate a broad theory of separation of powers, his rights thesis is remarkably consistent with the view of separation of powers set forth in this Note.

**CLASSIFYING SEPARATION OF POWERS ARGUMENTS**

This Note’s discussion of separation of powers relies to some extent upon a distinction between two types of separation of powers arguments. The first category of separation of powers arguments might be labelled *ex ante* arguments. These are arguments which attempt to justify dividing government power and responsibility into three more or less independent and autonomous spheres with more or less separate and distinct functions: an executive, a legislature and a judiciary. When we discuss these *ex ante* arguments, we are discussing the fundamental arguments the Framers of the Constitution might have considered in choosing a tripartite system of government over the British parliamentary system. *Ex ante* arguments are

*Constitutional Law* (1985). Thus, the Note’s discussion certainly raises the possibility that the Framers imported Locke’s special notion of liberty and its corresponding implicit theory of separation of powers into the Constitution, and that therefore, the account of separation of powers presented in the Note is consistent with the Framers’ intent.

Even so, the Note takes no particular position in this paper on what weight should be given to the Framers’ intent in constitutional interpretation, and specifically, on whether the account of separation of powers set forth in this Note should be embraced simply because it might accurately reflect the Framers’ intent. In any event, Locke’s notion of the rule of law may well be as vital today as it was two hundred years ago. Thus, although Locke’s notion of the rule of law is not entirely uncontroversial, one might hazard the claim that the account of separation of powers set forth in this Note is quite consistent with contemporary legal and constitutional culture, and the persuasiveness of this account, to whatever extent it possesses any, is not dependent on any normative assumptions about the significance of the Framers’ intent.


The Note will discuss later the separation of powers argument Dworkin refers to in “Hard Cases” for the need for judges to avoid making policy. Dworkin has apparently only published one work in which he discusses separation of powers, *See R. Dworkin, A Bill of Rights for Britain* (1990). That work, it seems, does not implicate the sort of theory purposed here, and this Note will not rely on it to any extent.
arguments for creating a world in which three more or less separate spheres of government power exist.

The second category of separation of powers argument might be labelled *ex post* arguments. These are arguments which attempt to justify degrees of independence of each of the three spheres given that the spheres already exist. *Ex post* arguments are arguments for why each sphere should remain as separate as possible assuming that we are already in a world in which three spheres exist. They are arguments that we are already in a world in which three spheres exist. They are arguments about how the relationships between the judiciary, the executive, and legislature should be organized; *ex ante* arguments are about whether we need a judiciary, executive, and legislature in the first place. *Ex ante* arguments are what architectonic political theorists like Locke are concerned with. *Ex post* arguments are what cases like *Bowsher v. Synar*\(^9\) are about.

**OVERBREADTH DOCTRINE CASES**

*Massachusetts v. Oakes*

In *Massachusetts v. Oakes*,\(^10\) the appellee took photographs of his fourteen-year-old stepdaughter clad only in brief bikini bottoms and was convicted under a Massachusetts criminal statute which prohibited adults from allowing a minor “to pose or be exhibited in a state of nudity.”\(^11\) The Massachusetts Supreme Judicial Court concluded that because the statute would make “a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool,”\(^12\) the statute was substantially overbroad under the First Amendment. Without deciding whether the statute could be applied constitutionally to Oakes, the Court reversed Oakes’ conviction. After the United States Supreme Court granted *certiorari*, the Massachusetts legislature, hoping to preempt the Court’s review of Oakes’ overbreadth challenge, narrowed the scope of the statute by amending the statute to require “lascivious intent.”

Justice O’Connor, writing for a plurality, remanded the case for the lower court to decide whether the old version of the statute could be applied constitutionally to Oakes.\(^13\) Justice O’Connor’s reasoning did not command the majority of the Court, however. Justice O’Connor found that the legislature had sufficiently narrowed the scope of the statute, and that Oakes’ overbreadth challenge was moot. Justice O’Connor’s analysis proceeded roughly as follows. Standing and *jus tertii* doctrine prohibit a party from challenging a statute on the ground that the statute may

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\(^13\) Oakes, 109 S.Ct. at 2638.
be unconstitutionally applied to others; a person normally has standing only to seek
to vindicate his own constitutional rights. First Amendment overbreadth doctrine
is an exception to this rule, however. Of course, a person convicted under a statute
restricting his right of expression has standing to challenge the statute on the grounds
that it violates his own First Amendment rights. But even if the statute may be
constitutionally applied to him, that person may still challenge the statute on the
grounds that it may be applied unconstitutionally to other persons, and is therefore
overbroad. If his challenge is successful, the Court may strike down the statute, and
overturn his conviction.\footnote{Thus, the overbreadth doctrine is said to provide an “overbreadth defense.”}

But, Justice O'Connor said, overbreadth analysis is only appropriate in cases
where the Court can use the analysis to achieve overbreadth analysis' underlying
rationale, to prevent the chilling of constitutionally protected expression.\footnote{Oakes, 109 S.Ct. at 2638.}
Because the Massachusetts legislature had successfully amended the statute so as to eliminate
the statute's overbreadth, the new statute would not chill constitutionally protected
expression. In turn, Oakes' overbreadth challenge of the old version of the statute
was moot, since the old version had been eliminated. Thus, Oakes was not entitled
to challenge the overbreadth of the old version of the statute, and the only remaining
issue for the lower court to dispose of was whether the old version could be applied
constitutionally to Oakes.

Justice Scalia, joined by four other Justices,\footnote{Justice Scalia filed a two-part opinion, concurring in the judgment in part and dissenting in part. Justice
Blackman, Justice Brennan, Justice Marshall, and Justice Stevens joined in the first part, in which Justice
Scalia disagreed with the Court's reasoning. Justice Blackmun joined in the second part, in which Justice
Scalia agreed with the Court's result. Justice Brennan filed a separate dissenting opinion, in which Justice
Marshall and Justice Stevens joined. Oakes, 109 S.Ct. at 2639.} agreed with Justice O'Connor
that overbreadth analysis is only appropriate in cases where the Court can use the
analysis to achieve overbreadth analysis' underlying purpose, to prevent the chilling
of constitutionally protected expression. But, Justice Scalia argued, the purpose
underlying overbreadth doctrine mandated that a subsequent amendment could not
deprive a person convicted under the old version of the statute of an overbreadth
defense.\footnote{Oakes, 109 S.Ct. at 2639.} Justice Scalia reasoned roughly as follows: the overbreadth doctrine's
purposes is to protect constitutionally protected expression from being chilled. It
accomplishes that purpose in two ways, the second of which Justice O'Connor failed
to sufficiently appreciate. One practical result of standing to argue that a statute may
be unconstitutionally applied to an other person's constitutional rights, coupled with
Supreme Court power to strike down an overbroad statute, is that the Court does not
have to wait until someone to whom the statute cannot be applied constitutionally
challenges the statute. Overbreadth doctrine, by giving a person standing to mount
a challenge for which he otherwise lacks standing, ensures that the Court will in some
cases have the opportunity to examine, and if necessary, strike down an overbroad
statute earlier than it would normally have. The earlier the overbreadth challenge is mounted, the earlier the statute might be struck down, and the earlier it is struck down, the less protected expression the statute will have chilled since its enactment.

But giving a third party standing to mount an overbreadth challenge serves merely to prevent the chilling of speech once an offending statute is either struck down by a court or hurriedly amended by a legislature anxious not to have its statute declared unconstitutional. Overbreadth analysis, Justice Scalia argued, is meant to serve a much greater deterrent function than the one Justice O’Connor recognizes. Overbreadth doctrine not only gives a third person standing; it permits a third party to use an overbreadth challenge as a defense against his conviction. Thus, if a statute is declared to be overbroad, the State loses a conviction which it would otherwise have had. In light of this, Justice Scalia reasoned, legislatures enact overbroad statutes at the cost of having the first person convicted under the statute who successfully mounts an overbreadth challenge go free. This cost deters legislatures from enacting overbroad statutes which chill protected expression in the first place. Thus, in Justice Scalia’s words, overbreadth doctrine

serves to protect constitutionally legitimate speech not merely ex post, that is, after the offending statute is enacted, but also ex ante, that is, when the legislature is contemplating what sort of statute to enact.

Justice O’Connor’s approach clearly undermines this “ex ante” deterrent function of overbreadth doctrine. As Justice Scalia concluded,

If the promulgation of overbroad laws affecting speech were cost free, as the plurality’s new doctrine would make it—that is, if no conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal—then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.

When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within the constitutional bounds, a substantial amount of legitimate speech would be “chilled” as a consequence of the rule the plurality would adopt.
Justice Scalia's view of overbreadth doctrine commanded the majority of the Court.22 Oakes can therefore fairly be said to stand for the holding that an overbreadth challenge is not mooted by subsequent pre-appeal narrowing of the challenged statute.23 But if the Supreme Court in Oakes prohibited state legislatures from eliminating a person's overbreadth defense by hastily curing overbroad laws, the Court effectively gave state courts license to do it in Osborne v. Ohio.24

Osborne v. Ohio

In Osborne,25 the appellant was found with four photographs of a nude male adolescent in sexually explicit positions and was convicted under an Ohio statute prohibiting the "possess[ion] or view[ing] of any material or performance that shows a minor who is not the person's child or ward in a state of nudity."26 The Ohio Supreme Court noted that the statute was potentially overbroad because mere nudity constitutes First Amendment expression.27 What Justice Brennan said in a dissenting opinion he filed in Oakes about the Massachusetts statute seemed to apply to the Ohio statute as well, namely, that the statute made possession of a reproduction, or even a postcard print of one of Degas', Renoir's, or Donatello's paintings of nude children a criminal offense.28 And as Osborne's trial counsel suggested, the Ohio statute as written probably even prohibited adults from keeping baby pictures of themselves or other childhood photographs of themselves in which they appear nude.29

Rather than strike down the statute, however, the Ohio Supreme Court employed saving construction to cure the Ohio statute—just as the Massachusetts legislature had employed a saving amendment to cure the Massachusetts statute. The Ohio Supreme Court upheld Osborne's conviction, narrowly reading the statute as applying only to

[t]he possession or viewing of material or performance of a minor who

22 Justice Scalia found that Oakes' overbreadth challenge was not moot. However, in the second part of his opinion, he found that the Massachusetts statute was not overbroad even on its face. He therefore was able to join Justice O'Connor in rebuffing Oakes' overbreadth challenge and remanding the case to simply allow the lower court to decide whether the old version of the statute could be applied constitutionally to Oakes. Justice Brennan, in his dissenting opinion, found that the Massachusetts statute was overbroad on its face, and therefore would have overturned Oakes' conviction.

23 See Osborne v. Ohio, 110 S.Ct. 1691, at 1701 (1990) ("In Oakes ... five Justices agreed that the state legislature could not cure the potential overbreadth problem, through the subsequent legislative action."). Thus, even if a legislature amends a challenged statute before an appeal, the court will consider whether the earlier version of the statute was overbroad. If it finds that it was, the court will presumably not need to strike it down, since the statute will already have been amended. The court will, however, overturn the defendant's conviction.

24 Id. at 1691.
25 Id.
26 Id. at 1694.
28 109 S.Ct. at 2643-46 (Brennan, J., dissenting).
29 110 S.Ct. at 1704.
is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus of the genitals and where the person depicted is neither the child nor the ward of the person charged.\(^3\)

Osborne argued to the United States Supreme Court that the Ohio Supreme Court’s interpretation of the statute was still overbroad, and that even if it was not, the Court’s reasoning in *Oakes* compelled the Court to consider his overbreadth challenge to the statute as it was originally written. Osborne argued that *Oakes* not only stands for the proposition that an overbreadth defense may not be defeated by a post-conviction, pre-appeal amendment to the statute. Osborne contended that, *Oakes* stands for a similar but distinct proposition that, when faced with a potentially over inclusive statute, a court may not construe the statute to avoid overbreadth problems, and *then apply the statute, as construed, to past conduct*.\(^3\)

Justice White, writing for the Court,\(^3\) held that the statute, as construed by the state supreme court, “avoided penalizing persons for viewing or possessing innocuous photographs of naked children”\(^3\) and was, therefore, not overbroad. As for Osborne’s reliance on *Oakes*, Justice White admitted that if a legislature knows its mistakes can be cured without the significant cost of overturning a criminal conviction, and that if a legislature could as readily count on a court to adopt a saving construction as it could count on its own ability to amend the statute, a legislature would indeed have less incentive to draft narrowly tailored laws in the first place.\(^3\)

But ultimately, Justice White said, Osborne’s reliance on *Oakes* was misplaced.\(^3\) *Oakes* would only compel the result Osborne urged if legislatures could rely on courts’ adopting saving constructions. But legislatures can never predict accurately whether or not a court will be willing and able to adopt a saving construction. Consequently Justice White maintained, legislatures will proceed to enact statutes with the same degree of caution which the *Oakes* Court intended them to even if courts occasionally sidestep an overbreadth challenge to a statute by interpreting the statute narrowly.\(^3\) Thus, the Court refused to extend Justice Scalia’s reasoning in *Oakes* to saving constructions applied by courts to overbroad statutes, and upheld Osborne’s conviction.

**LOCKE’S RULE OF LAW DOCTRINE**

This Note shall now proceed to the argument that Locke’s notion of the rule

\(^3\) *State v. Young*, 37 Ohio St. 3d 249, 252, 525 N.E.2d 1363, 1368 (1988) (emphasis added).
\(^3\) 110 S.Ct. at 1701 (emphasis added).
\(^3\) Among the Justices joining the opinion of the Court was Justice Scalia, who dissented in part in *Oakes*.
\(^3\) Id. at 1698.
\(^3\) Id. at 1702.
\(^3\) Id.
of law, with its attendant emphasis on a person’s certainty about what the law requires, provides a more or less coherent justification of separation of powers and, conversely, that separation of powers is an instrument by which a society may increase the likelihood that each citizen will be certain as to what he may and may not lawfully do.

The Note’s main purpose in discussing Oakes and Osborne was to flesh out certain basic concepts which will be useful in the Note’s discussion of separation of powers. But this discussion may also be useful in shedding light on Locke’s notion of the rule of law since in some ways the curing of overly broad statutes is the paradigmatic illustration of the application of rule of law doctrine. Put differently, Locke’s notion of the rule of law and the ability of each citizen to predict what he or she will be punished for is in some sense First Amendment chilling doctrine writ large.37

Overbreadth doctrine is predicated on the concern that overly broad statutes will chill constitutionally protected behavior. There are no doubt several ways of accounting for our concern with chilling speech. Some of us believe that personal expression is intrinsically valuable. Others believe that personal expression is valuable because it contributes to the well-being of society. Still others believe that freedom of speech is the most important freedom because, as Justice Cardozo wrote, it is “the matrix, the indispensible condition of nearly every other form of freedom”.38 Under this second view, overbreadth doctrine is constitutional law. Under all three views, free expression is valued, and because chilling it (obviously) diminishes the amount of it, chilling is avoided.

Rule of law doctrine does not oppose overbreadth doctrine, it subsumes it. Under Locke’s rule of law doctrine, chilling free speech is bad for the same reason that chilling any legal behavior is bad: it is an infringement on personal liberty. Under rule of law doctrine, a vaguely or ambiguously phrased statute which restricts free expression is bad for the same reason any vaguely or ambiguously phrased statute is bad: it prevents a person from knowing with certainty what he may do lawfully and from predicting with accuracy what acts he will be punished for. It therefore undermines the very basis of consent to the rule of law, namely, the desire to be restrained by “established, settled, known law,” so that “every one may know what is his.”39

37This is not to say that overbreadth doctrine is the only manifestation of the rule of law doctrine in American law. Due process doctrine is held to require that a person have “fair warning” that a statutory proscription covers his conduct. 110 S.Ct. at 1703 n.16. Another form of the rule of law doctrine is the proscription against ex post facto laws in Article I, section 10 of the Constitution.
39While the use of the possessive pronoun “his” seems to suggest that Locke is concerned only that people know what material goods and land belong to them, in fact it refers both to what people “have” and to what people “may do.” As Rogers Smith notes, “[In his Second Treatise, Locke] makes clear that ‘liberty’... is part of the ‘property’ that governments are to secure.” R. Smith, supra note 4, at 26.
As Justice White observed in *Osborne*, state legislatures will not be deterred from drafting overly broad statutes regulating expression if they are certain that their mistakes will be cured by a statutory amendment. But since *Oakes* now prohibits such statutory amendments, state legislatures will not be deterred from drafting overly broad statutes regulating expression only if they are certain their mistakes will be cured by a saving construction.

There is a sliding scale of certainty a legislature can have with respect to the likelihood of a court adopting a saving construction in a particular case, which varies in direct proportion to the frequency the same court adopts saving constructions. The more often a court adopts a saving construction, the more certain a legislature will be at the time it enacts a statute that the statute will be cured, and in turn, the more likely the legislature will be to overlook vagueness and constitutional deficiencies when drafting the statute.

More important, what *Osborne* suggests about overly broad statutes regulating First Amendment activities is also true of many other statutes which might potentially run afoul of the Constitution. The more likely a court is to cure or separate an unconstitutional clause of the statute, the more likely it is that the legislature will be sloppy in drafting the statute, regardless of what activity the statute regulates.

As this Note suggested in the previous section, a statute which is drafted vaguely or ambiguously conflicts with rule of law doctrine. The less clear a statute, regardless of what activity it regulates, the more difficult it is for a person to regulate his behavior in accordance with that statute. Thus, whatever doctrine mandates or encourages a court to desist from constantly applying broad saving interpretations to statutes necessarily also serves the ends of the rule of law. Separation of powers is precisely such a doctrine.

It has long been recognized that many a saving construction or statutory severance carried out by courts in the name of legitimate statutory construction is in fact prohibited by separation of powers doctrine. The Supreme Court has noted that “introduc[ing] words of limitation” into an overbroad criminal statute can sometimes “substitute the judicial for the legislative department,” in effect creating a new law, not enforcing an old one. The Court has also cautioned against “perverting the [legislative] purpose of a “statute” in attempting to narrow overbroad laws.

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40 The Note will discuss the separation of legislative and executive power later.
41 The Note is here referring to the strand of separation of powers doctrine which prohibits courts from interfering excessively with legislative and policy functions.
42 United States v. Reese, 92 U.S. 214, 221 (1875).
Of course, saving construction and statutory severance are often well within the domain of power and discretion accorded the judiciary by separation of powers doctrine. This Note's limited claim is that courts which operate well within the domain of power and discretion accorded them by a fairly narrow notion of separation of powers will cure statutes by saving constructions and statutory severance less often than otherwise. In turn, under such a separation of powers regime, legislatures will be less certain than otherwise whether the court will cure carelessly drafted legislation, and they will be tempted to draft vague or ambiguously drafted statutes less often. In turn, people will be able to regulate their behavior in society with greater certainty. They will be more certain of what they may lawfully do. They will be able to better predict what acts they will be punished for. As a result, they will be, according to Locke, more free.

So far, this Note has modified and expanded Justice White's dicta in Osborne to explain the connection between separation of powers and the rule of law with respect to enactments by state legislatures as well as by Congress of statutes which implicate constitutional rights. This Note would now add that this theory also applies to the enactment of statutes even where the issue of the constitutionality of the statute is not present and the courts are not faced with the option of employing saving construction and severance. In other words, this theory applies—albeit in a slightly different way and with somewhat less strength—to the simple problem of the drafting and interpreting of vague and ambiguous statutes.

'constitutional interpretation,' on the one hand, and judge-made law on the other is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative purpose with respect to the issue at hand attenuates.

The separation of powers doctrine's dictum that each branch of government should exercise only its own power, and should not encroach on the power of the other branches, of course begs the question what each branch's sphere of power is. Hopefully, the Note's discussion does not beg this question. Presumably, it is relatively uncontroversial that some things which courts have passed off as saving construction and statutory severance was in fact policy-making and legislating.

That legislatures are prone to enacting poorly drafted statutes—and, therefore, that there is arguably a need to deter them from doing so—has been observed often. See, e.g., R. Keeton, Judging 150 (St. Paul, Minn.: West Publishing Co., 1990).

According to Locke, it is only man's capacity of knowing the "law of reason" which makes him capable of being a free man. Under this view, liberty is the capacity to direct ourselves in accordance with the law of reason. But the law of reason subsumes the laws made by the state, themselves made in accordance with the law of reason. Thus, liberty is in part the capacity to direct ourselves in accordance with the laws of the state. In turn, if we cannot direct ourselves in accordance with the laws of the state, because those laws fail to give us explicit and precisely drafted guidelines, we cannot be free.

The appositeness of extending the theory in this way is suggested by Justice Scalia's general position. Justice Scalia is not only very cautious about the role of courts in curing unconstitutional statutes, he also often expresses concern about the overly active role of courts in statutory interpretation. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with unenacted legislative intent."); Johnson v. Transportation Agency, 480 U.S. 616, 670 (1987) (Scalia, J., dissenting) (cautioning against "rewriting the statute it purported to construe"). For Justice Scalia, at least, it seems that the role of courts in curing unconstitutional statutes and their role in statutory interpretation implicate the very same concerns—e.g., the concern I discuss above about judicial policymaking, and the effect it has on the legislative process.
The more courts agree to engage in interpreting vague and ambiguous statutory language and filling in statutory interstitial gaps, the less external incentive legislatures have to draft narrowly tailored statutes. The less incentive the legislatures have to draft narrowly tailored statutes, the more badly drafted statutes they will enact, and the less certain people will be about what they may and may not lawfully do.

Admittedly, many instances of statutory construction are well within the domain of power and discretion accorded the judiciary by separation of powers doctrine. Indeed, it may well be impossible for even the most precise legislature to enact a statute which does not require some interpretation. And, admittedly, no legislature can anticipate every case which will arise. No statute can therefore possibly afford every person under all possible circumstances certainty with respect to how the law would be applied to him. Nevertheless, courts which operate well within the domain of power and discretion accorded them by a fairly narrow notion of separation of powers will be tempted to rewrite statutes less often. 49

The preceding separation of powers argument is an ex post separation of powers argument. Its claim is that once we are operating within a system in which the judicial power and the legislative power are divided, there is a reason generated by the very existence of these two separate branches for maintaining clear boundaries between the functions served by each branch. Specifically, the mere existence of a separate judiciary with tools at its disposal to cure unconstitutional statutes by saving construction or statutory severance, and to give substance to vague and ambiguous statutes by liberal interpretation and rewriting, is a constant temptation to the legislature to draft poorly drafted statutes. This temptation ill serves the need to regulate people’s behavior according to well-defined legal constraints. Separation of powers doctrine is a means of reducing the risk that the judiciary will be the legislature’s accomplice in frustrating the desire to be fairly certain about what is and is not legal. Separation of powers doctrine serves as a prophylactic which deters legislatures from enlisting the conspiratorial aid of courts in the first place by circumscribing what courts may do on a legislature’s behalf.

49 Thus, to be sure, Locke’s notion of the rule of law, and the principle that people are entitled to know what behavior is and is not legal is a legal ideal at best. However, it would probably be Locke’s view that it is an ideal worth striving after, and that even if people are not capable of achieving perfect certainty about what the law demands of them, surely the more certainty people have, the better. Thus, this Note’s claim is not that separation of powers helps produce perfectly precise laws which afford people absolute certainty about what they may and may not lawfully do, only that it increases the likelihood that more precise laws, and in turn, a greater degree of certainty, will be possible.

49 It may seem that by agreeing to interpret vague statutes, courts are in fact giving people fair notice of what is and is not legal. But this point misses the mark, since it remains that from the time the statute is enacted until the court interprets the statute, people may be chilled from behavior later determined to be legal under the court’s interpretation. This Note’s view is that separation of powers serves as a prophylactic to deter legislatures from enacting vague statutes in the first place, thereby reducing the need for courts to interpret
DWORKIN AS SEPARATION OF POWERS AND RULE OF LAW ADVOCATE

So far it has been suggested that separation of powers prohibits courts from adopting saving constructions in certain cases and from interpreting statutes broadly in other cases; and further, that because separation of powers constrains courts in this way, it ultimately gives legislatures incentive to draft statutes more clearly. One question this thesis raises is, where exactly does separation of powers doctrine draw the line between permissible and impermissible judicial statutory construction?

One of Ronald Dworkin’s thesis in Taking Rights Seriously50 can be construed as a decisive answer to this basic separation of powers problem. Dworkin’s thesis in a chapter entitled “Hard Cases” suggests that courts should adopt saving constructions and engage in expansive statutory interpretation only when curing the statute in a particular way assuredly conforms with a right implicitly or explicitly created by the statute rather than when curing the statute in a particular way merely helps further some previously articulated broad legislative policy. Dworkin’s thesis not only provides a way of drawing the line between what courts should and should not do. Where Dworkin draws the line seems to conform with the line-drawing required by a separation of powers doctrine and rule of law theory. Dworkin’s ban on judicial decisions based on policy would inhibit courts from engaging in much of the statutory saving, construction, and gap-filling they might otherwise engage in. Dworkin would allow courts to base decisions only on “principles.”51 “Principles” are rights and duties which the parties had all along, so to speak, and therefore, at least in theory, had notice of. Principles based on “principles” do not therefore frustrate a person’s certainty of what he may or may not lawfully do.

Indeed, one of Dworkin’s justifications for his thesis is a rule of law argument. Dworkin says, “if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the fact.”52 This is a persuasive argument “against a decision generated by policy” because “we all agree that it would be wrong to sacrifice the rights of an innocent man in the name of some new duty created after the event.”53

Thus, in Dworkin’s scheme, rule of law concerns give rise to the separation of powers notion that courts must not overstep their bounds and base their decision on policy judgments. Dworkin is mainly concerned with how the rule of law might be threatened when a court is confronted with a vague, ambiguous, or open-ended statute from the point of view of the individual plaintiff or defendant. That is to say, Dworkin is concerned simply with whether the loser in a case will have had notice

50 R. DWORKIN, supra note 5.
51 Id. at 84.
52 Id.
53 Id.
of the duty being enforced against him.

However, as discussed above, there is a more expansive rule of law concern that goes far beyond the liberty of the individual parties in a case before a court. A statute which needs to be interpreted, filled in or cured in some way in a particular case is likely to have confused many members of society about how the statute constrains them long before that particular case arises. For instance, some people will be chilled from engaging in activity which the statute, as later interpreted by a court, does not in fact prohibit. In response to this more expansive concern, this Note has suggested that the sort of restraints on policy judgments proposed by Dworkin serve the broad purpose of deterring legislatures from enacting ill-drafted statutes in the first place.

Dworkin states that while his concern about fairness to the parties in a particular case weighs against a decision generated by policy, it "has no force against an argument of principle."54 If one accepts that Dworkin’s fairness concern is at bottom of rule of law concern which can and should be made to fit with rule of law theory generally, then Dworkin’s statement here seems to be somewhat of an exaggeration. Rule of law theory posits that people are entitled to know what they may and may not lawfully do. Dworkin argues that when courts base their decision on policy, they necessarily abridge that entitlement because they are telling the parties something that the parties could not have known with certainty in advance. But this argument also applies to some decisions based on “principles.” Dworkin says that when a court bases a decision on the “principle,” the court is basing the decision on a pre-existing right, something the parties either had or didn’t have all along. But this only nominally weighs in favor of the rule of law’s fundamental concern. Dworkin admits that sometimes it is a herculean task for the court to determine what the rights of parties are in a particular case. Although a court through “herculean” efforts can ascertain the rights of parties in particular cases, it does not follow that the parties had any idea of what these rights were in advance. Thus, a

54 Id. at 85. It is possible that Dworkin’s “Hard Cases” thesis proves too much. Dworkin states that cases decided on the basis of principles do not run afoul of the usual objections to judicial originality because in such cases, the court is merely discovering or acknowledging rights which in some sense the parties had all along. Id. at 81 (“It remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.”) But if this is so, then every party who has lost in a case decided under a particular statute would surely have grounds for relitigating his claims if an appellate court “discovers” a new right in that statute in a later case.

The answer to this conundrum must be that the doctrine of finality would prohibit the retroactive application of even Dworkin’s discovered rights. This is not necessarily a satisfactory answer, however, since it is difficult to see why the doctrine of finality should prevent a person from litigating for the first time a newly discovered right which, according to Dworkin’s view, the person probably had at the time of the first litigation, but didn’t litigate because he didn’t know he had it. At the very least, Dworkin’s thesis puts an enormous amount of pressure on the notion of finality, and to the extent that Dworkin’s thesis is connected to rule of law theory, the rule of law theory puts an enormous amount of pressure on finality as well. It would be interesting to know how Dworkin himself would reconcile his views in “Hard Cases” with, say, Teague v. Lane, 109 S.Ct. 1060 (1989).
party found guilty or liable in a case decided on the basis of a "principle" may have
had no more notice that his conduct was unlawful than he would have had were the
case decided on the basis of policy.

There are several possible ways to answer these objections. Dworkin admits
that even when a decision is based on principle, the duty that is imposed on the losing
party may not have been "imposed upon him by explicit prior legislation," and that
to some extent, then, the court's decision takes the loser by surprise. But, Dworkin
adds, when a court decides that party has a duty, the court has in effect decided that
"on balance, the [other party's] argument is stronger," and in turn, that the court
"decided that the [other party] was, on balance, more justified in his expectations." 55

Another possible response to the objections is that while the party found guilty
or liable in a case decided on principle may not have known of his rights, he may be
expected under Locke's rule of law theory to have known them, and it is his fault,
and not the legislature's fault or the court's fault that he did not. Rule of law theory
might hold that a person is entitled to not have new policy sprung on him by the
courts. It may be a person's own responsibility to infer what his rights are from pre-
existing statutes (and the legislature merely has the related obligation to make these
statutes as unambiguous as possible). In other words, while a person may not have
actual notice of what his rights are, he is under constructive notice of what they are.
Just as Dworkin requires a judge to have herculean rational capacities to meet the
herculean task of discovering which rights prevail in a particular case, Locke may
assign each member of society the herculean task of discovering what his rights are,
and require him to have herculean rational capacities to meet this task. Such
optimism about the ordinary person's rational capacities is consistent with Locke's
notion of and faith in the "law of reason." 56

Finally, even if we admit that Dworkin's line drawing between policy and
principle does not serve the interest of the rule of law perfectly, as a practical matter,
Dworkin's dichotomy surely goes a long way in assuring that courts will exercise
the degree or prudence and circumspection which will lead to much less saving con-
struction and expansive statutory interpretation.

Ex Ante Arguments for Separation of
Legislative and Judicial Power

So far it has been shown how rule of law theory supports ex post separation
of powers arguments. But rule of law theory also supports ex ante separation of
powers arguments. Let us say we can imagine a world in which all government
powers were centralized in one government department which had ultimate control
over both judicial and legislative functions. To simplify matters, we might imagine

55 R. DWORKIN, supra note 7, at 85 (emphasis added).
56 R. SMITH, supra note 6, at 16.
a world in which Congress had control over the Supreme Court. Or, to put the problem as the Framers might have conceptualized it, we might imagine we are designing a new government and we have the British Parliament as a contemporary model we may or may not choose to emulate. As set forth below, rule of law theory provides a reason in these circumstances to depart from the prevailing system or model and to divide judicial and legislative power between two independent government departments.

This claim rests on the same assumption which is at the heart of Justice Scalia’s and Justice White’s view, expressed in Oakes and Osborne, that courts need to deter legislatures from drafting overly broad statutes. According to that view, if a legislature could count on the independent judiciary to save, amend, reconstruct, interpret, or fill in badly drafted statutes—as the Ohio state legislature might have counted on in Osborne—then the legislature will be more apt to enact badly drafted statutes. But if a legislature is apt to enact badly drafted statutes under that regime, then surely in a regime wherein there are no independent branches of government at all, wherein in effect the legislature has control over the judiciary, the legislative branch will even more often enact badly-drafted statutes and count on the judiciary under its control to cure such statutes according to the legislature’s dictates.

For instance, in a system of government in which there is no separation of powers, there might be a spate of extremely vague and open-ended statutes chilling constitutionally protected activity of the sort found in Oakes and Osborne. A government department in which both the judiciary and legislative power was vested might be extremely reluctant to suffer the embarrassment of declaring one of its own statutes unconstitutional. The department would, therefore, have a strong incentive to draft vague statutes in which its judicial arm could under almost all conceivable circumstances “discover” a constitutional meaning. Saving construction and other curing mechanisms, used in a fairly limited way by the current independent federal judiciary, would become dominant stock judicial devices.

Thus, the ex ante separation of powers argument based on the rule of law rests on a fear. The fear is that unless the legislature and the judiciary are two independent branches, and the judicial power vested in the judiciary does not consist of a broad, unlimited authority to cure badly drafted statutes, the legislature will employ the judiciary much like a congressional sub-committee to fill the sort of policymaking role which Dworkin in Taking Rights Seriously and Justice Scalia in Oakes inveigh against. The ex ante separation of powers argument is, therefore, very

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57 Granted, it is not all that “simple” to imagine exactly what such a world would be like.
58 Executive power will be discussed later.
59 The Note will not discuss whether such a fear is altogether rational. It is certainly not implausible that this fear is rational. And even a somewhat irrational fear may play a part in motivating framers of a constitution, or Supreme Court Justices.
60 The Note will not venture into a discussion of what reasons a legislature might have for wanting to draft...
closely related to the \textit{ex post} separation of powers argument. According to the \textit{ex ante} argument, we create an independent judiciary in order to remove from the legislature the temptation to draft vague and ambiguous statutes and to then use the judiciary under its control as an instrument to shore up such statutes. According to the \textit{ex post} separation of powers argument, once the system of an independent legislature and an independent judiciary is in place, we must be vigilant in preventing courts from assuming a broad, unlimited authority to cure badly drafted statutes, for this would ultimately undermine the basis for creating an independent judiciary in the first place.

THE RULE OF LAW AND JUDICIAL REVIEW

Until now, this Note has discussed the implications on rule of law doctrine for the courts' role in interpreting statutes and in determining the constitutionality of statutes. But rule of law doctrine has implications for the courts' role in interpreting the constitution as well. In particular, it is difficult to imagine how an independent judiciary could possibly play the role of keeping the legislature in check without also having the final say in what the constitution means.\footnote{For instance, as argued in this Note, an independent judiciary must often choose to strike down, rather than cure, overbroad or vague statutes which might chill constitutionally protected activity. Such judicial decisions, it seems, will often depend on a particular interpretation of a provision of the constitution. Therefore, to give the legislature and not the judiciary the final say on the meaning of the constitution, would undermine the rule of law basis of the separation of powers scheme by giving the legislature the means to overrule or circumvent the judiciary's decision to strike down a statute as unconstitutional. The judiciary's threat to strike down poorly drafted statutes, necessary for encouraging well-written ones, would be empty.}

On a similar note, the rule of law notion that a legislature should do whatever possible to permit a person to be certain of what he may and may not lawfully do applies to the judiciary as well. Judicial opinions articulating new common law rules of decision, and new interpretations of constitutional provisions should make the same effort to be explicit, precise, and unambiguous as legislatures should make when drafting and enacting legislation.\footnote{One might even say that measured by a rule of law standard, the best overarching constitutional theory, or theory of constitutional interpretation, is the one under which the degree of clarity, unambiguity, and explicitness attributed to specific constitutional provisions is the greatest. To the extent that the notion of the rule of law is implicit in the constitution, the constitution itself may mandate such a theory about or interpretation of itself.}

\begin{quote}
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This Note’s argument about the rule of law basis for the separation between the legislative and executive power is similar to its claim about the rule of law basis for separation between the legislative and judicial power. The same theme of legislative uncertainty drives both analyses.

Rule of law theory supports an *ex ante* separation of powers argument *vis a vis* the executive and legislative functions. In a system where the branch of government with the legislative power also holds the executive power, the vagueness and ambiguity of a statute will not necessarily hinder the legislative will both from being given effect and from being executed in the administration of government. If a statute is vague or ambiguous, an executive official is likely to give the statute the meaning which best accords with his perception of the legislative will at the time he is administering the statute. Moreover, in such a system, the legislature would not only be able to cope with the vagueness and ambiguity of statutes, it will be able to exploit the vagueness and ambiguity to give greater rein to its administration of government. The more vague or ambiguous the statute, the more latitude the legislature would have in administering and executing that statute. Indeed, for this very reason, the legislature would be sorely tempted to draft vague and ambiguous statutes in the first place. One consequence of this temptation is that people would be much less sure about what the law is, and will be in a poor position to regulate their behavior in accordance with the law.

By separating the legislative and the executive power, this temptation is removed. Once an independent executive is established, vagueness and ambiguity in statutes work against, not for, the legislature. Now the executive branch can exploit the vagueness and ambiguity of statutes to give greater rein to the executive’s administration of government. The executive branch can use vagueness and ambiguity to attach meanings to statutes which accord with the policies and will of the President, or Governor, and other high level executive officials.

Thus, uncertainty about whether the executive branch will accurately execute the legislature’s statutes encourages the legislature to draft more precise statutes in the first place. Since the legislature will not be executing the statutes on its own, it must be far more careful about how it drafts the statutes. Precision in drafting becomes an important mechanism to insure that the legislature’s policies will be implemented. By thus establishing a governmental structure which gives legislatures incentive to write precise and explicit statutes which, in turn, accord people greater certainty about what their legal rights, duties, and privileges are, separation of powers again gives full effect to the rule of law’s notions of certainty and predictability.

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Executive power is the “power...which should see to the execution of the laws that are made and remain in force.” J. Locke, *The Second Treatise of Government* 82 (T. Peardon ed. 1981).