American University Law Review

Volume 48 | Issue 2 Article 2

1998

Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement

Marc E. Isserles

Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement

Keywords
United States v. Salerno, Supreme Court, Planned Parenthood v. Casey, First Amendment

OVERCOMING OVERBREADTH: FACIAL CHALLENGES AND THE VALID RULE REQUIREMENT

MARC E. ISSERLES*

TABLE OF CONTENTS

* J.D., 1998, *Harvard Law School*. Special thanks to Richard Fallon, whose guidance and insight truly made this Article possible. Thanks also to Michael Dorf and Henry Monaghan for reading the manuscript and offering helpful comments and criticisms. Finally, thanks to Anne Harkavy, Kimo Peluso, and Joshua Waldman for their thoughtful suggestions, constant dialogue, and encouragement.

INTRODUCTION

Litigants in the federal courts can attack the constitutionality of legislative enactments in two ways: they can bring a facial challenge to the law, alleging that it is unconstitutional in all of its applications, or they can bring an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts that their case presents.[1] Although the rhetoric of "nullification" (i.e., that a facially invalid statute is null and void) continues to accentuate artificially the differences between facial and as-applied challenges,[2] the differences

1. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

2. S*ee* Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of cert.) (stating that a court's holding that a statute is facially unconstitutional renders the statute "utterly inoperative"); John Christopher Ford, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1444 (1997) ("Successful facial challenges, in short, nullify a state law."). As others have remarked, statements invoking the concept of nullification are somewhat exaggerated, given that state officials need only obtain a narrowing construction from a state court to continue enforcing a state statute that the Supreme Court has held facially unconstitutional. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 854 (1991) (remarking that the vocabulary of "voidness" and similar terms do more to mislead than to describe); *see also* Osborne v. Ohio, 495 U.S. 103, 115-16 (1990) (noting the possibility of a narrow construction of the statute). *But see* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 149-50 (1998) (arguing for a more robust notion of facial invalidation).

A lower federal court's ruling that a state statute is facially unconstitutional has even less effect on the state's power to enforce its own statutes because the coordinate relationship between state and lower federal courts dictates that a federal court's ruling extends only to the parties before the court. *See* Fallon, *supra*, at 853-54 & nn.5-6. On the other hand, to the extent that state officials do not often seek such narrowing constructions after the Supreme Court's facial rulings, *see* Ford, *supra*, at 1444 n.11, or state officials cease enforcement of statutes when even a lower federal court holds a statute facially invalid, *see* Fallon, *supra*, at 888 n.219, the effects of a successful facial challenge may be more severe in practice than these rules indicate.

are quite real and important.[3] A ruling that a statute is unconstitutional on its face implicates a relatively robust role for the federal courts in reviewing legislative enactments.[4] Such a role is in substantial tension with core principles underpinning Article III courts that require resolution of concrete disputes, general deference to the legislative process, and determination of constitutional questions as a matter of last resort and on a limited basis.[5] As the Supreme Court has made clear on numerous occasions, facial challenges are appropriate, if at all, only in exceptional circumstances.[6]

In *United States v. Salerno*,[7] the Supreme Court set forth what appeared to be a general test governing facial challenges in the federal courts. The Court stated that to succeed on a facial challenge the challenger labors under a "heavy burden" and "must establish that *no*

Moreover, in cases in which the Supreme Court holds a federal statute facially invalid, the lower federal courts and the state courts are bound by the Court's ruling and cannot avoid that holding through a subsequent narrowing construction. *See* United States v. Petrillo, 332 U.S. 1, 6 (1947); Fallon, *supra*, at 853 n.3. In part because of these competing considerations, this Article will use the term "facial invalidation" to describe a federal court's pronouncement that a statute is facially unconstitutional, with full recognition that the effect of such a pronouncement may be at most provisional.

3. *See Ada*, 506 U.S. at 1013.

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting—through judicial decision or enforcement discretion—statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the state . . . from punishing people who violate a prohibition that is, in the context in which is applied, entirely constitutional.

Id.; *see* Fallon, *supra* note 2, at 877-84 (analyzing the various costs of a facial overbreadth holding). For jurisdictional purposes, the distinction is perhaps less important today than it once was. *See* Dorf, *supra* note 1, at 294 n.265 (explaining that congressional elimination of almost all of the Court's mandatory appellate jurisdiction brought an end to the previous importance that the distinction between as-applied and facial challenges had in identifying cases appropriate for discretionary review and those falling within the Court's mandatory appellate jurisdiction under 28 U.S.C. § 1257 (1964)). Nonetheless, Congress has retained some measure of interest in the distinction by occasionally enacting statutes that limit federal court jurisdiction to deciding facial challenges. *See* Reno v. ACLU, 521 U.S. 844, 876 (1997) (noting that the Communications Decency Act's special provision for review by a three-judge district court limited the jurisdictional grant to challenges to the Act "on its face").

4. *See* Cass R. Sunstein, *The Supreme Court, 1995 Term —Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 39 & n.159 (1996) (relating the debate over the propriety of facial versus as-applied adjudication to the broader debate over judicial minimalism, or the practice of a court deciding no more than it must.)

5. *See* New York v. Ferber, 458 U.S. 747, 767-68 & n.20 (1982) ("The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before the Court."); Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) (explaining that constitutional adjudication is permissible only in cases of necessity); Younger v. Harris, 401 U.S. 37, 52 (1971) (noting that constitutional adjudication is appropriate only in cases resolving concrete disputes).

6. *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2175 (1998); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990); *Broadrick*, 413 U.S. at 613; *Younger*, 401 U.S. at 52-53.

7. 481 U.S. 739 (1987).

set of circumstances exists under which the Act would be valid."[8] Although both the Supreme Court and the lower federal courts repeatedly have applied *Salerno* in adjudicating facial challenges,[9] some Justices and commentators recently have called *Salerno*'s facial challenge standard into question, criticizing it as unnecessary dictum, lacking in precedential authority, and draconian in effect.[10] This attack has surfaced most prominently in the abortion context,[11] in which two Supreme Court Justices,[12] several federal courts of appeal,[13] and several commentators[14] have concluded that the Court tacitly overruled

8. *Id.* at 745 (emphasis added) (noting that a facial challenge is "the most difficult challenge to mount successfully").

9. *See, e.g.*, Anderson v. Edwards, 514 U.S. 143, 155 n.6 (1995) (applying *Salerno* to a facial challenge seeking to enjoin a state grant assistance regulation as a violation of federal law); Reno v. Flores, 507 U.S. 292, 301, 309 (1993) (applying *Salerno* to decide a facial challenge to the constitutionality of a deportation statute); Rust v. Sullivan, 500 U.S. 173, 183 (1991) (applying *Salerno* to reject a facial challenge to family planning regulations); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 (1990) (rejecting a facial challenge under *Salerno* to parental notification provision of an abortion statute); Webster v. Reproductive Health Servs., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (observing that a state statute regulating abortions would survive a facial challenge under *Salerno*); Roulette v. City of Seattle, 97 F.3d 300, 306 (9th Cir. 1996) (en banc) (applying *Salerno* to a challenge to a state ordinance making it unlawful to sit or lay on a commercial street); Chemical Waste Management, Inc. v. EPA, 56 F.3d 1434, 1437 (D.C. Cir. 1995) (rejecting a procedural due process facial challenge to an environmental regulation under *Salerno*); Government Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267, 1283 (7th Cir. 1992) (applying *Salerno* to a Commerce Clause facial challenge to a state statute imposing a fee for waste originating outside the state); United States v. Mena, 863 F.2d 1522, 1527 (11th Cir. 1989) (rejecting a facial challenge to a criminal statute under *Salerno*).

10. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 740 (1997) (Stevens, J., concurring in the judgments) (claiming that the Court has never in fact applied "such a strict standard"); Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting denial of cert.) (calling *Salerno* "draconian" and containing "rigid and unwise dictum" that the Court properly had ignored both within and without the abortion context); Dorf, *supra* note 1, at 239-40 (discussing the harsh standard set forth in *Salerno*); Ford, *supra* note 2, at 1445-48 (calling *Salerno* draconian within the abortion context); Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 MD. L. REV. 292, 325-30 (1996) (characterizing *Salerno* as the "stealth destruction of constitutional liberty" and criticizing its rule as a "radical and unwise departure from established constitutional law").

11. Similarly, the controversy has arisen in the assisted suicide cases, *see, e.g.*, *Glucksberg*, 521 U.S. at 738-39 (Stevens, J., concurring in the judgments); Compassion in Dying v. Washington, 79 F.3d 790, 816 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997); Kevorkian v. Arnett, 939 F. Supp. 725, 730 (C.D. Cal. 1996), *opinion vacated and appeal dismissed*, 136 F.3d 1360 (9th Cir. 1998), and in the Establishment Clause context, *see, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 627 n.1 (1988) (Blackmun, J., dissenting); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 278 n.2 (5th Cir. 1996); Walker v. San Francisco Unified Sch. Dist., 741 F. Supp. 1386, 1398 (N.D. Cal. 1990).

12. *See* Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J. & Souter, J., concurring in denial of application for stay and injunction pending appeal). Although Justice Stevens has repeatedly criticized *Salerno*, he has explicitly reserved the question of whether it is the controlling test. *See Janklow*, 517 U.S. at 1175.

13. *See, e.g.*, Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 193-96 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998); Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied sub nom.* Leavitt v. Jane L., 117 S. Ct. 2453 (1997); Planned Parenthood v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995); Casey v. Planned Parenthood, 14 F.3d 848, 863 n.21 (3d Cir. 1994).

14. *See, e.g.*, Dorf, *supra* note 1, at 272-77; Ford, *supra* note 2, at 1451-54; Skye Gabel, Note,

Salerno's facial challenge test in *Planned Parenthood v. Casey*,[15] replacing it with an alternative, more permissive, test modeled on the First Amendment overbreadth doctrine.[16]

This Article argues that the supposed conflict between *Salerno* and *Casey* is a false one that rests on a fundamental misconception about the nature of facial challenge adjudication in the federal courts. The prevailing assumption is that all facial challenges take the structural form of First Amendment overbreadth challenges. *Salerno*'s "no set of circumstances" language is thus seen to be a particularly stringent test for adjudicating facial challenges outside of the First Amendment. Under this view, a facial challenger under *Salerno* must prove that each and every statutory application, not just a substantial number of them (as under the First Amendment overbreadth test and possibly *Casey)*, are unconstitutional.[17]

This Article demonstrates instead that not all facial challenges are alike. Facial challenges can take at least two qualitatively distinct forms. First, a facial challenge may be asserted as an "overbreadth facial challenge," which predicates facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law.[18] Second, and quite distinctly, a facial challenge may be asserted as a "valid rule facial challenge," which predicates facial invalidity on

---

Casey "versus" Salerno: Determining an Appropriate Standard for Evaluating the Facial Constitutionality of Abortion Statutes, 19 CARDOZO L. REV. 1825, 1853-55 (1998).

15. 505 U.S. 833 (1992).

16. *See id.* at 895 (facially invalidating a statutory provision on the grounds that "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"). The Fifth Circuit is the only federal court of appeals to reject the argument that *Casey* displaced *Salerno*, and it continues to apply *Salerno* in the abortion context. *See, e.g.*, Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1102-04 (5th Cir. 1997); Barnes v. Mississippi, 992 F.2d 1335, 1342 (5th Cir. 1993); *see also* Ruth Burdick, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the Salerno Test*, 23 HASTINGS CONST. L.Q. 825, 870-75 (1996) (discussing the circuit split); Gabel, *supra* note 14, at 1837-41 (same); *cf.* Manning v. Hunt, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (suggesting in dicta that *Salerno* remains the governing standard absent an explicit holding by the Supreme Court).

Justice Scalia, joined by Chief Justice Rehnquist and Justice White, has similarly argued that *Casey* "did not purport to change [*Salerno*'s] well-established rule." Ada v. Guam Soc'y. of Obstetricians & Gynecologists, 506 U.S. 1011, 1013 (1992) (Scalia, J., dissenting from denial of cert.). More recently, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, has explicitly called for the Court to resolve the question of *Casey*'s effect on *Salerno* in light of the circuit split. *See* Janklow v. Planned Parenthood, 517 U.S. 1174, 1176-78 (1996) (Scalia, J., dissenting from denial of cert.). The dissenting Justices may well have grown tired of this particular battle. In the Court's recent decision to deny certiorari in a case involving a ban on partial-birth abortions, the dissenters confined their arguments to the importance of deciding the substantive abortion issues and did not mention the *Salerno/Casey* controversy. *See Voinovich*, 118 S. Ct. at 1347 (Thomas, J., dissenting from denial of cert.). This omission seems all the more remarkable given that the court of appeals had held that *Casey* displaced *Salerno* in the abortion context. *See* Voinovich, 130 F.3d at 196.

17. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

18. *See infra* notes 21-22 and accompanying text.

a constitutional defect inhering in the terms of the statute itself, independent of the statute's application to particular cases.[19] The goal of this Article is to elaborate the conceptual and practical distinctions between these two kinds of facial challenges, to argue that *Salerno*'s "no set of circumstances" language applies only to valid rule facial challenges, and to suggest how this distinction between kinds of facial challenges might be used to resolve the current confusion over facial challenges in the abortion context. A central claim of this Article is that *Salerno*'s "no set of circumstances" is not a "test" that prescribes an application-specific method of determining constitutional invalidity, but rather a descriptive claim about a statute whose terms state an invalid rule of law. Because *Salerno* directs a court to analyze the challenged statute under the applicable constitutional doctrine, it cannot itself conflict with any substantive constitutional law.

Part I introduces the federal courts' traditional response to "overbreadth" facial challenges. Federal courts have held that absent two limited exceptions (of which the First Amendment overbreadth doctrine is the most well known), litigants have no standing even to assert overbreadth facial challenges. Therefore, most litigants are restricted to as-applied constitutional challenges asserting a constitutional infirmity arising from application of the statute in a particular case.

Part II sets forth the prevailing scholarly and judicial approach to interpreting *Salerno*'s test. Part II.A explains the main lines of the current critique, which asserts that *Salerno*'s test is "draconian," mere dictum, inconsistent with the Court's precedents, and unjustifiably prejudicial to facial challengers outside of the First Amendment context. Part II.B then demonstrates that this critique, as well as the proposed alternatives, are premised on an unacknowledged assumption that all facial challenges are structured as overbreadth facial challenges. Part II.C shows that this assumption, together with the corollary assumption that *Salerno* sets forth a particularly stringent test for adjudicating overbreadth facial challenges outside of the First Amendment, is untenable in light of the background standing rules of the as-applied regime.

Part III offers a new interpretation of *Salerno*'s "no set of circumstances" as language designed exclusively for adjudicating valid rule facial challenges. Part III.A provides a summary of the distinctions between valid rule and overbreadth facial challenges and then traces the development of the concept of a valid rule facial challenge in Professor Monaghan's work and in First Amendment case law. Part

19. *See infra* text accompanying note 129.

III.B then demonstrates that an interpretation of *Salerno*'s "no set of circumstances" language as a descriptive claim about a statute whose terms state an invalid rule of law adequately responds to all of the principal claims of *Salerno*'s critics. Part III.C then explores the question whether there is an independent role for the First Amendment overbreadth doctrine in light of valid rule facial challenges.

Part IV clarifies the distinction between valid rule facial challenges and as-applied constitutional challenges. Part IV.A argues that the difference between valid rule facial invalidation and as-applied invalidation results less from judicial preference or constitutional command than from the practical features of constitutional adjudication that structure a court's constitutional analysis into one of the two competing modes. This subpart identifies three necessary preconditions of constitutional adjudication that must be satisfied for a valid rule facial challenge to succeed. Part IV.B. contrasts this structured account with an alternative remedial conception. Finally, the Conclusion suggests the appropriate lines of inquiry for resolving the current controversy over facial challenges in the abortion context.

I. "OVERBREADTH FACIAL CHALLENGES" AND THE AS-APPLIED REGIME

The term "facial challenge" suggests a constitutional challenge asserting constitutional invalidity "on the face" of the statute—that is, some constitutional flaw evident in the statutory terms themselves.[20] However, some facial challenges, which this Article terms "overbreadth facial challenges," focus constitutional scrutiny on the applications embraced by statutory terms broad enough to cover both constitutional and unconstitutional applications. An overbreadth facial challenge is not, strictly speaking, a challenge that identifies a constitutional infirmity on the "face" of the statute. Rather, an overbreadth

20. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it . . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."); Smith v. Cahoon, 283 U.S. 553, 562-65 (1931) (noting that analysis begins with an interpretation of the statute on its face); Sam & Ali, Inc. v. Ohio Dep't of Liquor Control, 158 F.3d 397, 405 (6th Cir. 1998) (Krupansky, J., concurring in the result) (stating that facial challenges do not present material issues of fact for resolution); Doe v. City of Butler, 892 F.2d 315, 325 (3d Cir. 1989) (Roth, J., dissenting) (stating that a law is facially unconstitutional if a court can determine its invalidity simply by reading its terms and that a court does not need to know what the effect of the law as administered has been); Tobe v. City of Santa Ana, 892 P.2d 1145, 1152 (Cal. 1995) ("A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual."); Adler, *supra* note 2, at 36 (identifying a facial challenge as one that a court analyzes by focusing solely on the "predicate and history" of the challenged rule).

facial challenge peers beyond the four corners of the statute's face in order to assess the validity of the applications authorized by the statutory terms.

An overbreadth facial challenge ordinarily takes the following basic form. A litigant, against whom a particular law can be constitutionally applied, argues that because distinct applications of the law to parties not before the court would be unconstitutional, the court should facially invalidate the law and deem it unenforceable against all parties.[21] This kind of challenge should be understood as an "overbreadth facial challenge,"[22] because it predicates the claim of facial invalidity on the existence of some aggregate number of potentially unconstitutional applications embraced by an overbroad, but otherwise valid, rule of law.

As a general matter, federal courts reject overbreadth facial challenges under the rule barring so-called "third party" standing. Under this rule, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."[23] Because the overbreadth challenger, by hypothesis, has no constitutional complaint against the statute in its application to his or her case, a court ordinarily will deny the very assertion of an overbreadth facial challenge.[24] Moreover, the rule against third-party standing equally precludes the assertion of an overbreadth facial challenge by a litigant who could succeed on an as-applied challenge,

---

21. *See, e.g.*, Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912) ("[T]he argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*.").

22. The First Amendment overbreadth doctrine is a specific example of the general category of overbreadth facial challenges. *See infra* notes 37-41 and accompanying text; *see also* Fallon, *supra* note 2, at 858-62 (explaining the rules governing "ordinary overbreadth" challenges as distinguished from challenges asserted under the First Amendment overbreadth doctrine).

23. New York v. Ferber, 458 U.S. 747, 767 (1982); *see* United States v. Raines, 362 U.S. 17, 21 (1960); *Yazoo*, 226 U.S. at 219-20. The third-party standing bar generally is considered to be a prudential limitation on a court's ability to entertain certain claims of a litigant who otherwise has standing in the constitutional sense. Obviously, in the context of an enforcement action against a defendant, the requisite "personal injury" for Article III standing purposes is easily satisfied. The third-party standing bar is an additional limitation that precludes the assertion of certain claims within the defendant's constitutional case. *See* Barrows v. Jackson, 346 U.S. 249, 256 (1953); *see also* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 277 (1984) (criticizing the prevailing view).

24. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) (describing the third-party standing bar); *Raines*, 362 U.S. at 21 (recognizing the rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"); Fallon, *supra* note 2, at 862 (noting the general rule that "outside the First Amendment context, a challenger generally cannot attack a statute on the overbreadth ground that it would be unconstitutional as applied to someone else").

but nonetheless, attempts to invalidate the statute facially.[25]

The Court has offered numerous justifications for foreclosing ordinary overbreadth facial challenges pursuant to the rule barring third-party standing. First, because constitutional rights are said to be personal, no individual has a constitutional right to litigate the constitutional claims of absent third parties.[26] Second, the rule barring third-party standing is related to prudential limitations favoring concrete adjudication of discrete legal rights between the parties to the controversy before the court.[27] Finally, the rule is intended to serve federalism and institutional interests by allowing state courts an opportunity to construe a statute to avoid constitutional infirmities.[28]

One difficulty with the third-party standing bar is its apparent inconsistency with a litigant's right to be judged in accordance with a constitutionally valid rule of law.[29] Thus, the overbreadth challenger might claim that he or she is asserting a personal right to be free from prosecution because an overbroad law that permits some unconstitutional applications cannot be enforced against anyone.[30] Courts, however, reject this claim by invoking a "presumption of severability" under which a federal court presumes that, if the state later attempts to enforce the statute in an unconstitutional application, the state courts will sever those applications from the statute.[31] Because of this presumption, the application of the law against the present litigant, and the denial of the litigant's attempt to assert the constitutional rights of absent third parties, is consistent with the right to be judged by a constitutionally valid rule of law.[32]

---

25. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985) (denying the applicability of the First Amendment overbreadth doctrine in the case of a litigant whose conduct is constitutionally protected, given that "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it").

26. *See Broadrick*, 413 U.S. at 610; Fallon, *supra* note 2, at 861-62.

27. *See Broadrick*, 413 U.S. at 610-11; *Raines*, 362 U.S. at 22; Fallon, *supra* note 2, at 861. On certain occasions, the Court has related these prudential considerations to more weighty rules limiting the federal courts' jurisdiction to actual cases and controversies. *See, e.g.*, Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955 & n.5 (1984) (noting the relationship between prudential rules against third-party standing and Article III case or controversy requirements); *Ferber*, 458 U.S. at 767-68 n.20 (same).

28. *See Ferber*, 458 U.S. at 768; Barrows v. Jackson, 346 U.S. 249, 256 (1953).

29. *See* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (1981). On the various justifications for the right to be judged by a valid rule of law, see *infra* note 142.

30. *See* Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912) ("[T]he argument to sustain the contention is that, if the statute embraces [unconstitutional] cases as are supposed, it is void as to them, and if so void, is void *in toto*.").

31. *See id.* at 219-20; Dorf, *supra* note 1, at 250; Fallon, *supra* note 2, at 862; Monaghan, *supra* note 29, at 7.

32. *See* Dorchy v. Kansas, 264 U.S. 286, 289-90 (1924) ("A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad."); Dorf, *supra* note 1, at 249-50 (explaining the connection between the severability doctrine and the right to be judged by a constitutionally valid rule of law); Fallon, *supra* note 2, at

The Court has developed two principal exceptions to the rule barring third-party standing and the corollary presumption of severability.[33] The first exception stems from the law of statutory severability and allows an overbreadth challenger to assert, and to succeed on, a facial challenge if the litigant can demonstrate that the legislature enacting the law intended that the statute's unconstitutional applications would be inseverable from the constitutional ones.[34] This is technically an exception to the rules barring third-party standing because the litigant must invoke unconstitutional applications of the statute against third parties to prove the case of statutory inseverability.[35] Thus, in what Professor Fallon views as a "rule-of-law" or due

862 (same).

33. A different set of exceptions to the third-party standing bar concerns those instances in which a litigant may claim the benefit of *jus tertii* standing. Under this doctrine, a federal court may permit the litigant to assert the rights of absent third parties "where, as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where [the absent party] has no effective way to preserve them himself." United States v. Raines, 362 U.S. 17, 22 (1960) (citing NAACP v. Alabama, 357 U.S. 449, 459-60 (1958), and Barrows v. Jackson, 346 U.S. 249, 259 (1953)). *See generally* Monaghan, *supra* note 23, at 287–310 (providing overview of *jus tertii* doctrine).

34. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) ("Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid."); *Dorchy*, 264 U.S. at 290-91 ("[A] provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."); *see also* Dorf, *supra* note 1, at 285, 288 (discussing state and federal standards governing statutory severability); Monaghan, *supra* note 29, at 10 (noting that statutory inseverability occurs most typically in situations "where the court concludes that, given the nature or range of the act's invalid applications, the legislature would not want the statute to stand, or that the court simply cannot sever the valid from the invalid applications"). The classic treatment of the issue of statutory severability is Robert Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV L. REV. 76 (1937); *see also* John Copeland Nagle, *Severability*, 72 N.C.L. REV. 203 (1993) (arguing that severability analysis should be governed by ordinary principles of statutory construction).

It should be emphasized here that the kind of inseverability primarily at issue in the current discussion is inseverability of statutory applications embraced by a broad statutory term, and not inseverability of distinct statutory provisions. *See* Stern, *supra*, at 79, 82-83 (distinguishing "separable applications" from the severability of distinct provisions or statutory terms). Although severability of discrete statutory provisions within a larger statute may implicate the same basic principles as severability of applications, *see id.* at 82-83 (concluding that both forms of severability rest on the principle that a court should determine "whether the legislative body would intend the law to be given effect to whatever extent was constitutionally possible"), both the overbreadth doctrine and the prevailing interpretation of *Salerno* concern the effect that severability of applications has on the potential for facial invalidation of a discrete statutory provision. Henceforth in this Article, references to statutory invalidation should be taken only to refer to the invalidity of a discrete statutory section (and the applications it embraces) under the governing facial challenge test, and not to the invalidity of an entire statutory measure or statutory scheme.

35. *See Raines*, 362 U.S. at 23 (noting as exceptions to the third-party standing bar cases in which the Court "can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application"). Although the claim requires the litigant to make reference to third-party applications, the ultimate right in question is the litigant's right not to be judged by an unconstitutional rule of law.

process qualification to the ordinary foreclosure of overbreadth challenges, "a statute that proscribes any constitutionally protected conduct is unconstitutional in its totality unless severable."[36]

The second important exception to the rule barring third-party standing is the First Amendment overbreadth doctrine. Under this doctrine, a party whose conduct is not constitutionally protected[37] is permitted to raise the constitutional rights of third parties not before the court.[38] Once asserted, an overbreadth facial challenge may succeed if the challenger can show that a "substantial number" of applications against third parties would be unconstitutional.[39] Although the theoretical justifications for the doctrine are by no means settled,[40] the Court understands the doctrine's principal purpose to be protecting third parties, who might fear prosecution under an overbroad statute, from self-censoring or "chilling" protected speech.[41]

The similarity between challenges alleging statutory inseverability and challenges under the First Amendment overbreadth doctrine, and the reason both should be categorized as overbreadth facial challenges, is that each type of challenge asserts facial invalidity based on the existence of some number[42] of potentially unconstitutional appli-

---

See Fallon, *supra* note 2, at 862 (discussing constitutional challenges to inseverable statutes as an instance of the litigant's own right, and explaining that if a statute is deemed inseverable, "no constitutionally valid rule of law would remain under which a defendant might be sanctioned").

36. Fallon, *supra* note 2, at 874–75. *But see* Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063, 1083 (1997) (arguing that the claim that a statute is unenforceable due to statutory inseverability is not a constitutional claim).

37. The First Amendment overbreadth doctrine is available only to those litigants whose speech or expressive conduct is not protected under the First Amendment. *See Brockett*, 472 U.S. at 503.

38. *See* Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990); New York v. Ferber, 458 U.S. 747, 768-69 (1982).

39. *See Ferber*, 458 U.S. at 769-70.

40. *See* Lawrence A. Alexander, *Is There an Overbreadth Doctrine*?, 22 SAN DIEGO L. REV. 541, 542 (1985) ("The most notable fact about the [overbreadth] doctrine . . . is that what it is and what justifies it remain the subjects of controversy and confusion."). The most important controversy concerns whether the overbreadth claimant is asserting a third party's constitutional right or his own right to be free from punishment under an unconstitutional rule of law. The Court has officially endorsed only the former view. *See Osborne*, 495 U.S. at 112 n.8. For the classic defense of the latter view, see Monaghan, *supra* note 29, at 4-14; *infra* notes 132-36 and accompanying text.

41. *See* Massachusetts v. Oakes, 491 U.S. 576, 581 (1989). A subsidiary purpose of the doctrine is to create incentives for legislatures to draft laws affecting First Amendment liberties with greater precision. *See id.* at 586 (Scalia, J., concurring in the judgment in part and dissenting in part); Fallon, *supra* note 2, at 888.

42. Under the First Amendment overbreadth doctrine, the statute must embrace a "substantial" number of potentially unconstitutional applications relative to the constitutional applications. *See Ferber*, 458 U.S. at 769-70. In cases of overbreadth challenges premised on statutory inseverability, the touchstone of the inquiry is legislative intent and not the number of unconstitutional applications. However, the latter may sometimes affect the determination of the former. *See Raines*, 362 U.S. at 23 (noting an exception to the third-party standing bar in cases in which the courts have already declared the unconstitutionality of the statute in question "in the vast majority of its intended applications, and it can fairly be said that it was not intended to

cations of an otherwise valid statutory rule.[43] That the rule in question in an overbreadth facial challenge is "otherwise valid" follows directly from the presupposition of all overbreadth challenges; namely, that at least some statutory applications are constitutionally valid. The special standing exception that the Court employs to permit litigants to assert overbreadth challenges is only necessary on the assumption that the application against the particular litigant before the court is constitutionally permissible under the rule as written.[44] Moreover, the Court's limitation on the availability of the First Amendment overbreadth doctrine,[45] its occasional suggestion that the doctrine itself could be further narrowed as a matter of judicial policy,[46] and perhaps most importantly, the rule that only constitutionally unprotected litigants may assert overbreadth challenges,[47] all underscore the point that a statute deemed facially invalid under the overbreadth doctrine is not a statute whose terms violate any independent constitutional requirement.[48]

---

stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover"); Monaghan, *supra* note 29, at 10 (describing a court's analysis of the "nature or range" of invalid applications as part of severability inquiry).

43. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 244 (1988). Fletcher notes that, in an overbreadth facial challenge,

> [T]he argument of invalidity is based on a combination of two arguments: first, that the statute cannot be applied to certain conduct to which it now applies; and second, that if the statute applies to the protected conduct, the statute as a whole must fall because the permissible and impermissible parts of the statute are not severable.

Id.

44. *See Oakes*, 491 U.S. at 584 ("An overbroad statute is not void *ab initio*, but rather voidable, subject to invalidation notwithstanding the defendant's unprotected conduct out of solicitude to the First Amendment rights of parties not before the court."). Outside the First Amendment context, the theory with which the Court rejects a litigant's standing to assert an overbreadth facial challenge similarly presupposes that the statute as written can be constitutionally applied in at least some cases. *See* Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912).

45. *See* Central Gas & Elec. v. Public Servs. Comm'n, 447 U.S. 557, 566 n.8 (1980) (holding that the overbreadth doctrine is inapplicable in cases involving commercial speech); Parker v. Levy, 417 U.S. 733, 758-59 (1974) (holding the same with respect to military regulations).

46. *See* Osborne v. Ohio, 495 U.S. 103, 122 (1990) (noting that a requirement that "statutes be facially invalidated whenever overbreadth is perceived would very likely invite reconsideration or redefinition of the doctrine in a way that would not serve First Amendment interests"); *see also* Fallon, *supra* note 2, at 870 (recognizing that overbreadth doctrine is a "two-edged sword" which can be expanded to promote First Amendment values, but which also "licenses, even if it does not prescribe, judge-made cutbacks").

47. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). The very same statute may, or may not, be subject to overbreadth scrutiny, depending solely on the nature of the conduct of the litigant before the court. If the overbreadth doctrine were directed at the validity of statutory terms themselves, and not applications, such an approach could not sensibly be maintained. Moreover, the Court's decision in certain cases to reserve judgment on third-party applications for future as-applied adjudications rests, by necessity, on the implicit judgment that the rule as written presents no constitutional infirmity. *See, e.g.*, Renne v. Geary, 501 U.S. 312, 323-24 (1991).

48. One might perhaps object on the grounds that the Constitution itself requires some form of an overbreadth doctrine, even if it is not the precise doctrine that the Court currently

Once a court grants an overbreadth facial challenge, it is indeed true that the statutory rule is no longer "otherwise valid" in any meaningful sense. Absent a narrowing construction from an authoritative source, the state cannot continue to enforce the statute against any party.[49] However, the method by which that conclusion is reached—accumulating a sufficient number of potentially unconstitutional applications to warrant the conclusion that the statute must be struck down on its face—is a peculiar feature of overbreadth methodology. The First Amendment overbreadth doctrine permits a court to declare a statute invalid on its face and, therefore, in *all* of its applications, because of an empirical prediction about *some*, albeit a substantial number, of statutory applications.[50] Likewise, the doctrine of statutory inseverability permits a court to invalidate a statute on its face if some number of statutory applications are unconstitutional and the statute is deemed inseverable under the governing statutory law.[51] The invalidity of the statute is thus derivative of a court's conclusion that, under the relevant third-party standing exception doctrine, the statute's inclusion of some number of unconstitutional applications cannot be tolerated.

II. *SALERNO'S* "NO SET OF CIRCUMSTANCES" FACIAL CHALLENGE TEST: THE PREVAILING INTERPRETATION

A. The Critique of Salerno

In *United States v. Salerno*,[52] the Court considered facial challenges to the Bail Reform Act,[53] which authorizes pretrial detention of arrestees upon a judicial officer's determination that alternative procedures would not "reasonably assure the appearance of the person as required and the safety of any other person and the community."[54] The defendants in *Salerno* claimed that the Act was invalid on its face because pretrial detention based on future dangerousness consti-

applies. *See* Dorf, *supra* note 1, at 277-79; Fallon, *supra* note 2, at 868 n.94. But a constitutionally grounded overbreadth doctrine is still an overbreadth doctrine that invalidates statutory rules because some unconstitutional statutory applications exist. Overbreadth facial challenges take place at the level of statutory applications and reason upwards, as it were, to the level of the rule itself. The important point for present purposes is that the statute, absent the invocation of overbreadth doctrine, would be capable of at least some constitutional applications.

49. *See* Board of Trustees of the State Univ. v. Fox, 492 U.S. 469, 483 (1989) ("Where an overbreadth attack is successful, the statute is obviously invalid in all of its applications, since every person to whom it is applied can defend on the basis of the same overbreadth.").

50. *See* New York v. Ferber, 458 U.S. 747, 769-70 (1982).

51. *See* United States v. Raines, 362 U.S. 17, 23 (1960).

52. 481 U.S. 739 (1987).

53. 18 U.S.C. §§ 3141-3150, 3156 (1982 & Supp. III 1993).

54. *Id.* § 3141(e).

tuted impermissible punishment before trial in violation of the Due Process Clause of the Fifth Amendment.[55] The defendants also argued that the statute violated the Excessive Bail Clause of the Eighth Amendment.[56] As a preface to its rejection of both facial claims, the Court announced what it took to be the obviously applicable test: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[57] Although the Court recognized the existence of the First Amendment overbreadth doctrine, under which the Court applies a less onerous facial challenge test, the Court stated that the doctrine was inapplicable "outside the limited context of the First Amendment."[58] The Court ultimately concluded that the defendants failed to satisfy the "no set of circumstances" test, and thus rejected their facial challenges.[59]

Perhaps even more so than its holding,[60] *Salerno*'s "no set of circumstances" test has been subjected to rather severe, and persuasive, criticism. First, critics argue that the consequence of imposing *Salerno*'s heavy burden on facial challenges outside of the First Amendment is effectively to doom all such facial challenges to failure. To demonstrate that "no set of circumstances" exists is thought to require proof that each and every statutory application would be unconstitutional.[61] Thus, the facial challenger who loses on an as-applied challenge, or who concedes that the statute could constitutionally be applied against him, necessarily will fail *Salerno*'s test, because the application against him constitutes the one constitutional application sufficient to defeat the "no set of circumstances" requirement.[62] Even in cases in which application of the statute against

55. *See Salerno*, 481 U.S. at 746.
56. *See id.* at 746, 752.
57. *Id.* at 745.
58. *Id.*
59. *See id.* at 745-55.
60. *See, e.g.*, Law, *supra* note 10, at 328 & n.179 (citing commentators who have criticized the *Salerno* holding).
61. *See* Dorf, *supra* note 1, at 241. It bears repetition that the relevant facial invalidity implicated by *Salerno*, under any interpretation, is the invalidity of a discrete statutory provision that embraces multiple statutory applications. *See supra* note 34 (discussing statutory inseverability). Contrary to the suggestion of Professor Hill, *Salerno* does not require a litigant to prove the invalidity of every statutory provision within a statute to succeed on a claim that any particular statutory provision is facially invalid. *See* Hill, *supra* note 36, at 1072 n.34 (criticizing the *Salerno* formulation on the grounds that "*distinct parts* of a statute may be unconstitutional as written or construed; before and sometimes even after *Salerno*, the Court has declared that such parts were facially unconstitutional") (emphasis added).
62. *See* Dorf, *supra* note 1, at 239; Ford, *supra* note 2, at 1445; *see also* Adler, *supra* note 2, at 157 ("*Salerno* conceives of the facial invalidity of a rule as the limiting point of as-applied invalidity: a rule is facially invalid if, for every application of the rule, that application is constitution-

the litigant would be unconstitutional, it would be the rare case indeed in which the party opposing the facial challenge (ordinarily the government), or the court itself, could not hypothesize at least one constitutional application against a third party sufficient to defeat the facial challenge under *Salerno*.[63] Moreover, because the litigant in such a case is, *arguendo*, protected from punishment, the litigant will have little or no incentive to undertake *Salerno*'s "heavy burden."[64] Given these practical effects, the charge that *Salerno*'s test is "draconian" seems entirely justified.[65] If the Court in *Salerno* had intended virtually to eliminate facial challenges outside of the First Amendment, it seems likely that the Court would have provided some explanation for its radical departure from past practice. The Court in *Salerno*, however, purported to apply a well-established facial challenge rule.[66]

Critics have also sought to reduce *Salerno*'s "no set of circumstances" from the level of an authoritative doctrinal test to "unwise dictum,"[67] "unfortunate language,"[68] and mere "rhetorical flourish."[69] If the Court in *Salerno* had applied the "no set of circumstances" test, critics argue, the Court would have dismissed the defendants' facial challenge simply by postulating one set of circumstances in which the challenged statute could have been constitutionally applied.[70] Instead, the Court in *Salerno* apparently ignored this expedient, indeed nearly fool-proof, method of disposing of facial challenges, and proceeded to evaluate the constitutionality of the Act against the requirements of the Due Process Clause and the Eighth Amendment.[71]

---

ally invalid.")

63. *See* Dorf, *supra* note 1, at 241.

64. *See id.* at 239 ("In short, a litigant can prevail on a facial challenge only if she can also prevail on an as-applied challenge, and even then she may lose the facial challenge. Under *Salerno*, a litigant bringing a facial rather than an as-applied challenge gains nothing.").

65. *See* Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of cert.); Adler, *supra* note 2, at 154; Dorf, *supra* note 1, at 239-40; Ford, *supra* note 2, at 1445.

66. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (prefacing the "no set of circumstances" test with the remark that a "facial challenge to a legislative Act is, *of course*, the most difficult challenge to mount successfully") (emphasis added); *see also Janklow*, 517 U.S. at 1176-77 (Scalia, J., dissenting from denial of cert.) (noting that *Salerno* "summariz[ed] a long established principle of [the Court's] jurisprudence").

67. *See Janklow*, 517 U.S. at 1175 (Stevens, J., respecting the denial of cert.).

68. *See id.*

69. *See* Dorf, *supra* note 1, at 241.

70. *See* Washington v. Glucksberg, 521 U.S. 702, 709 n.6 (1997) (Stevens, J., concurring in the judgments).

71. *See Salerno*, 481 U.S. at 745-55; Dorf, *supra* note 1, at 240-42 (arguing that "one finds no apparent link between the Court's opening broadside decrying the facial challenge vehicle and the actual decision"). Dorf recognizes at least one portion of the opinion in which the Court actually appeared to apply the "no set of circumstances" test, but he dismisses that aspect of the opinion as resting on a misreading of the relevant precedent and confusing a procedural due

Because the very Court that articulated the "truly draconian"[72] "no set of circumstances" test apparently lacked the draconian will to apply it,[73] critics suggest that *Salerno*'s dictum should not be interpreted to impose its "heavy burden" on at least some facial challengers.[74]

Critics have further sought to reduce *Salerno*'s authority by highlighting the lack of case support for the "no set of circumstances" test, as well as the test's alleged inconsistency with prior decisions of the Court invalidating statutes on their face. In addition to the abortion cases, there have been numerous occasions in which the Court has apparently deviated from *Salerno*'s rigor and facially invalidated statutes without imposing any burden on the litigant to demonstrate that the statute would be unconstitutional in each and every application.[75]

---

process balancing test with the method dictated by *Salerno*'s test. *See* Dorf, *supra* note 1, at 241 n.22 (stating that the Court applied the balancing test of *Schall v. Martin*, 467 U.S. 253 (1984), and not the "no set of circumstances" test). On the compatibility of procedural balancing tests and *Salerno*, see *infra* notes 181, 392-97 and accompanying text.

72. *See* Dorf, *supra* note 1, at 239.

73. *See* Janklow v. Planned Parenthood, 517 U.S. at 1175 (noting that "*Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases"). *But cf. id.* at 1180 (Scalia, J., dissenting from denial of cert.) (noting that courts of appeals regularly apply *Salerno*, "often in cases in which its 'draconian' character prevents the facial challenge from succeeding").

74. *See* Dorf, *supra* note 1, at 239. The claim that *Salerno*'s test is mere dictum is also based on the claim that, after announcing the "no set of circumstances" test, the Court seemed to offer the following justification: "The fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *Salerno*, 481 U.S. at 745. Although Dorf is no doubt correct that one cannot derive a "no set of circumstances" test from the principle that a few isolated unconstitutional applications will not invalidate a statute, he appears mistaken in interpreting this principle, which he accepts, as a justification for *Salerno*, which he rejects. The full quotation, which both Dorf and Justice Stevens cleverly abridge, makes clear that the Court invoked the idea of facial invalidation based on "some conceivable set of circumstances" as the First Amendment overbreadth counterpart to *Salerno*'s test. *See id.* at 745 ("The fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, *since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment*.") (emphasis added). The mistake that the *Salerno* Court made was its implication, through the word "conceivable," that the First Amendment overbreadth test is a far more lenient test than it actually is. Justice Stevens' suggestion that this clumsy sentence somehow implies that statutes with a large fraction of unconstitutional applications may be facially invalidated, *see Janklow*, 517 U.S. at 1174 (claiming that *Salerno* effectively rejected the facial challenges because the "large fraction" standard had not been met), would effect, by implication, a vast extension of First Amendment overbreadth doctrine to all facial challenges in all constitutional contexts. Some lower courts have followed Justice Stevens' lead, interpreting *Salerno* as an overbreadth test demanding a showing only of a "large fraction" of unconstitutional applications, and reasoning that as long as a statute survives facial scrutiny under such a test, it survives scrutiny under the "no set of circumstances" test as well. *See, e.g.*, Roulette v. City of Seattle, 97 F.3d 300, 306 (9th Cir. 1996) (en banc); Florida League of Prof'l Lobbyists v. Meggs, 87 F.3d 457, 459 (11th Cir. 1996).

75. *See* Dorf, *supra* note 1, at 251-53 (discussing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), and arguing that the Court's treatment of underinclusive equal protection challenges implicitly rejects the *Salerno* approach); *see id.* at 266-78 & n.152 (discussing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964), and the abortion case law, and arguing that the Court has tacitly employed a form of overbreadth doctrine in non-litigation fundamental rights cases); *id.* at 278-81 (discussing Establishment Clause cases that allegedly demonstrate the incompatibility of purpose tests and the *Salerno* facial challenge test); *id.* at 281-82 (discussing Wuchter v. Pizzutti, 276 U.S. 13

Justice Stevens relied on Professor Dorf's scholarship in this area as the principal authority for two opinions questioning whether *Salerno* states a facial challenge rule to which the Court has ever adhered, and questioning whether the Court should continue to apply that test in the future.[76]

Finally, critics of *Salerno* raise a claim of unequal treatment across constitutional doctrines: *Salerno*'s doctrinal limitation of the overbreadth test to the First Amendment is said to privilege unjustifiably First Amendment facial challengers.[77] Moreover, critics argue that, because the primary justification for employing the First Amendment overbreadth doctrine—protecting against a chilling effect—is present in at least certain doctrinal areas outside of the First Amendment, there is no principled basis for limiting the overbreadth doctrine to the First Amendment context.[78] Imposing *Salerno*'s test on a facial challenge simply because the challenger does not assert First Amendment protections seems, in addition to draconian, constitutionally arbitrary.[79]

B. The Overbreadth Assumption

The critics' case against *Salerno* is, at first blush, a compelling one.

(1928), and Shaffer v. Heitner, 433 U.S. 186 (1977), as examples of a constitutional restraint on applying *Salerno* even in "peripheral areas of constitutional law such as personal jurisdiction"); *see also* Fallon, *supra* note 2, at 908 (noting that the "doctrinal pattern is somewhat more complex" than *Salerno* pretended, and focusing on *Aptheker* and the abortion cases as examples of the Court's use of the overbreadth doctrine in fundamental rights areas outside of the First Amendment); Ford, *supra* note 2, at 1450-55 (arguing that the Court has consistently employed overbreadth methodology in the abortion context).

76. *See* Washington v. Glucksberg, 521 U.S. 702, 740 & n.6 (1997) (Stevens, J., concurring in the judgments) (citing Dorf for support); *Janklow*, 517 U.S. at 1175 & n.1 (1996) (Stevens, J., respecting denial of cert.) (same). Even Justice Scalia, who has argued consistently in favor of *Salerno*, has been compelled to acknowledge that, at least within the abortion context, the Court has "sent mixed signals" on the question of the appropriate facial challenge test. *See Janklow*, 517 U.S. at 1176 (Scalia, J., dissenting from denial of cert.); *see also* Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of cert.) (noting that the Court in *Roe v. Wade*, 410 U.S. 113 (1973), "seemingly employed an 'overbreadth' approach–-though without mentioning the term and without analysis").

77. *See* Dorf, *supra* note 1, at 265 ("To treat some democracy-preserving constitutional provisions as privileged contravenes the Constitution's own architecture." (citing LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 25-27 (1991))); Ford, *supra* note 2, at 1458 (arguing that the attempt to limit overbreadth challenges to the First Amendment must be based on the notion that First Amendment constitutional rights are more important than other constitutional rights, and rejecting that notion).

78. *See* Dorf, *supra* note 1, at 264-76; Fallon, *supra* note 2, at 859 n.29.

79. *See* Compassion in Dying v. Washington, 79 F.3d 790, 798 n.9 (9th Cir. 1996) (noting in dictum that *Salerno* would not apply to a facial challenge to a statute prohibiting physician-assisted suicide because the Court declined to apply *Salerno* in *Planned Parenthood v. Casey*, 505 U.S. 833, 893-97 (1992), and the liberty interests were similar), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997); Dorf, *supra* note 1, at 265 (arguing for an extension of the overbreadth doctrine to certain fundamental rights); Ford, *supra* note 2, at 1458-59 (arguing for an extension of the overbreadth doctrine to abortion cases).

It should, therefore, come as little surprise that, at least on the level of justification, the critique has largely gone unchallenged. The federal courts regularly apply *Salerno* in disposing of facial challenges, but that disposition typically resembles judicial treatment of motions to dismiss for failure to state a claim: summary invocation of controlling legal principle with little or no explanation.[80] Additionally, the sole court of appeals to defend *Salerno* in the face of an apparent conflict with a substantive constitutional test—the *Casey* test—relied on the Supreme Court's failure explicitly to displace *Salerno*, and not on the merits of *Salerno* itself.[81]

Justice Scalia, joined by three other Justices, has emerged as *Salerno*'s most outspoken defender.[82] Although one should not demand too much in the way of elaborate justification in dissenting opinions to denials of certiorari, Justice Scalia's defense, thus far, has failed to meet the critics' case at its strongest points. To the charge that the "no set of circumstances" test is draconian, Justice Scalia responds by noting the judiciary's willingness to tolerate a draconian result,[83] and by invoking familiar but rather conclusory claims about the undesirable effects of facial invalidation.[84] To the charge that *Salerno*'s test represents mere dictum, Justice Scalia is curiously silent. To the charge that *Salerno*'s test is inconsistent with the Court's approach to facial challenge adjudication, Justice Scalia asserts that *Salerno*'s test represents a "long established principle of our jurisprudence."[85] Tellingly, the cases he cites to support this long established principle are drawn exclusively from the post-*Salerno* period.[86] Finally, to the charge that limiting the overbreadth doctrine to the First Amendment unjustifiably privileges First Amendment protections,

---

80. *See, e.g.*, Roulette v. City of Seattle, 97 F.3d 300, 306 (9th Cir. 1996) (en banc); Chemical Waste Management, Inc. v. EPA, 56 F.3d 1434, 1437 (D.C. Cir. 1995); Government Suppliers Consol. Servs., Inc. v. Bayh, 975 F.2d 1267, 1283 (7th Cir. 1992).

81. *See* Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992).

82. *See* Janklow v. Planned Parenthood, 517 U.S. 1174, 1176 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of cert.); Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of cert.).

83. *See Janklow*, 517 U.S. at 1177.

84. *See Ada*, 506 U.S. at 1012 (asserting misleadingly that facial invalidation "render[s] [a statute] utterly inoperative" and justifying *Salerno*'s strict standard on the ground that it ensures that courts do not act as "'roving commissions assigned to pass judgment on the validity of the Nation's laws'" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973))). Justice Scalia's defense of *Salerno* is conclusory because, even if one concedes that facial invalidation is appropriate only in exceptional circumstances, the relevant question is to identify those circumstances. Asserting the judiciary's traditional preference for as-applied adjudication is no response to the claim that *Salerno* effectively removes the possibility for all successful facial challenges outside of the First Amendment.

85. *Janklow*, 517 U.S. at 1178.

86. *See id.* at 1178-79 & n.3 (citing post-*Salerno* cases); *Ada*, 506 U.S. at 1012 (same).

Justice Scalia responds by quoting the passage from *Salerno* in which the Court asserted, unpersuasively, that overbreadth does not extend beyond the First Amendment because the Court has never recognized such an extension.[87]

The principal goal of this Article is to provide a more convincing defense of *Salerno*—one that adequately responds to the critics' charges of draconian effects, unnecessary dictum, insufficient precedential support, and inequitable treatment of constitutional provisions. Before embarking on that task, however, it is necessary to unmask two core assumptions of *Salerno*'s critics. The first assumption is that *Salerno*'s "no set of circumstances" language sets forth a particularly stringent test for adjudicating overbreadth facial challenges outside of the First Amendment context—facial challenges predicating facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law. The second assumption, related to the first, is that all facial challenges are structured as overbreadth facial challenges. It is only after these assumptions are unmasked, and rejected, that one can construct a convincing defense of *Salerno*.

Analysis of *Salerno* typically begins by contrasting the "no set of circumstances" test with the test for adjudicating First Amendment overbreadth challenges.[88] Indeed, the Court in *Salerno* made this distinction explicitly and justified the "heavy burden" imposed on the non-First Amendment facial challenger on the grounds that the Court has not "recognized an 'overbreadth' doctrine outside of the First Amendment."[89] Although the First Amendment facial challenger need only demonstrate a "substantial number" of potentially unconstitutional applications,[90] the non-First Amendment overbreadth challenger under *Salerno* is said to labor under the "heavy burden" of demonstrating that each and every statutory application is unconstitutional.[91] Thus, the doctrinal universe for adjudicating facial challenges appears to be constituted as follows: facial challenges are subject to the strict "no set of circumstances" test, unless the challenge concerns First Amendment interests, in which case it is subject

87. *See Janklow*, 517 U.S. at 1178-79; *Ada*, 506 US. at 1012.

88. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 893-94 (1997) (O'Connor, J., concurring in the judgment in part and dissenting in part); *Ada*, 506 U.S. at 1011 (1992) (Scalia, J., dissenting from denial of cert.); Adler, *supra* note 2, at 154-55; Dorf, *supra* note 1, at 261-72; *see also* Ford, *supra* note 2, at 1445 (stating that *Salerno* recognized a "bifurcated structure" for analyzing facial attacks: the "no set of circumstances" test and the First Amendment overbreadth doctrine).

89. United States v. Salerno, 481 U.S. 739, 745 (1987) (citing Schall v. Martin, 467 U.S. 253, 269 n.18 (1984)); *see* Dorf, *supra* note 1, at 261.

90. *See* New York v. Ferber, 458 U.S. 747, 769-70 (1982).

91. *See Salerno*, 481 U.S. at 745.

to the more lenient overbreadth test.[92] Of crucial importance to this scheme is the rule that the First Amendment overbreadth exception is the single doctrinal exception to *Salerno* that the Court formally recognizes.[93] *Salerno* and the First Amendment overbreadth doctrine purportedly supply facial challenge tests that encompass the totality of available facial challenges.

In this analysis, *Salerno* and the First Amendment overbreadth doctrine are thought to be facial challenge tests that differ primarily because of the number of unconstitutional applications that they deem intolerable. Whereas *Salerno* can tolerate any number of unconstitutional applications (fewer than all), the First Amendment overbreadth doctrine draws the line at a "substantial" number. Every facial challenge is subject to one of these tests, and which one depends entirely on the substantive constitutional doctrine on which the challenge is based. Even though critics bemoan the differential burdens that this scheme places on facial challengers, the very contrast between the two tests reveals two related assumptions that critics have not recognized. First, because *Salerno*'s "no set of circumstances" language is interpreted to require a demonstration that each and every application, and not just a substantial number of them, is unconstitutional, it must be assumed that the facial challenge subject to *Salerno*'s test is structured as an overbreadth facial challenge. It would only make sense to require the facial challenger to prove that every application is unconstitutional if the challenger is basing the claim of invalidity, as overbreadth facial challengers do, on some aggregate number of unconstitutional applications of an otherwise valid rule of law. *Salerno*, then, is thought to be a particularly stringent version of the First Amendment overbreadth test that governs overbreadth facial challenges outside of the First Amendment context. The second assumption follows from the first: since all facial challenges outside of the First Amendment are subject to *Salerno*, it must be assumed that all facial challenges are structured as overbreadth facial challenges. This Article refers to these twin assumptions as the "overbreadth assumption."

The critics' main contentions flow directly from the overbreadth assumption. Because the First Amendment overbreadth test is a more lenient test than *Salerno*, *Salerno* appears to be a draconian

92. *See* Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgments); *Ada*, 506 U.S. at 1012; Ford, *supra* note 2, at 1445-46.

93. *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2194 (1998) (Souter, J., dissenting); Reno v. ACLU, 521 U.S. 844, 893-94 (1997) (O'Connor, J., concurring in the judgment in part and dissenting in part); *Ada*, 506 U.S. at 1011; *Salerno*, 481 U.S. at 745.

overbreadth facial challenge test. Indeed, it would be strange to criticize *Salerno* as a draconian test as compared with the First Amendment overbreadth test if the facial challenge subject to *Salerno* were not structured in the same way as a First Amendment overbreadth challenge (rather like criticizing the strict scrutiny test of the Equal Protection Clause on the ground that content-neutral restrictions on speech trigger mid-level scrutiny and thus impose a less exacting burden on the state). Because a court judging an overbreadth facial challenge completes its task by identifying the requisite number of unconstitutional applications for facial invalidation, the Court in *Salerno* apparently ignored the method dictated by its own test. Since it is an empirical fact that the Court has facially invalidated statutes in the past without following this method, let alone satisfying *Salerno*'s test, *Salerno*'s test appears inconsistent with the Court's prior approach to facial challenge adjudication. Finally, because all facial challenges, irrespective of the underlying substantive law, are overbreadth facial challenges, it seems arbitrary to penalize facial challenges outside the First Amendment. In short, the current critique of *Salerno* flows directly, and indeed inevitably, from the overbreadth assumption.[94]

The critics' proposed alternatives to *Salerno*'s test are also rooted in this assumption. The main focus of reform proposals, inspired by the controversy in the abortion context, is to offer justifications for extending the First Amendment overbreadth test beyond the First Amendment context.[95] This approach does not reject *Salerno* outright, but rather subjects it to a kind of doctrinal war of attrition. The point of attack is *Salerno*'s seeming insistence that overbreadth methodology is permissible in the First Amendment alone, and that *Salerno*'s facial challenge test therefore governs all non-First Amend-

94. One important exception is Professor Adler's critique of *Salerno*, which rests on a conception of constitutional adjudication that implicitly rejects the notion that all facial challenges are structured as overbreadth challenges. *See* Adler, *supra* note 2, at 154-58. For Adler, all constitutional adjudication involves scrutiny of the validity of statutory rules and not the validity of statutory applications. *See id.* at 157. Adler shares with the critics, however, the view that *Salerno* directs a court to scrutinize the validity of particular statutory applications and requires the challenger to prove that every one of them is unconstitutional in order to succeed. *See id.* at 155.

95. *See* Dorf, *supra* note 1, at 261-71 (arguing for use of overbreadth doctrine in all cases involving certain fundamental rights); Ford, *supra* note 2, at 1454-60 (arguing for the use of a modified overbreadth doctrine in the abortion context); *see also* Fallon, *supra* note 2, at 884 n.192 (recognizing that his argument "concerning the proper contours of First Amendment overbreadth doctrine would support a doctrine of equal sweep in cases involving alleged infringements of other fundamental rights" but limiting his discussion to the First Amendment because the doctrine is most well-defined in that context and because of the special nature of First Amendment protections).

ment facial challenges.[96] By expanding the doctrinal contexts in which the First Amendment overbreadth test should govern, or calling attention to those areas in which it already does govern, the critics hope to ameliorate the undesirable consequences that *Salerno*'s harsh test produces. Whether the strategy of extending the overbreadth doctrine to new constitutional contexts is correct or sound, the important point for present purposes is that it naturally flows from the overbreadth assumption.[97]

Dorf, who has offered the most sophisticated theory in response to the perceived inadequacies of *Salerno*'s test, makes this assumption throughout his work. Most importantly, Dorf equates *Salerno*'s "no set of circumstances" test with the rules of the as-applied regime establishing a presumption of severability, and refers throughout to the "*Yazoo/Salerno* presumption of severability."[98] According to Dorf, *Salerno* authorizes a federal court to uphold a statute on its face even when some of its statutory applications are, or might be, unconstitutional.[99] For this rule to be consistent with the right to be judged by a valid rule of law, Dorf argues, a court applying *Salerno* must also be presuming that the constitutional and unconstitutional applications of the statute may be severed.[100] *Salerno*'s test is, therefore, the kind of facial challenge test that a presumption of severability necessarily yields: it is only when a statute is unconstitutional in all of its applications that statutory severance is impossible and the statute as a whole must fail.[101] In most other cases, when a litigant demonstrates that fewer than all applications are, or might be, unconstitutional, statutory severance presumptively saves the statute from facial invalidation.[102] In both situations, Dorf views facial challenge adjudication under *Salerno* as exclusively concerned with aggregating the requisite

96. *See Salerno*, 481 U.S. at 745; Dorf, *supra* note 1, at 282 (criticizing the Court's "gross overstatement" about the limitations of overbreadth doctrine).

97. Of course, advocating an extension of overbreadth does not necessarily commit one to the assumption that all facial challenges are overbreadth challenges. *See infra* notes 440-443 and accompanying text. However, prior arguments for such an extension have not discussed the structure of facial challenges and proceed as if an extension of the overbreadth doctrine is the only conceivable means of preserving facial challenges outside of the First Amendment. To the extent that the critics assume that overbreadth methodology is the sole mechanism through which facial challenges can succeed, they are implicitly committed to this assumption.

98. *See* Dorf, *supra* note 1, at 250-51 (describing the relationship between *Salerno* and Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912)). Occasionally, Dorf describes *Salerno* as an even stronger version of *Yazoo* that, because it does not refer by its own terms to the severability doctrine, creates in effect an "irrebuttable presumption of severability." Dorf, *supra* note 1, at 238, 287.

99. *See* Dorf, *supra* note 1, at 241.

100. *See id.* at 250.

101. *See id.*

102. *See id.*

number of unconstitutional applications, which is overbreadth's unique methodology. In short, Dorf's identification of the *Yazoo/Salerno* presumption of severability, which focuses on the validity of particular statutory applications, as the main cause of failed facial challenges, reveals his implicit commitment to the first aspect of the overbreadth assumption: "no set of circumstances" is a particularly stringent test for adjudicating overbreadth facial challenges outside of the First Amendment context.

The second aspect of the overbreadth assumption is evident in Dorf's account of how, notwithstanding *Salerno*'s draconian test, facial challenges sometimes succeed. Dorf attempts to explain the Court's apparent deviations from *Salerno* by arguing that *Salerno* must yield to constitutional norms and institutional values that prevent a court from presuming, as *Salerno* allegedly directs, statutory severability.[103] By relying on constitutionally and institutionally mandated inseverability rules as the exclusive mechanism through which facial challenges succeed, Dorf seems to commit himself to the view that all facial challenges are structured as overbreadth facial challenges. Facial challenges succeed when the relevant legal principles—statutory, constitutional, or institutional—dictate that a court should invalidate a statute on its face even though the statute is capable of some number of constitutional applications.[104]

Dorf's commitment to the overbreadth assumption is most clearly evident in his conclusion that the difference between facial and as-

---

103. *See id.* at 251-83. The main constitutional areas in which Dorf locates a constitutional constraint on severability are: under-inclusive equal protection challenges, First Amendment overbreadth doctrine, any case involving a "nonlitigation fundamental right," and cases involving purpose tests. *See id.* Dorf also argues that there are institutional limits on the presumption of severability—most importantly, that a court cannot presume statutory severability when the underlying statutory law dictates that the statute is inseverable. *See id.* at 283-94.

104. *See* Dorf, *supra* note 1, at 251. To be sure, Dorf appears to recognize the existence of facial challenges that, unlike overbreadth facial challenges, direct a court's scrutiny to the validity of the statutory terms under the applicable constitutional doctrine (what this Article terms a "valid rule facial challenge"). *See, e.g.*, *id.* at 279-80 (discussing statutes enacted with an illegitimate purpose). However, Dorf's appeal to substantive constitutional doctrine as an independent basis for successful facial challenges seems undercut by his insistence that the relevant import of that doctrine is its limitation of *Salerno*'s alleged severability presumption—an insistence that necessarily implicates overbreadth's methodology of proving facial invalidity by aggregating unconstitutional applications. Even if Dorf can be taken to have recognized tacitly this Article's thesis that overbreadth facial challenges are not the only kind of facial challenges, his analysis unquestionably makes use of the other aspect of the overbreadth assumption—that *Salerno*'s test is a particularly stringent test for adjudicating overbreadth facial challenges outside of the First Amendment context. But this latter point simply raises the additional question why Dorf should object to *Salerno*'s overbreadth facial challenge test if he also recognizes a qualitatively distinct kind of facial challenge that does not involve overbreadth methodology. To the extent that he does recognize such a challenge, the appropriate response would be that *Salerno* (a test for overbreadth facial challenges) does not apply to such challenges, not that *Salerno* must be trumped by countervailing principles.

applied challenges ultimately is a "superficial distinction[]" that obscures the underlying constitutional and institutional concerns at the heart of constitutional adjudication.[105] In Dorf's view, "any constitutional challenge to a statute is both as-applied and facial," because justiciability requirements mandate that the statute be applied against the litigant, and because all constitutional challenges, in some sense, challenge the constitutionality of the statute itself.[106] Thus, Dorf explicitly calls for the abandonment of the misleading, and in his view purely terminological, distinction between facial and as-applied challenges so that courts can focus "more sharply on the real issues—both subconstitutional and constitutional—at the core of any challenge to a statute."[107] A successful facial challenge is, for Dorf, nothing more than an as-applied challenge plus a claim of inseverable statutory applications under a legal principle strong enough to trump *Salerno*'s presumption of severability.[108] Like his proposal for overcoming *Salerno*'s presumption in order to make facial challenges succeed, Dorf's account of the nature of facial challenges generally reveals his implicit adherence to the overbreadth assumption.

C. Abandoning the Overbreadth Assumption

The most striking fact about the critics' case and their alternative proposals is the unexamined nature of the overbreadth assumption. In fact, the classic understanding of a facial challenge—a challenge to the constitutionality of the statute "on its face"—has no evident relationship to the overbreadth doctrine's method of aggregating unconstitutional applications of an otherwise valid rule. Facial invalidation pursuant to an overbreadth challenge is a kind of sleight of hand, justified though it may be, that infers thoroughgoing constitutional invalidity from invalidity in particular statutory applications. It is, therefore, quite remarkable that the overbreadth assumption has taken such a hold on judicial and scholarly thinking about facial challenges.

The fundamental difficulty with the overbreadth assumption is its incompatibility with the as-applied regime outlined in Part I. That regime establishes a complete set of rules to dispose of overbreadth facial challenges in the federal courts: save two limited exceptions, no litigant has the right to assert such a challenge and argue the con-

105. *See id.* at 239, 294.
106. *Id.* at 294.
107. *Id.*
108. *See id.* ("[The] proper approach to a constitutional case typically turns on the applicable substantive constitutional doctrine and the institutional setting, not the classification of a case as a facial or as-applied challenge.").

stitutional rights of third parties not before the court.[109] The noteworthy feature of the First Amendment overbreadth doctrine is not, contrary to the overbreadth assumption, that it makes it *easier* for litigants to succeed on facial challenges, but that it permits such challenges to be asserted in the first place. By focusing instead on the different burdens of proof between non-First Amendment and First Amendment facial challenges, the Court in *Salerno* seemed erroneously to imply that courts ordinarily entertain overbreadth facial challenges on the merits.[110] Indeed, if the overbreadth assumption is correct, the Court in *Salerno* appears to have disregarded the threshold standing requirements precluding third-party standing in order to entertain the defendants' facial challenge.[111] Moreover, *Salerno*'s "no set of circumstances" test, thus understood, authorizes precisely the same disregard for the rules barring third-party standing in every case in which a court applies the test. A necessary consequence of adopting the overbreadth assumption is the paradoxical conclusion that the Court in *Salerno* set forth a test for determining the success on the merits of all non-First Amendment overbreadth challenges that litigants have no standing to assert.[112]

The Court's apparent disregard of the threshold question of standing, if true, would be especially troublesome given the weighty justifications that the Court has put forth in support of those rules.[113] For example, *Salerno*'s test for judging facial claims on the merits seems to invite, indeed to require, consideration of the very hypothetical claims that those rules aim to foreclose.[114] In theory, a litigant can overcome *Salerno*'s facial challenge test only by a Herculean effort at hypothetical litigation: a demonstration that each and every application of the statute would be unconstitutional.[115] Admittedly, courts can avoid this uncharacteristic form of hypothetical litigation in certain cases simply by pointing to the constitutional application against the litigant as the one, non-hypothetical application sufficient to defeat the facial challenge. But if the litigant's own conduct is protected, and the Court must postulate a constitutional third-party ap-

---

109. *See supra* notes 33-41 and accompanying text (outlining the exceptions to the bar on third-party standing).

110. *See* United States v. Salerno, 481 U.S. 739, 745 (1987). This Article's reinterpretation of *Salerno* demonstrates that the Court, despite this language, intended no such implication. *See infra* notes 162-70 and accompanying text.

111. *See* Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912).

112. *See Salerno*, 481 U.S. at 745 (justifying the "no set of circumstances" test on the grounds that a facial challenge is "the most difficult challenge *to mount successfully*") (emphasis added).

113. *See supra* notes 26-28 and accompanying text.

114. *See* United States v. Raines, 362 U.S. 17, 21 (1960); *Yazoo*, 226 U.S. at 219-20.

115. *See* Ford, *supra* note 2, at 1459.

plication to defeat the facial challenge, it is plain that *Salerno*'s "no set of circumstances" test would directly conflict with the third-party standing bar. The fact that facial challenges under *Salerno* typically fail, and fail rather quickly, should not obscure its apparent incompatibility with these rules.

Thus, *Salerno*'s "no set of circumstances" is not, as Dorf contends, equivalent to the rule of *Yazoo*.[116] By equating *Salerno* with the *Yazoo* presumption of severability, Dorf seems to have confused the justification for *Yazoo* with the rule of *Yazoo* itself, and, therefore, overlooked the fundamental inconsistency between *Yazoo* and *Salerno* (interpreted with the overbreadth assumption). The rule of *Yazoo* is a standing rule limiting a litigant to the assertion of his or her own constitutional rights.[117] The so-called presumption of severability is an explanation for why such a standing rule is compatible with a litigant's right to be judged by a constitutionally valid rule of law.[118] The essential feature about *Yazoo* for facial challenge litigation is that, except insofar as a statute is inseverable, it forecloses the possibility for all non-First Amendment overbreadth facial challenges in the federal courts. By contrast, *Salerno*'s "no set of circumstances" test, according to the prevailing view, skips over the rule of *Yazoo* altogether and sets forth a test for adjudicating on the merits the very facial challenges that *Yazoo* would have dismissed for lack of standing.[119]

The overbreadth assumption proves equally troubling in cases involving statutory inseverability—one of the exception doctrines to the rules of the as-applied regime.[120] In such cases, as with the First Amendment overbreadth doctrine, the standing rules themselves provide the exception necessary to allow a litigant to assert the facial claim.[121] However, *Salerno* (pursuant to the overbreadth assumption) appears to apply the "no set of circumstances" test to all challenges (except, of course, First Amendment overbreadth challenges), including those directed at statutes that are inseverable under the ap-

116. *See* Dorf, *supra* note 1, at 250-51.

117. *See Yazoo*, 226 U.S. at 219-20; Monaghan, *supra* note 23, at 277.

118. *See* Monaghan, *supra* note 29, at 7 n.26.

119. The harder question is whether *Salerno*'s test, despite its surface inconsistency with *Yazoo*'s standing bar, shares with *Yazoo* the presumption of severability at the level of justification. Because, as Dorf argues, *Salerno* permits a court to uphold a statute on its face even if it might be capable of unconstitutional applications, *Salerno* seems to rest in part on a presumption of severability. However, because *Salerno* is best understood as governing a qualitatively distinct form of facial challenge, which does not direct a court to examine the constitutionality of particular statutory applications, it turns out the very association of *Salerno* with *Yazoo*'s presumption of severability is misleading and should be rejected. *See infra* notes 212-18 and accompanying text.

120. *See supra* notes 33-36 and accompanying text.

121. *See* United States v. Raines, 362 U.S. 17, 23 (1960).

plicable statutory law.[122] The facial challenge predicated on statutory inseverability ordinarily turns on legislative intent and does not require a demonstration that each and every conceivable statutory application would be unconstitutional.[123] Yet, *Salerno*, interpreted with the overbreadth assumption, requires just such a demonstration and seemingly supersedes a court's ability to deem the statute facially invalid on the grounds of statutory inseverability. In addition to disregarding the rules of the as-applied regime, *Salerno* would disregard one of that regime's principal exceptions, seemingly blind to the due process and rule of law values associated with prohibiting punishment under an inseverable statute.[124]

It seems clear, then, that *Salerno* is reduced to virtual unintelligibility if one assumes that all facial challenges are structured as overbreadth challenges, and that *Salerno* sets forth a particularly stringent test for adjudicating non-First Amendment overbreadth facial challenges on the merits. Critics of *Salerno* might view its conceptual demise as a welcome event. But this last blow is premised on the very same assumption that underlies the critics' alternative proposals. Extension of the overbreadth doctrine and the identification of constitutional constraints on the presumption of severability are proposals implicitly committed to the overbreadth assumption.[125] An assumption responsible for rendering *Salerno*'s test virtually unintelligible can hardly form the basis for a new facial challenge regime. The sounder course is to reject the overbreadth assumption altogether in favor of a more complex account of the dual structure of facial challenges. Part III demonstrates that the critics' case against *Salerno* dissolves once the misleading overbreadth assumption is abandoned.

III. RECONSIDERING *SALERNO*'S "NO SET OF CIRCUMSTANCES"

This Part asserts two central claims as an alternative to the overbreadth assumption. The first, simply stated, is that not all facial challenges are alike. In addition to overbreadth facial challenges, litigants also may assert what this Article terms a "valid rule facial challenge." The second claim is that *Salerno*'s "no set of circumstances" language does not set forth a particularly stringent test for judging overbreadth facial challenges outside of the First Amend-

122. *See* United States v. Salerno, 481 U.S. 739, 745 (1997) (failing to distinguish between severable and inseverable statutes).

123. *See* Dorchy v. Kansas, 264 U.S. 286, 289-90 (1924).

124. *See* Fallon, *supra* note 2, at 862; *see also* Dorf, *supra* note 1, at 283-93 (discussing the incompatibility between *Salerno*'s irrebuttable presumption of severability and statutory severability doctrine).

125. *See supra* notes 95-108 and accompanying text.

ment. Instead, *Salerno* is best understood, not as a facial challenge "test" at all, but rather as a descriptive claim about a statute whose terms state an invalid rule of law: "no set of circumstances" exists under which such a statute can be constitutionally applied.

But what is this other type of facial challenge? What is the basis for the claim that overbreadth facial challenges are not the only type of facial challenge? This Part seeks to answer those questions, first by providing a brief comparison of the main features of each type of facial challenge and tracing the development of the conception of a valid rule facial challenge in Professor Monaghan's work. Second, this Part provides a reinterpretation of *Salerno* equipped with the understanding of valid rule facial challenges and demonstrates that such an interpretation is fully compatible with the standing rules of the as-applied regime. Moreover, this interpretation answers all of the critics' principal claims and shows that *Salerno*'s "no set of circumstances" language is a straightforward and satisfactory response to the kind of constitutional challenge raised by a valid rule facial challenge. In short, *Salerno* need not be rejected to avoid the parade of horribles catalogued and analyzed in Part II. It need only be correctly understood.

A. Valid Rule Facial Challenges Explained

1. A summary sketch

As explained in Part I, an overbreadth facial challenge predicates facial invalidity on some aggregate number of potentially unconstitutional applications of an otherwise valid rule.[126] The general rule is that no litigant has standing to assert such a challenge in the federal courts.[127] If, however, the litigant asserts an overbreadth facial challenge within the First Amendment, or if the statute subject to the overbreadth facial challenge is a statute whose unconstitutional applications are inseverable from its constitutional ones, the litigant has standing to assert an overbreadth facial challenge.[128] Once asserted, a court will evaluate the overbreadth facial challenge by assessing the constitutional validity of particular statutory applications. The conclusion that an "otherwise valid" statutory rule should be deemed facially invalid is derived, not from a court's assessment of the validity of the statutory terms, but rather from an assessment of the effect that some number of unconstitutional applications has on the rule

126. *See supra* notes 21-22 and accompanying text.
127. *See supra* notes 23-25 and accompanying text.
128. *See supra* notes 33-41 and accompanying text.

itself. In other words, an overbreadth facial challenge succeeds only when the First Amendment overbreadth doctrine or the law of statutory severability dictates that the number or nature of potentially unconstitutional applications is sufficient to invalidate the statute as a whole.

However, contrary to the overbreadth assumption, overbreadth facial challenges are not the only form of facial challenge. The other kind of facial challenge, which this Article terms a "valid rule facial challenge," presents a completely different picture of facial challenge adjudication. The valid rule facial challenger asserts a personal right to be judged under a constitutionally valid rule of law, and thus does not require a special dispensation from the third-party standing bar. Moreover, a valid rule facial challenge directs judicial scrutiny to the terms of the statute itself, and demonstrates that those terms, measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contains a constitutional infirmity that invalidates the statute in its entirety.[129] Unlike the statute subject to an overbreadth attack, this statute was never "otherwise valid" in the important sense that every conceivable statutory application is tainted by the constitutional defect inhering in the statutory terms. A valid rule facial challenge seeks to show that, *under the statute as it is currently written and authoritatively construed*, the underlying substantive constitutional doctrine dictates that there is "no set of circumstances" in which the statute can be constitutionally applied. A valid rule facial challenge is a constitutional challenge that, if successful, satisfies *Salerno*'s "no set of circumstances" language. That language, however, does not set forth an application-specific method of proof or a facial challenge "test," but is rather a descriptive claim about a statute that on its face expresses an invalid rule of law. Finally, principles of statutory severability are not relevant to the determination of facial invalidity under a valid rule facial challenge because a statute with no constitutional applications cannot be saved from invalidity by severing the unconstitutional applications. The remainder of this Part attempts to elaborate and support this sum-

129. This Article's use of the term "statute" is meant to refer only to a discrete statutory provision, or statutory rule, that may or may not be a part of a larger statutory measure. To say that a valid rule facial challenge demonstrates that a statute cannot be constitutionally applied at all is only to say that the statutory rule subject to the valid rule facial challenge is constitutionally infirm. Whether other statutory rules contained in discrete statutory provisions (or even contained in a discrete section of the same statutory provision) are constitutional despite a successful valid rule facial challenge to one statutory rule is a question of pure statutory severability, and not a question relevant to facial validity. This Article uses the terms statute and statutory rule interchangeably, even though, as a technical matter, valid rule facial challenges assert that individual statutory rules are constitutionally invalid.

mary capsule of facial challenge adjudication under *Salerno*.

2. The First Amendment: Two forms of facial challenges

The first step in proving the dual structure of facial challenges is taken, curiously enough, within the First Amendment context. Professor Monaghan, in his now-famous attempt to reinterpret the First Amendment overbreadth doctrine, was perhaps the first scholar to recognize and explain the concept of a valid rule facial challenge.[130] According to Monaghan, the principal First Amendment overbreadth cases do not rest on a judicially-created exception to the third-party standing bar that permits unprotected litigants to assert the constitutional claims of third parties not before the court.[131] Rather, Monaghan argues that those cases are more sensibly explained as illustrations of the well-established principle that a litigant has a right to be judged by a constitutionally valid rule of law:[132]

> [I]n addition to a claim of privilege, a litigant has always been permitted to make another, equally "conventional" challenge: He can insist that his conduct be judged in accordance with a rule that is constitutionally valid. In sharp contrast to a fact-dependent privilege claim, a challenge to the content of the rule applied is independent of the specific facts of the litigant's predicament. *Rather, it speaks to the relationship between the facial content of the rule being applied to the facts and the applicable constitutional law, and it insists that that rule itself be valid.*[133]

Against this conceptual background, Monaghan views the First Amendment overbreadth doctrine, with its purported justification of protecting against the undesirable chilling of third parties' speech through a special standing exception, as a superfluous procedural doctrine that contradicts important principles of constitutional adjudication and federalism.[134] On the contrary, Monaghan argues, overbreadth doctrine simply expresses the First Amendment's substantive requirement that statutes abridging First Amendment interests employ the least-restrictive regulatory means to achieve the government's professed regulatory ends.[135] Because the First Amendment

---

130. *See* Monaghan, *supra* note 29, at 4-14; *see also* Henry Paul Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195 (elaborating on the concept of a constitutional challenge to the validity of a rule).

131. *See* Monaghan, *supra* note 29, at 13.

132. *See id.* at 4-14; Monaghan, *supra* note 23, at 283. For a similar effort to reinterpret other exceptions to the bar against third-party standing in terms of a litigant's own constitutional rights, see Monaghan, *id.* at 297-310; Robert A. Sedler, *The Assertion of Constitutional Jus Tertii*, 70 CAL. L. REV. 1308, 1323-35 (1982).

133. Monaghan, *supra* note 29, at 8 (emphasis added).

134. *See id.* at 14-23.

135. *See id.* at 24-25, 37-39. Subsequent cases have made clear that, at least with respect to

imposes a requirement of regulatory precision on statutes impinging on First Amendment interests, Monaghan argues that any litigant, regardless of the nature of his conduct, has standing to challenge his punishment under an imprecise, and thus, constitutionally invalid, statutory rule.[136]

As several scholars have noted, the Supreme Court has implicitly rejected Monaghan's attempt to recharacterize the First Amendment overbreadth doctrine.[137] The Court continues to insist that the doctrine is premised on a special rule of standing necessary to prevent third parties from chilling protected expression.[138] Whether the Court's prophylactic policy is constitutionally justified as a matter of original inquiry,[139] it now seems beyond question that the First Amendment overbreadth doctrine, at least as a formal matter, rests on an exception to the third-party standing bar and not, as Monaghan argues, on the substantive constitutional requirement of narrowly tailored regulatory measures.[140]

However, in criticizing Monaghan's more ambitious reinterpretation of the First Amendment overbreadth doctrine,[141] scholars have not seriously undermined Monaghan's central claim that litigants have a right to be judged under a constitutionally valid rule of law,[142]

---

content-neutral restrictions on speech, the actual First Amendment requirement is one of "narrowly tailored" regulatory measures and not a requirement that the state adopt the least restrictive means available. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Monaghan's claim is obviously not affected by this clarification.

136. *See* Monaghan, *supra* note 29, at 37 (stating that the "dominant idea" of First Amendment overbreadth doctrine is "serious means scrutiny" or a requirement of regulatory precision).

137. *See* Dorf, *supra* note 1, at 264; Fallon, *supra* note 2, at 873.

138. *See* Massachusetts v. Oaks, 491 U.S. 576, 581 (1989); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 575-76 (1987); Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 957 n.7 (1984); Dorf, *supra* note 1, at 261-64; Fallon, *supra* note 2, at 872-73.

139. *See* Fallon, *supra* note 2, at 867-70.

140. *See, e.g.*, Alexander v. United States, 509 U.S. 544, 555 (1993) (stating that First Amendment overbreadth is a departure from traditional standing requirements); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985) (same); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (same).

141. Despite this critique, Monaghan's theory continues to garner support as an alternative rationale for the First Amendment overbreadth doctrine. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8, at 999 (5th ed. 1995) (arguing that it is not precise to view overbreadth as a standing doctrine); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1023-24 (2d ed. 1988) (proposing that the First Amendment overbreadth doctrine is not an exception to standing, but rather a recognition of a litigant's right to be judged by a valid law); Fletcher, *supra* note 43, at 244 & n.105 (accepting Monaghan's argument that an overbreadth challenger is asserting a personal right to be free from an invalid law); Ford, *supra* note 2, at 1460-62 (treating Monaghan's valid rule theory as an "alternative justification for overbreadth analysis"). *But see* Martin H. Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1040 (1983) (calling Monaghan's thesis "conclusory and unresponsive").

142. *See* Monaghan, *supra* note 130, at 196 (stating that it is "embedded in our conception of

and thus have a right to assert valid rule facial challenges.[143] Indeed, contrary to occasional suggestions that overbreadth doctrine provides the sole vehicle for asserting a First Amendment facial challenge,[144] the Court has repeatedly differentiated between two distinct kinds of facial challenges in the First Amendment context.[145] Although the

---

the 'rule of law'" that no litigant, regardless of the privileged nature of his conduct, can be subject to punishment under a constitutionally invalid rule); *see also* Dorf, *supra* note 1, at 263 & n.106 (recognizing that case law partially supports Monaghan's interpretation of First Amendment overbreadth doctrine). Fallon, although critical of Monaghan's elaboration of the claim that a litigant has a constitutional right to be judged by a valid rule of law, concludes that the claim itself is "self-evidently correct" and that it explains the constitutionally mandated core of the First Amendment overbreadth doctrine. *See* Fallon, *supra* note 2, at 874-75. Fallon identifies this constitutionally mandated core with the due process or rule-of-law qualifications to the standing rules of the as-applied regime, which mandate that a litigant may not be punished under an inseverable statute embracing unconstitutional applications and that the evidence with which a defendant is convicted must establish that the litigant's conduct was constitutionally prohibitable. *See id.* Although Dorf criticizes both Monaghan and Fallon for accepting this principle in a conclusory fashion, *see* Dorf, *supra* note 1, at 243, he concludes in the end that such a right may be derivative of *Marbury v. Madison*'s conception of judicial review and the Supremacy Clause's requirement that laws, not their applications, be constitutionally valid. *See id.* at 246-49.

However, Dorf creates perhaps more difficulties than necessary by assuming that the right to be judged under a constitutionally valid rule of law entails a right to "challenge laws that are 'unconstitutional as applied to someone else.'" *Id.* at 243 (quoting Fallon, *supra* note 2, at 862). But the right in question entails the much more limited claim that the application of the statute against the litigant, due to the constitutional invalidity of the rule itself, is constitutionally invalid. *See* Monaghan, *supra* note 29, at 3 ("[A] litigant [can] make a facial challenge to the constitutional sufficiency of the rule *actually applied to him*, irrespective of the privileged character of his own activity.") (emphasis added). In other words, the argument that litigants who are not constitutionally privileged nonetheless have a constitutional right to assert constitutional claims, *see* Dorf, *supra* note 1, at 246-49, is fully compatible with the notion that the constitutional claims that such litigants assert are their own. *But see* Adler, *supra* note 2, at 160 (agreeing with Monaghan that constitutional adjudication involves judicial scrutiny of rules but rejecting the claim that such scrutiny derives from the moral or legal rights of the litigants to be free from the application of invalid rules against them).

143. As the remainder of this Article will demonstrate, the Court has entertained valid rule facial challenges, predicated on a litigant's right to be judged according to a valid rule of law, in a variety of constitutional contexts.

144. *See* Board of Trustees v. Fox, 492 U.S. 469, 483 (1989) (implying that all First Amendment challenges that are not overbreadth challenges involve a claim about the litigant's protected conduct); Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 976-77 (1984) (Rehnquist, J., dissenting) (describing overbreadth claims as the single exception to as-applied challenges).

145. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 381-82 n.3 (1992) (concluding that claim of facial invalidity "was *not* just a technical 'overbreadth' claim (*i.e.*, a claim that the ordinance violated the rights of too many third parties) but included the contention that the ordinance was 'overbroad' in the sense of restricting more speech than the Constitution permits, *even in its application to him, because it is content based*") (second emphasis added); New York State Club Ass'n v. New York, 487 U.S. 1, 11 (1988) (distinguishing facial challenges based on the overbreadth doctrine from those based on the claim that the statute is unconstitutional in all of its applications); *Joseph H. Munson Co.*, 467 U.S. at 965 n.13 ("[T]here is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face and, therefore, in all its applications, falls short of constitutional commands."); City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984) ("There are two *quite different* ways in which a statute or ordinance may be considered invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad'") (emphasis added); New York v. Ferber, 458 U.S. 747, 768 n.21

Court has never used the term "valid rule" challenge to explain the valid rule alternative to overbreadth facial challenges,[146] the structure of this facial challenge is consistent with Monaghan's conception of a facial challenge: the litigant asserts a personal right to be judged by a constitutionally valid rule of law,[147] irrespective of the "privileged" nature of his or her own conduct.[148] Moreover, the alternative form of facial challenge that these cases contemplate is perfectly consistent with the kind of facial challenge to which *Salerno*'s "no set of circumstances" language is addressed: a claim of facial invalidity predicated on a constitutional infirmity in the terms of the statute itself that invalidates all conceivable statutory applications.[149]

(1982) ("Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face.").

146. Indeed, the Court sometimes persists in referring to both kinds of challenges as overbreadth challenges, suggesting that the distinction is really one of terminology alone. *See Joseph H. Munson Co.*, 467 U.S. at 965 n.13.

> "[O]verbreadth" is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. "Overbreadth" has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest.

Id. (citation omitted). On other occasions, the Court's insistence on distinct terminology reflects its understanding that the structure of the facial challenge at issue is distinct. *See Vincent*, 466 U.S. at 796–98 (referring to the distinction between overbreadth challenges and challenges alleging that a statute can never be applied constitutionally); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 n.8 (1980) (same). Thus, although the Court has not adopted the term "valid rule facial challenge," this Article will henceforth use this term to refer to the non-overbreadth form of facial challenge whenever it is present in a particular case, even if the Court did not denominate it as such.

147. *See Vincent*, 466 U.S. at 798 (explaining that valid rule facial challenges do not require an "exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court").

148. *See Ferber*, 458 U.S. at 768 n.21 (citing Monaghan for the proposition that a person whose constitutional rights are not violated by a statute may nevertheless assert a valid rule facial challenge). Thus, in licensing cases involving prior restraint, the Court allows the facial challenge whether or not the challenger applies for a license, and whether or not the challenger's conduct can be sanctioned under a properly drawn statute. As the Court explained in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 766 (1988), it has considered

> facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened [the] same, *even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue.*

Id. (emphasis added). In one of the Court's most extensive discussions of the distinction between overbreadth and valid rule facial challenges, the Court apparently erred in describing the licensing cases as cases in which "a litigant has claimed that *his own activity was protected* by the First Amendment, and [in which] the Court has not limited itself to refining the law by preventing improper applications on a case-by-case basis." *Joseph H. Munson Co.*, 467 U.S. at 965 n.13 (emphasis added). This statement is incorrect insofar as the licensing cases clearly permit facial challenges irrespective of whether the litigant's own conduct is constitutionally protected. It is also inconsistent with the Court's statement in *Munson* that valid rule facial invalidation represents the invalidation of a statute that is invalid in all of its conceivable applications. *See id.*

149. *See Joseph H. Munson Co.*, 467 U.S. at 966 ("The flaw in the statute is not simply that it

This case law puts to rest the reductionist assumption that all facial challenges are necessarily of the overbreadth variety. At the same time, these cases, by distinguishing between two qualitatively distinct kinds of facial challenges within the First Amendment, respond definitively, if not wholly conclusively, to Monaghan's attempt to prove that all facial challenges are valid rule facial challenges.[150] The Court has rejected both attempts to reduce all facial challenges within the First Amendment to one category. Instead, it has arrived at a doctrinal synthesis of Monaghan's valid rule theory and traditional overbreadth doctrine in which valid rule facial challenges are not a substitute explanation for overbreadth challenges, but instead a qualitatively distinct alternative to them.[151] Monaghan's overbreadth thesis has not so much been rejected as it has been appropriated, and thus minimized, within a preexisting doctrinal structure.[152]

The Court's recognition of two alternative forms of facial challenges within the First Amendment underscores a further weakness in Monaghan's thesis. By focusing his analysis on a reinterpretation of First Amendment overbreadth challenges, which direct judicial scrutiny to statutes that sweep in too many unconstitutional applications, Monaghan appears to limit the reach of valid rule facial challenges to constitutional contexts that impose a requirement of regulatory pre-

---

includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud"); *id.* at 965-66 n.13 (stating that "there is no reason to limit challenges to case-by-case 'as-applied' challenges when the statute on its face and therefore in all of its applications falls short of constitutional demands"); *Vincent*, 466 U.S. at 797-98 (noting that a holding of facial invalidity "expresses the conclusion that the statute *could never be applied in a valid manner*") (emphasis added); *see also* Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 972 (D.C. Cir. 1996) (likening *Salerno* to *Vincent*'s conclusion that a statute is facially invalid if it can never be applied constitutionally).

150. The response is not wholly conclusive because the Court's repeated reliance on a standing exception to explain the overbreadth doctrine does not in itself defeat the substance of Monaghan's claims. *See infra* notes 254-77 and accompanying text.

151. *See Ferber*, 458 U.S. at 768 n.21 (acknowledging overbreadth as one of two qualitatively distinct means of facially attacking a statute).

152. This observation takes much of the force out of the claim that Monaghan's reinterpretation of First Amendment overbreadth doctrine in valid rule terms "would eviscerate the [First Amendment overbreadth] doctrine altogether." Hill, *supra* note 36, at 1089; *see also* Alexander, *supra* note 40, at 542 (calling Monaghan's thesis an "attempt[] to discredit" overbreadth analysis). These claims are premised on the notion that the overbreadth doctrine is essentially a prophylactic one that aims to protect the rights of absent third parties, and which therefore cannot (by definition) be limited to protecting a litigant's personal right to be judged by a constitutionally valid rule of law. *See* Hill, *supra* note 36, at 1085-86. To the extent that the Court has settled on the view that valid rule theory and the prophylactic overbreadth doctrine can coexist within the First Amendment, these concerns are obviously unfounded. *See Ferber*, 458 U.S. at 768 n.21. The important point for present purposes is that one can maintain a commitment to a robust overbreadth doctrine, and, at the same time, acknowledge that Monaghan's valid rule theory explains a basic fact about the other form of facial challenge–the valid rule facial challenge—available both within and without the First Amendment.

cision.[153] However, the principle underlying the valid rule facial challenge—that litigants have a right to be free from punishment under a constitutionally invalid rule of law–clearly extends beyond cases involving constitutional challenges to the tightness of a statute's means-end relationship. Accordingly, the Court has facially invalidated statutes within the First Amendment context on a variety of valid rule grounds, including: that the statutes contained an impermissible content-based discrimination on speech;[154] that they were enacted with the impermissible purpose of suppressing speech;[155] and that they impermissibly conferred unbridled discretion on administrative officials.[156] The Court's rejection of Monaghan's proposed identification between overbreadth and valid rule facial challenges therefore rests on a recognition, albeit implicit, that valid rule facial challenges comprise a larger category of cases than those asserting constitutional invalidity on the basis of imprecise regulatory measures.

153. *See* Monaghan, *supra* note 29, at 37-39.

154. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (concluding that an ordinance prohibiting bias-motivated disorderly conduct was facially invalid because it prohibited speech solely on the basis of content); Boos v. Barry, 485 U.S. 312, 334 (1988) (holding that a prohibition on displaying signs critical of foreign governments in a public forum was facially invalid as a content-based restriction); Police Dep't v. Mosley, 408 U.S. 92, 102 (1972) (concluding that a statute prohibiting all picketing of schools except peaceful labor picketing was a content-based restriction and thus facially invalid); *see also* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 766-67 (1988) (describing *Mosley* as a facial invalidation based on impermissible content discrimination).

155. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 797 n.14 (1984) (explaining Stromberg v. California, 283 U.S. 359 (1931), and Lovell v. Griffin, 303 U.S. 444 (1938), as facial invalidations resting on this ground).

156. *See Plain Dealer Publ'g Co.*, 486 U.S. at 757-59 (invalidating on its face an ordinance giving officials standardless discretion to deny permits to place newsracks on public property). The Court has explained its licensing cases as instances of successful valid rule facial challenges, in which statutes have been invalidated because "*any* attempt to enforce [the statute] would create an unacceptable risk of the suppression of ideas." *Vincent*, 466 U.S. at 797; *see id.* at 797-98 & nn.14-15 (citing Saia v. New York, 334 U.S. 558 (1948); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496, 516 (1939); and Lovell v. Griffin, 303 U.S. 444 (1938), as examples of successful valid rule facial challenges). On other occasions, however, the Court has been less precise and included these cases within the "overbreadth" rubric, implying that the overbreadth doctrine's special standing exception and prophylactic justifications are necessary to explain them. *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2194 (1998) (Souter, J., dissenting); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); *see also* Fallon, *supra* note 2, at 866 (explaining licensing cases as an aspect of the First Amendment overbreadth doctrine). But the "risk of suppression" that justifies the conclusion that a licensing statute is unconstitutional in *all* of its applications, *see Vincent*, 466 U.S. at 797, is analytically distinct from the concern for preventing chill in the overbreadth doctrine. Whereas the concern in overbreadth doctrine is that a broad statute threatens to suppress third parties' speech in a substantial number of applications (even though it is constitutionally valid in the case at hand), *see id.* at 798, the concern in a valid rule facial challenge is that, in any individual application (including the one against the party before the court), the constitutional flaw in the statute itself creates such a likelihood of suppression that the statute must be deemed invalid in every application. *See id.* at 797-98; Sanjour v. EPA, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) (recognizing this distinction). Although this distinction is admittedly a subtle one, it highlights the structural differences between overbreadth and valid rule facial challenges.

In another important sense, however, Monaghan's valid rule theory is appropriately more expansive than the Court's current doctrinal synthesis. Monaghan argues that valid rule facial challenges, because they are based on the substantive requirements of constitutional doctrine and not on prophylactic-based protection against undesirable chilling of First Amendment expression, are applicable outside of the First Amendment context.[157] By contrast, the Supreme Court's explicit recognition of two distinct forms of facial challenges has, in the main, been limited to the First Amendment context.[158] Outside of the First Amendment context, the Court maintains that facial challenges succeed only when "no set of circumstances" exists under which the statute can be constitutionally applied, but it has not explicitly identified the kind of facial challenge subject to this standard.[159] Indeed, *Salerno* was silent on this score, which perhaps more than anything else explains the prevailing view that all facial challenges share the same structure.

As explained above, it is not plausible to interpret *Salerno*'s "no set of circumstances" as a test for adjudicating non-First Amendment overbreadth facial challenges on the merits.[160] Given that non-First Amendment facial challenges unquestionably exist, that there are only two known forms of facial challenges, and that litigants generally have no standing to assert overbreadth facial challenges outside of the First Amendment, the process of elimination seems to dictate that non-First Amendment facial challenges are generally of the valid rule variety. Contrary to the overbreadth assumption, *Salerno*'s "no set of circumstances" language is best understood as governing the adjudication of valid rule facial challenges alone.

---

157. *See* Monaghan, *supra* note 29, at 38.

158. That is not at all to say that the Court has never recognized valid rule facial challenges outside of the First Amendment. Much of this Article attempts to demonstrate that it has. The point here is simply that the Court has not often distinguished between kinds of facial challenges outside of the First Amendment. One counter-example is *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n.5, 495 & n.7 (1982), in which the Court distinguished vagueness facial challenges, which cannot succeed unless the statute is "impermissibly vague in all of its applications," from overbreadth facial challenges. *See id.* at 495; *see also* Sanitation & Recycling Indus., Inc. v. City of New York., 107 F.3d 985, 992 (2d Cir. 1997) (distinguishing between a general facial challenge under which a litigant demonstrates that the statute can never be constitutionally applied, and an overbreadth facial challenge under the First Amendment overbreadth doctrine). And on at least one occasion within the First Amendment, the Court implicitly recognized that a qualitatively distinct form of facial challenge from overbreadth exists in other constitutional contexts. *See* Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965-66 n.13 (1984) (discussing the distinctions between overbreadth and valid rule facial challenges, noting that the latter have been successful outside of the First Amendment, and citing cases involving facial challenges to criminal statutes on grounds of vagueness, and facial challenges to statutes violating procedural due process guarantees).

159. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

160. *See supra* notes 110-25 and accompanying text.

The Court's failure to make this point explicit in *Salerno* can perhaps be explained as a function of the practical realities of constitutional adjudication. The First Amendment context, in which two qualitatively distinct facial challenges are available, presents a particularly pressing need for the Court to distinguish precisely between forms of facial challenges.[161] *Salerno*'s silence about the kind of facial challenge embraced by the "no set of circumstances" language may be a function of the absence of a similar need for precision in constitutional contexts in which, due to the ordinary foreclosure of overbreadth facial challenges, essentially only one form of facial challenge exists. That facial challenges outside of the First Amendment context are almost exclusively valid rule facial challenges is perhaps a truism of constitutional practice that has lacked judicial attention, and thus terminological expression, for want of practical urgency.

B. Reinterpreting Salerno *as a Descriptive Claim About a Statute Whose Terms State an Invalid Rule of Law*

The assumption that all facial challenges are overbreadth challenges and that *Salerno* is a particularly stringent test for judging non-First Amendment overbreadth facial challenges yields an interpretation of *Salerno* riddled with conceptual confusion. More specifically, as Part II explains, that assumption renders *Salerno*'s "test" susceptible to five principal charges: (1) that it is incompatible with the rules of the as-applied regime; (2) that the test was unnecessary dictum in *Salerno* itself; (3) that the test is inconsistent with the Court's actual

161. Yesterday's precision can be tomorrow's ambiguity. In a recent First Amendment case, *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), the Court seemed to straddle (and consequently to muddy) the conceptual line between valid rule facial challenges and the First Amendment overbreadth doctrine. *See id.* at 2175-80 (rejecting a facial challenge to a provision of the National Foundation of the Arts and Humanities Act requiring the National Endowment for the Arts to ensure that artistic excellence and merit are criteria by which grant applications are judged, taking into consideration general standards of "decency and respect" for the diverse beliefs and values of the American public). The Court began by invoking the *Salerno*-like "heavy burden" under which the facial challengers were said to labor, but then proceeded immediately to state that the challengers were required to prove that the statute created a "substantial risk" of suppression in order to succeed, citing an overbreadth case, but never explicitly mentioning the doctrine. *See id.* at 2175 (citing Broadrick v. Oklahoma, 413 U.S 601, 615 (1973)). As the dissent observed, it is not at all clear which method of analysis the Court employed. *See id.* at 2193-95 & n.15 (Souter, J., dissenting) (noting that the Court seemed to justify its holding in part based on the existence of some constitutional applications, even though the Court also conceded that in the First Amendment such an approach would have been unwarranted (presumably because of the overbreadth doctrine's alternative method of proving facial invalidity)). The Court's ultimate conclusion that the statutory provision was facially valid seemed to be a kind of hybrid of valid rule and overbreadth theory, fusing the valid rule observation that the statute itself did not create a content-based discrimination on speech, *see id.* at 2175-77, and the quasi-overbreadth determination that most applications of the statute did not present a serious risk of suppressing speech, *see id.* at 2177-78.

facial challenge practice; (4) that the test is draconian; and (5) that the test unjustifiably privileges First Amendment facial challengers. This Subpart demonstrates that each of these changes can be rejected once *Salerno*'s "no set of circumstances" language is interpreted, not as a facial challenge "test" at all, but rather as a descriptive claim about a statute whose terms state an invalid rule of law.

1. Salerno *is consistent with the rules of the as-applied regime*

Perhaps the most distinctive feature of a valid rule facial challenge, in contrast to an overbreadth challenge, is that a valid rule facial challenger asserts a personal right to be judged by a constitutionally valid rule of law.[162] Unlike the overbreadth facial challenger, who must invoke an exception to the rule barring third-party standing in order to assert facial invalidity predicated on unconstitutional statutory applications to third parties,[163] the valid rule facial challenger is unaffected by the third-party standing bar.[164] This is so because the valid rule facial challenge—which alleges that the challenged statute is unconstitutional in all of its conceivable applications—necessarily includes the claim that the statute is unconstitutional in its application against the litigant.[165] Additionally, the method by which a challenger reaches that goal—measuring the statutory terms against the applicable constitutional doctrine—does not require a court to analyze the constitutionality of particular applications not presently before the court.[166]

Thus, and contrary to initial appearances, the Court in *Salerno* did not overlook the question of third-party standing by setting forth a test for judging non-First Amendment overbreadth facial challenges on the merits and by applying that test to resolve the defendants' facial challenges.[167] Rather, the Court correctly assumed that the particular standing problems implicated by overbreadth facial challenges (e.g., hypothetical litigation concerning the conduct of third parties not before the Court) were not relevant to a valid rule facial challenger's personal right to assert constitutional invalidity inhering in the statute itself. *Salerno*'s "no set of circumstances," once understood as governing valid rule facial challenges, is perfectly consistent with the standing rules of the as-applied regime.

Salerno is also consistent with the statutory inseverability exception

162. *See* Monaghan, *supra* note 29, at 3.
163. *See* Massachusetts v. Oakes, 491 U.S. 576, 581 (1989).
164. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 797-98 (1984).
165. *See Vincent*, 466 U.S. at 796; Monaghan, *supra* note 29, at 3, 12.
166. *See infra* Part III.B.2.
167. *See* United States v. Salerno, 481 U.S. 739, 745-54 (1987) (finding no facial invalidity either under the Eighth Amendment or the Due Process Clause of the Fifth Amendment).

to the as-applied regime's preclusion of overbreadth facial challenges outside of the First Amendment context. A successful valid rule facial challenge, which renders every conceivable statutory application invalid, produces the same result as a conclusion that a statute is inseverable.[168] At the same time, a court's rejection of a valid rule facial challenge under *Salerno* does not foreclose the possibility of a later overbreadth facial challenge predicated on statutory inseverability. A failed valid rule facial challenge means only that the statutory terms themselves do not contain a constitutional infirmity that invalidates all constitutional applications. Just as a litigant may assert an as-applied constitutional challenge following a rejected valid rule facial challenge,[169] so too may a litigant make out a case of statutory inseverability, and thus of facial invalidity, despite the fact that the statutory terms state a valid rule of law.[170]

2. Salerno's *"no set of circumstances" was not unnecessary dictum*

As noted above, the critics also claim that *Salerno*'s "no set of circumstances" was mere dictum given that the Court in *Salerno* neglected to hypothesize the one constitutional application of the statute sufficient to defeat the facial challenge.[171] But this charge is rooted in the mistaken overbreadth assumption and confuses the method appropriate for resolving overbreadth facial challenges with that appropriate for resolving valid rule facial challenges. Once it is understood that *Salerno* is not a facial challenge test for overbreadth facial challenges, and indeed not a facial challenge "test" at all, it becomes clear that the Court in *Salerno* in fact analyzed the facial challenges presented consistently with the structure of valid rule facial challenges and with the "no set of circumstances" descriptive conclusion.

The defendants in *Salerno* did not base their facial challenges on a demonstration, peculiar to overbreadth doctrine, that some number of unconstitutional applications rendered the statute constitutionally infirm. Instead, they argued that the Bail Reform Act's authorization

---

168. *See* Dorf, *supra* note 1, at 250 ("[I]f a statute has no constitutional applications, then no statute remains after a court severs the unconstitutional applications.").

169. *See* New York State Club Ass'n v. New York, 487 U.S. 1, 13 (1988) (noting the possibility of particular unconstitutional applications of a statute deemed constitutionally valid on its face); *Salerno*, 481 U.S. at 745 n.3 (withholding judgment as to the constitutionality of the statute as applied to the defendants even though the Court ultimately upheld the statute on its face).

170. Likewise, where First Amendment overbreadth facial challenges are available, such challenges may be asserted even after a court rejects a valid rule facial challenge under *Salerno*. *See New York State Club Ass'n*, 487 U.S. at 14.

171. *See supra* notes 67-74 and accompanying text.

of pretrial detention was, on its face, inconsistent with the requirements of the Due Process Clause and the Eighth Amendment.[172] In adjudicating these facial challenges, the Court first concluded that the Act survived facial scrutiny under the substantive component of the Due Process Clause because its pretrial detention provisions, rather than constituting impermissible pretrial punishment, as the defendants had argued, were intended to serve a permissible regulatory purpose and were not excessive in light of that goal.[173] Next, the Court rejected the court of appeals' conclusion that the Due Process Clause sets forth a "categorical imperative" against pretrial regulatory detentions and held that that such liberty restrictions should be evaluated pursuant to a balancing test weighing the government's interest against the individual's liberty interest.[174] Thirdly, the Court held that, because the Act's procedural protections[175] for determining the likelihood of future dangerousness would be "adequate to authorize the pretrial detention of at least some [persons] charged with crimes,"[176] the procedures were facially valid, even if they might be deemed insufficient in particular circumstances.[177]

Finally, the Court rejected the defendants' Eighth Amendment claim that the Act, by authorizing an unlimited bail amount without consideration of the risk of flight, violated the Eighth Amendment's

---

172. *See Salerno*, 481 U.S. at 746.

173. *See id.* at 746-48. The Court applied the two-prong test set forth in *Schall v. Martin*, 467 U.S. 253, 269 (1984), to distinguish between regulatory and punitive liberty restrictions. The first prong of the test looks to the intent of the legislature; if the legislature intended to impose punitive restrictions, the Act is invalid. *See* 481 U.S. at 747. If the legislature had no such intent, the restriction will be deemed permissible regulation if the legislature had an alternative purpose rationally related to the restriction, and if the restriction is not excessive in relation to that purpose. *See id.* The Court in *Salerno* concluded that the Bail Reform Act satisfied this test because Congress acted pursuant to a legitimate regulatory goal of preventing danger to the community, and because the Act's detention provisions were not excessive in light of this purpose. *See id.* at 747-48; *see also Schall*, 467 U.S. at 264-74 (holding that the challenged statute had a legitimate, regulatory objective in authorizing pretrial detentions of juveniles presenting a "serious risk" of committing a crime).

174. *See Salerno*, 481 U.S. at 748-50 (finding the Act consistent on its face with the Due Process Clause because the government's interest in preventing crime was both legitimate and compelling, and because the Act's delineation of specific circumstances under which pretrial detention was permitted justified a subordination of the individual's liberty to society's needs).

175. The Bail Reform Act provides for a number of procedural mechanisms designed to further the accuracy of the judicial officer's determination of the likelihood of an arrestee's future dangerousness. These include the right to counsel at the hearing, the right to testify, to present information, and to cross-examine witnesses, *see* 18 U.S.C. § 3142(f), statutory factors that guide the judicial officer's determination of the appropriateness of the detention, *see id.* § 3142(g), imposition of a "clear and convincing" evidence burden of proof on the government, *see id.* § 3142(f), a requirement of written findings of fact and a written statement of reasons for a detention decision, *see id.* § 3142(i), and immediate appellate review, *see id.* § 3145(c).

176. *Salerno*, 481 U.S. at 751 (quoting *Schall*, 467 U.S. at 264) (alteration in original) (internal quotation marks omitted).

177. *See id.* at 752.

Excessive Bail Clause under the Court's prior decision in *Stack v. Boyle*.[178] The Court distinguished *Stack* and determined that the Eighth Amendment permits the government to regulate pretrial detentions for compelling interests other than preventing flight.[179] The Court held that, when the government has a compelling interest, as it had in attempting to protect community safety in the Bail Reform Act, the Eighth Amendment does not require release on bail in all circumstances.[180]

The Court's analysis in *Salerno* illustrates the appropriate method for resolving valid rule facial challenges. In each step of its analysis, the Court measured the Bail Reform Act against the substantive requirements of the Due Process Clause and the Eighth Amendment as articulated in the relevant doctrinal tests. The *Salerno* defendants lost their facial challenge, not because the Court was able to identify some constitutional applications, but because the Court held that the Act on its face satisfied all of the applicable due process and Eighth Amendment doctrinal tests.[181] The clear implication of the Court's analysis is that, if the Act had been enacted with a punitive purpose, authorized detentions in excess of a permissible regulatory purpose, failed to delineate the circumstances under which detention was permitted, or if the Court had ruled that interests other than preventing flight are not sufficiently compelling under the Eighth Amendment's Excessive Bail Clause, the Court would have held the Act facially invalid. In so doing, the Court effectively would have

178. 342 U.S. 1 (1951).

179. *See Salerno*, 481 U.S. at 753.

180. *See id.* at 754-55.

181. *See id.* at 755 ("We are unwilling to say that [the Bail Reform Act] on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment."). The Court's analysis of the Act's procedural protections is, despite initial appearances, not to the contrary. Although the Court seemingly appealed to potentially valid applications to sustain the facial validity of the Act's procedural safeguards, *see id.* at 751 (holding that the procedures could defeat a facial challenge as long as they were adequate to authorize the detention of "at least some [persons] charged with crimes" (quoting Schall v. Martin, 467 U.S. 253, 264 (1984))), the Court was in fact analyzing the statute for facial validity consistent with the due process requirement that a statute restricting liberty must "provide sufficient protection against erroneous and unnecessary deprivations of liberty." *Schall*, 467 U.S. at 274 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976), and Gerstein v. Pugh, 420 U.S. 103, 114 (1975)). Thus, the Court was neither applying overbreadth methodology nor basing its facial ruling on the constitutionality of particular statutory applications per se. Rather, the Court's analysis reflects the fact that the Due Process Clause, sensitive to the government's legitimate interests and need for flexibility, *see Schall*, 467 U.S. at 275, does not demand that liberty-restricting procedures prevent every instance of a potentially erroneous determination in order to state a valid rule of law. *See Salerno*, 481 U.S. at 751. Instead, procedures that, in the main, constrain official discretion and guard against arbitrary applications are facially valid, even if they sometimes may be applied in an unconstitutional manner. *See id.* (citing *Schall* and stating that, because a prediction of future dangerousness is not "inherently unattainable," procedures that restrict liberty on that basis are not facially invalid).

determined that "no set of circumstances exist[ed]" in which the Act constitutionally could have been applied.[182]

The "no set of circumstances" language appears to be unnecessary dictum only if one assumes, quite mistakenly, that all facial challenges are of the overbreadth variety and that *Salerno* imposes an application-by-application test for adjudicating non-First Amendment overbreadth facial challenges. The true dictum in *Salerno*, and the language chiefly responsible for the mistaken overbreadth assumption, is the language contrasting the First Amendment overbreadth doctrine's more lenient facial challenge test with the supposed "heavy burden" imposed on non-First Amendment facial challenges.[183] The required method, under this analysis, would be to analyze the constitutional validity of each and every conceivable application—not just a substantial number of them. But nothing in *Salerno*, save this one sentence of dictum, supports the view that *Salerno* prescribes such a method for resolving facial challenges.[184]

Identifying the appropriate method for resolving valid rule facial challenges underscores why *Salerno*'s "no set of circumstances" language was not dictum. This task begins with an understanding of what a valid rule facial challenge seeks to prove. As the above analysis of the decision in *Salerno* itself reveals, *Salerno*'s "no set of circumstances" is, in effect, a descriptive claim about any rule of law that is ultimately judged invalid when measured against the relevant constitutional requirements: such a rule never could have been applied constitutionally to any set of circumstances.[185] But it is important to distinguish this descriptive claim from the one appropriate in cases involving overbreadth facial challenges. In the latter cases, the claim that "no set of circumstances exists" in which the statute can constitutionally be applied is a claim that is accurate only *after* a court em-

182. *Id.* at 745.

183. *See id.* ("The fact that [the Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

184. Nor does anything in *Salerno* support Justice Stevens' contention that the Court in *Salerno* upheld the statute based on its view that "the statute at issue would be constitutional as applied in a large fraction of cases." Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting denial of cert.); *see also supra* note 74.

185. *See* Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984) (stating that "there is no reason to limit challenges to case-by-case 'as-applied' challenges when the statute on its face *and therefore* in all of its applications falls short of constitutional demands") (emphasis added); City Council v. Taxpayers for Vincent, 466 U.S. 789, 797-98 (1984) (noting that, in cases of valid rule challenges, "a holding of facial invalidity *expresses the conclusion* that the statute could never be applied in a valid manner") (emphasis added). Conversely, a conclusion that a statute may be constitutionally applied in at least certain situations is the descriptive conclusion that follows from any statute, like the one at issue in *Salerno*, that survives scrutiny under the relevant constitutional requirements. *See Salerno*, 481 U.S. at 755.

ploys overbreadth methodology and determines, based on a case-specific judgment about the number of potentially impermissible applications tolerable under an otherwise valid rule, that the rule must be invalidated on its face.[186] It is a claim that states an unremarkable truth about facial invalidity—statutes held to be facially invalid cannot be applied against anyone—and that tells one nothing about how a court reaches the conclusion of facial invalidity in the first place. In an overbreadth facial challenge, there is a kind of gap between the determination that some applications are unconstitutional and the ultimate conclusion of facial, or complete, invalidity. The overbreadth doctrine is the conceptual bridge. In valid rule cases, by contrast, the claim that "no set of circumstances" exists in which the statute can constitutionally be applied is a descriptive claim about the constitutional validity of the statutory terms. In the valid rule context, "no set of circumstances exists" is not simply a post-hoc claim about the fact of facial invalidity reached, as in overbreadth cases, by some other conceptual bridge. Rather, it is an *explanation for why the statute was invalidated in the first place*: the underlying constitutional doctrine rendered the statutory terms incapable of *any* constitutional applications.

The Court's decision in *Bowen v. Kendrick*[187] highlights the distinction. In considering a facial challenge to a statute allegedly violating the Establishment Clause, the Court applied the *Lemon* test, under which a statute violates the Establishment Clause if a wholly impermissible purpose motivated its enactment, if it has the primary effect of advancing religion, or if it requires excessive entanglement between church and state.[188] Although the Court had decided *Salerno* in the prior term, the majority did not so much as mention *Salerno* and asserted without qualification that the *Lemon* test served adequately to resolve the facial challenge.[189]

In dissent, Justice Blackmun interpreted the Court's unexplained decision to apply the *Lemon* test to the facial challenge as an implicit rejection of *Salerno*'s applicability in Establishment Clause cases.[190] Justice Blackmun agreed with this approach, concluding that *Salerno*'s "no set of circumstances" test was "wholly incongruous" with the

186. *See* Board of Trustees of the State Univ. v. Fox, 492 U.S. 469, 483 (1989) ("Where an overbreadth attack is successful, the statute is obviously invalid in *all* its applications, since every person to whom it is applied can defend on the basis of the same overbreadth.").

187. 487 U.S. 589 (1988).

188. *See id.* at 602 (discussing the three part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) for Establishment Clause cases).

189. *See id.*

190. *See id.* at 627 n.1 (Blackmun, J., dissenting).

Lemon test and would render review under the *Lemon* test a "nullity."[191] Given that the *Lemon* test purports to invalidate statutes that have the "primary effect" of establishing religion and assumes at least some constitutional applications that would be sufficient to defeat a facial challenge under *Salerno,* Justice Blackmun reasoned that *Lemon* and *Salerno* are incompatible doctrinal tests.[192] Thus understood, the choice between *Lemon* and *Salerno* is mutually exclusive. Some courts have followed Justice Blackmun and concluded that, given *Lemon*, *Salerno* has no place in a facial challenge alleging an Establishment Clause violation.[193] The same analysis underpins the supposed opposition between *Salerno* and other substantive constitutional doctrines.[194]

However, Justice Blackmun's analysis, like the prevailing scholarly critique of *Salerno,* incorrectly assumes that *Salerno* prescribes an application-specific methodology under which a court cannot hold a statute facially unconstitutional unless it determines that each and every statutory application is unconstitutional. The alleged incongruity between *Salerno* and *Lemon* disappears once *Salerno* is properly viewed as a descriptive claim about a statute that, under the relevant constitutional doctrine, and independent of particular applications, states an invalid rule of law.[195] In other words, a statute that under *Lemon* is deemed to have the primary effect of establishing religion is a statute that under *Salerno* cannot be applied constitutionally in any set of circumstances.[196] That is not to say that *Salerno*, as a descriptive

191. *See id.*

192. *See id.*

193. *See, e.g.*, Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 279 n.2 (5th Cir. 1996) (explaining that the petitioner need not show that the statute at issue is invalid because facial attacks in Establishment Clause cases are evaluated using the *Lemon* test); Chandler v. James, 958 F. Supp. 1550, 1567 (M.D. Ala. 1997) (same); Walker v. San Francisco Unified Sch. Dist., 741 F. Supp. 1386, 1398 (N.D. Cal. 1990) (same), *aff'd in part, rev'd in part*, 46 F.3d 1449 (9th Cir. 1995).

194. *See* Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in order denying application for stay and injunction pending appeal, joined by Souter, J., concurring) (asserting that the lower courts' application of *Salerno* was inconsistent with *Casey*'s undue burden standard); Compassion in Dying v. Washington, 79 F.3d 790, 798 n.9 (9th Cir. 1996) (reasoning that the conflict between *Casey* and *Salerno* supports the conclusion that *Salerno* is inapplicable in a case involving the similar liberty interest in assisted suicide), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997); Planned Parenthood v. Miller, 63 F.3d. 1452, 1458 (8th Cir. 1995) (deciding to "follow what the Supreme Court actually did—rather than what it failed to say—and apply the undue burden test" instead of *Salerno*).

195. *See* Tipton v. University of Hawaii, 15 F.3d 922, 925-26 (9th Cir. 1994) (upholding a funding policy on its face under *Salerno* and *Lemon*).

196. The majority's analysis in *Kendrick* is thus identical to the majority's analysis in *Salerno*: the Court adjudicated the facial challenge exclusively at the level of the statutory rule itself and did not consider the constitutionality of particular statutory applications. *See* Bowen v. Kendrick, 487 U.S. 589, 611-17 (1988). As this Article explains below in more detail, the Court in *Kendrick* essentially applied *Salerno*'s facial challenge methodology even though, as is true of

conclusion, merely states an unremarkable truth about facial invalidity, because *Salerno* also envisions a particular method of identifying facially invalid rules of law. As explained below, *Salerno*'s "no set of circumstances" language is appropriate only when the court identifies constitutional infirmity that inheres in the statute itself and is independent of particular statutory applications.[197] To the extent that a doctrinal test such as *Lemon*'s "primary effect" test is interpreted to require application-specific constitutional scrutiny, the possibility of a successful valid rule facial challenge under *Salerno* may be foreclosed.[198] For now, it is sufficient to observe that, because *Salerno* instructs a court to measure the challenged statute against the applicable doctrinal test, it cannot itself be in conflict with any substantive constitutional law. The purported choice between *Salerno* and other constitutional requirements is, therefore, a false one that dissolves given the structure of valid rule facial challenges and the proper method of resolving them under *Salerno*.

The suggestion that *Salerno* invites a court or the party opposing the facial challenge to hypothesize constitutional applications in order to defeat the facial challenge[199] is entirely at odds with the structure of valid rule facial challenges. Application-specific constitutional scrutiny is the characteristic feature of overbreadth methodology. But a valid rule challenge must be resolved through a different method primarily because a valid rule challenge seeks to disprove precisely that which the overbreadth challenge necessarily assumes: that the rule as written and construed is facially valid under the relevant constitutional standards. *Salerno*'s facial challenge methodology, as employed by the Court in *Salerno*, directs a court faced with a valid rule facial challenge to evaluate the challenged statute against the relevant constitutional doctrine, independent of the statute's application to particular cases. A court entertaining a facial challenge under *Salerno* is not concerned with the details of particular statutory applications, and instead focuses on the content of the statutory terms to assess their consistency with constitutional requirements.[200] In other

---

many of the Court's facial challenge precedents, it never cited *Salerno* by name. *See infra* notes 397-417 and accompanying text.

197. *See infra* Part IV.

198. *See infra* notes 414-16 and accompanying text.

199. *See Glucksberg*, 521 U.S. at 740 n.6 (1997) (Stevens, J., concurring in the judgments).

200. *See* Reno v. Flores, 507 U.S. 292, 300-01 (1993) (explaining that a facial challenge is assessed without reference to factual findings or evidence of particular applications); *Kendrick*, 487 U.S. at 600-01 (noting that facial challenges under the Establishment Clause typically occur without "a record as to how the statute had actually been applied"); Virginia v. United States, 926 F. Supp. 537, 542 (E.D. Va. 1995) (stating that a facial challenge under *Salerno* "must challenge the language, rather than the application and enforcement of the statute" and that, for

words, a valid rule facial challenge is a challenge that "puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves the facts only insofar as it is necessary to establish that the rule served as a basis of decision."[201] Again, "no set of circumstances" is a descriptive claim about a facially invalid rule of law, and not an application-by-application method of proof.

It follows that the question in a valid rule challenge is not whether the state could punish the litigant or some hypothetical party in similar circumstances for similar conduct, but whether it could do so *under this statute as written and authoritatively construed*.[202] In a recent dissent in a case involving a facial challenge to the validity of a federal regulation under its authorizing statute, Justice Scalia articulated the reasons why a facial challenge cannot be rejected by focusing on particular features of individual statutory applications:

---

such an attack, "a record would be superfluous"), *aff'd*, 74 F.3d 517 (4th Cir. 1996); Berkeley Community Health Project v. Berkeley, 902 F. Supp. 1084, 1091 (N.D. Cal. 1995) (noting the general rule that "a facial challenge to the constitutional validity of an enactment considers only the text of the measure itself, not its application to the particular circumstances of the individual, so that the challenger must demonstrate that the enactment's provisions pose a total and flat conflict with applicable constitutional prohibitions"), *vacated in part*, 966 F. Supp. 941 (1997). Cases in which litigants assert facial challenges before the statute is enforced against any party make the fact-independent nature of a valid rule facial challenge especially clear. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 579-80 (1987) (noting that, given the posture of the case, the only issue presented was the "purely facial challenge" to the state's permit requirement); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981).

> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before . . . this Court . . . is whether the 'mere enactment' of the [statute] constitutes a taking.

Id.; *see also* Yee v. City of Escondido, 503 U.S. 519, 533-34 (1992) (same).

201. PAUL M. BATOR ET AL., HART & WECHSLER'S: THE FEDERAL COURTS & THE FEDERAL SYSTEM 662 (3d ed. 1988).

202. *See, e.g.*, Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 966-67 (1984) ("The flaw . . . [is] that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. *That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous.*") (emphasis added); *id.* at 971 n.3 (Stevens, J., concurring) (criticizing the dissent for arguing against the majority's facial invalidation on the basis of a hypothesized application of a different, constitutionally valid rule); Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (holding that, although the city was free to punish many forms of conduct encompassed by the challenged ordinance through "the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited," it could not "constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed"); Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964) ("[T]his Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."); Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928) (holding that the defendant's receipt of actual notice could not supply constitutional validity either to a service of process statute lacking a notice requirement or to the actual service that the state made to the defendant under that statute).

> It is one thing to say that a facial challenge to a regulation that omits statutory element *x* must be rejected if there is any set of facts on which the statute *does not require x*. It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element *x happens to be present*. On this analysis, the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires. In other words, to simplify its task the Court today confuses lawful application of the challenged regulation with lawful application of a *different* regulation, *i.e.*, one requiring the various elements of liability that this regulation omits.[203]

Because *Salerno* applies both to facial challenges asserting that regulations are unauthorized by statute and to challenges asserting that statutes are unconstitutional,[204] Justice Scalia's analysis should apply in the constitutional context as well. Without first establishing that the statutory terms themselves satisfy the applicable governing law, postulating individual applications that are conceivably constitutional often will be an evasion, not a resolution, of a valid rule facial challenge.[205]

The striking fact about post-*Salerno* facial challenge adjudication is that, notwithstanding the general conceptual confusion in this area, courts have implicitly understood the structure of valid rule facial

---

203. Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting) (emphasis added); *see also* National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1406-08 (D.C. Cir. 1998) (relying on *Sweet Home* and holding that the *Chevron* test is the applicable test for analyzing whether a regulation was within an agency's authority, and not the application-specific method that *Salerno* supposedly requires).

204. *See* Reno v. Flores, 507 U.S. 292, 301 (1993).

205. The qualification is necessary because, in some limited instances, a court's identification of a single constitutional application is the very method that the governing substantive law directs. Thus, a valid rule facial challenger under the void-for-vagueness doctrine must demonstrate that the statutory terms are so vague and indeterminate that their application to any defendant would be impermissibly vague. *See* Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-95 (1982). However, the courts also apply the rule that, if the statute is not vague as applied to the defendant, the facial challenge necessarily fails. *See id.* at 495. Proving one set of circumstances in which the statute can be constitutionally applied appropriately defeats the facial challenge because the *fact* of one non-vague application necessarily *disproves* the claim that the statute is vague in every instance.

challenges. The Supreme Court typically resolves facial challenges under *Salerno* precisely as it did in *Salerno* itself: it measures the challenged rule against the relevant constitutional or statutory requirements, independent of the rule's application to particular cases.[206] The same is generally true in the lower federal courts.[207]

Only a few courts actually have applied *Salerno* in the manner that the critics claim *Salerno* directs: hypothesizing constitutional applications without first verifying that the statute itself is constitutional under the relevant constitutional requirements.[208] For example, one

---

206. *See, e.g.*, Anderson v. Edwards, 514 U.S. 143, 155 & n.6 (1995) (rejecting a facial challenge to a state rule on the grounds that that rule did not violate federal law on its face and declining under *Salerno* to address the question whether particular applications of the state rule would violate federal law); *Reno*, 507 U.S. at 300-01 (explaining that a facial challenge to a federal regulation under *Salerno* is assessed without reference to factual findings or evidence of particular applications and solely on the basis of "the regulation itself and the statement of basis and purpose that accompanied its promulgation"); INS v. National Ctr. for Immigrants' Rights, 502 U.S. 183, 188-96 (1991) (upholding regulations subject to a facial challenge and specifically declining to address hypothetical as-applied applications of the regulation); Rust v. Sullivan, 500 U.S. 173, 183, 191-203 (1991) (upholding federal regulations restricting abortion access by evaluating the regulations against the relevant constitutional requirements of the First and Fifth Amendments).

207. *See, e.g.*, Legal Aid Soc'y v. Legal Servs. Corp., 145 F.3d 1017, 1024-29 (9th Cir. 1998) (rejecting a facial challenge asserting that federal regulations created an unconstitutional condition on receipt of funds by analyzing the terms of the regulations against the applicable substantive doctrine); Davidson v. Mann, 129 F.3d 700, 702 (2d Cir. 1997) (applying *Salerno* to a facial challenge to a prison regulation limiting access to stamps for non-legal mail and analyzing the regulation to determine whether it was reasonably related to legitimate penological interests); Aronson v. Akron, 116 F.3d 804, 809 (6th Cir. 1997) (applying *Salerno* to a facial challenge to a statute authorizing the seizure of property and analyzing the terms of the statute under probable cause and due process tests); Dean v. McWherter, 70 F.3d 43, 45-46 (6th Cir. 1995) (rejecting a facial challenge to a statute labeling sex offenders as mentally ill under *Salerno* by analyzing whether the terms of the statute itself deprived the challengers of due process).

208. *See* Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 82-83, 85 (1992) (Rehnquist, C.J., dissenting) (arguing that the possibility that a state statute would not act to discriminate unconstitutionally against foreign commerce was itself sufficient to defeat a facial challenge); Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 981 (1984) (Rehnquist, J., dissenting) (rewriting a statute to turn a valid rule challenge into an overbreadth challenge by imagining similar conduct constitutionally punishable under a different, valid statute); Roulette v. City of Seattle, 97 F.3d 300, 306 (9th Cir. 1996) (en banc) (erroneously interpreting *Salerno* as setting forth a test under which a statute survives a facial challenge if it would be constitutional in a "large fraction" of hypothetical applications). A similar mistake may perhaps explain the Court's unprecedented holding in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), that a zoning ordinance enacted with an irrational prejudice against the mentally retarded should nonetheless be invalidated on an as-applied basis. *See Cleburne*, 473 U.S. at 450. Justice Marshall criticized the majority opinion on precisely these grounds.

> The Court appears to act out of a belief that the ordinance might be 'rational' as applied to some subgroup of the retarded under some circumstances . . . and that the ordinance should not be invalidated in toto if it is capable of ever being validly applied. But the issue is not [whether the city may ever insist on a special use permit for the retarded] . . . . The issue is whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the "feeble minded," or whether the city must enact a new ordinance carefully tailored to the exclusion of some well-defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes.

Id. at 474 (Marshall, J., concurring in the judgment in part and dissenting in part).

court declined to reach the merits of a facial challenge alleging certain procedural due process violations, reasoning that the possibility of a single "procedurally valid" application rendered the facial challenge "improper" under *Salerno*.[209] This decision seems clearly erroneous because the court declined to address the relevant due process requirements necessary to uphold the constitutionality of any particular statutory application.[210] Although there is nothing inherently problematic about a court pointing to particular statutory applications as part of a demonstration that the statutory rule is a constitutionally valid one,[211] a court cannot defeat a valid rule facial challenge by hypothesizing particular applications without conducting the constitutional scrutiny necessary to ensure that the statutory rule is in fact consistent with substantive constitutional requirements.

One more point concerning method should be mentioned. *Salerno*, relieved of the overbreadth assumption, also draws into question Dorf's argument that in order for facial challenges to succeed certain constitutional clauses must be interpreted to preclude *Salerno*'s alleged presumption of severability.[212] As discussed above, *Salerno* is fundamentally distinct from the *Yazoo* presumption of severability Dorf identifies with it,[213] in that the latter is a justification for the standing rule precluding the assertion of overbreadth facial challenges, while the former is a descriptive claim about a statute whose terms state an invalid rule of law. In addition, a constitutionally mandated rule of inseverability is useful only if one is attempting to demonstrate facial invalidity by reasoning that the invalidity of individual applications creates the invalidity of the rule itself. But such a demonstration is the characteristic feature of overbreadth facial challenges and not of the valid rule facial challenges that *Salerno* evalu-

209. *See* Chemical Waste Management v. EPA, 56 F.3d 1434, 1436-38 (D.C. Cir. 1995).

210. *See id.* at 1437 (holding that, notwithstanding the litigant's assertion of a facial challenge to the statute's constitutionality, "the procedures are not properly before us for a full blown due process analysis under the three prong balancing test of *Mathews v. Eldridge*"). *Compare id. with* Jordan v. Jackson, 15 F.3d 333, 344 (4th Cir. 1994) (upholding procedural provisions authorizing the removal of a child against a facial challenge under the Due Process Clause on the grounds that the statute specifically limited the circumstances under which such orders could be obtained and the amount of time judicial review could be delayed, thus making the statutorily authorized delay in judicial review constitutionally valid in most, if not all, circumstances).

211. *See, e.g.*, Action for Children's Television v. FCC, 59 F.3d 1249, 1259 (D.C. Cir. 1995) (rejecting a facial challenge under *Salerno* because of the statutory scheme's potential for constitutional applications, but first concluding that "nothing in the statutes or regulations" prevented the government from enforcing the statute in accordance with constitutional requirements); *see also supra* note 205.

212. *See* Dorf, *supra* note 1, at 251.

213. *See id.* at 250-51; *supra* notes 116-19 and accompanying text.

ates.[214] It is thus not surprising that not one of the cases on which Dorf relies as precedent inconsistent with *Salerno* explicitly refers either to a presumption of severability, or to constitutional restraints on such a presumption, as part of its facial challenge analysis.[215] Once the assumption that all facial challenges are overbreadth challenges is abandoned, facial invalidity can be achieved without aggregating some number, fewer than all, of unconstitutional statutory applications.[216] Because valid rule facial challenges take place at the level of statutory rules and constitutional requirements and predicate the claim of facial invalidity on an inherent constitutional defect invalidating all conceivable applications, they are largely unaffected by matters of statutory severability, whether presumptive[217] or actual.[218]

214. *See supra* notes 199-201 and accompanying text.

215. Indeed, the only case that Dorf identifies to mention explicitly matters of statutory severability is *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942). *See* Dorf, *supra* note 1, at 253. But the severability question in *Skinner* was whether a statute already determined to contain a constitutional defect sufficient to warrant facial invalidation could be saved by applying the statute's severability clause. *See Skinner*, 316 U.S. at 542-43. The Court declined to address that question, reasoning that the effect of a severability clause on a constitutionally flawed statute was, under settled principles, a matter of state law that the state court should decide. *See id.* at 542-43 (citing Dorchy v. Kansas, 264 U.S. 286, 291 (1924)). *Skinner*'s severability analysis concerned a question of remedy peculiar to underinclusive equal protection challenges: namely, whether an identified constitutional defect, ordinarily sufficient for facial invalidation, can be eliminated either by expanding or contracting the class covered by the statute. *See id.* at 543. By contrast, the Court in *Skinner* identified the facial defect in the first place, consistent with valid rule theory, by evaluating the statute against the relevant constitutional requirements. *See id.* at 541 ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.").

216. Monaghan curiously seemed to question what would appear a necessary entailment of his valid rule theory. After citing *Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928), in support of the proposition that litigants can assert valid rule facial challenges both within and without the First Amendment context, *see* Monaghan, *supra* note 29, at 12, Monaghan then questions whether the decision in *Wuchter* is vulnerable for ignoring the *Yazoo* presumption of severability. *See id.* at 12 n.49; *see also* Monaghan, *supra* note 130, at 197 (stating that the "presumption of separability deprive[s] the valid rule requirement of significant operational bite"). The Court in *Wuchter* did not invalidate the statutory scheme at issue based on the view, necessary for severability to be operable, that the statute's potential for unconstitutional applications invalidated its otherwise constitutional applications. Instead, the Court held, pursuant to valid rule theory, that a statute "making the Secretary of State the person to receive the [service of] process [for a nonresident motorist], must, *in order to be valid*, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued." *Wuchter*, 276 U.S. at 18 (emphasis added). The Court could not save such a statute by presuming statutory severability because, consequent to its constitutional analysis of the statutory rule itself, the rule was incapable of any constitutional applications.

217. Again, Monaghan generated unnecessary confusion on this point because, in one portion of his article, he seems to imply that the *Yazoo* presumption is inapplicable to overbreadth challenges because of a special "elaboration requirement" that the First Amendment imposes upon state courts. *See* Monaghan, *supra* note 29, at 29; *see also* Fallon, *supra* note 2, at 871-72 & n.110 (noting that Monaghan failed to support adequately this claim); Hill, *supra* note 36, at 1082 n.83 (same). But Monaghan's conception of the valid rule requirement makes the use of severability doctrine unnecessary in determining constitutional invalidity, irrespective of the particular constitutional doctrine, because of the premise of a valid rule facial challenge that the statute, as authoritatively construed and applied, suffers from a thoroughgoing constitu-

3. Salerno *is consistent with the Supreme Court's past facial challenge practice*

Much of the above analysis goes a long way towards rejecting the claim that *Salerno*'s "no set of circumstances" was a creation of *Salerno* itself.[219] In fact, the Court had articulated a version of *Salerno*'s "no set of circumstances," understood as a descriptive claim about a statute whose terms state an invalid rule of law, in a variety of constitutional contexts prior to the decision in *Salerno*.[220] Thus, although the Court's discussion in *Salerno* is admittedly cryptic, and in certain respects outright misleading,[221] the Court was not without basis in assuming that the "no set of circumstances" language was a relatively uncontested and well-established proposition, and one not requiring elaborate justification.

Although *Salerno*'s critics apparently have overlooked this case law, their claim that *Salerno* is incompatible with much of the Court's prior facial challenge practice is still a formidable one. Specifically, the critics have focused on cases in which the Court has invalidated statutes on their face without inquiring first whether application of the statute against the litigant before the court might well be constitutional.[222] In other words, in these cases, the Court seemed to sug-

---

tional defect. The substantive First Amendment doctrine is relevant, not because it imposes a non-severability rule on state courts, but because, as Monaghan argues elsewhere, it (like several other constitutional doctrines)imposes on statutes a requirement of narrow tailoring that, if not satisfied, will facially invalidate the statute. *See id.* at 37-39; *infra* notes 390-391 and accompanying text (discussing possibility for successful valid rule facial challenges under narrow tailoring requirement).

218. Although statutory severability may be relevant in certain contexts in which severance is used as a remedy to cure a previously identified facial defect, *see Skinner*, 316 U.S. at 542-43, ordinary severance of the unconstitutional applications from the constitutional ones obviously will not work where every application is deemed unconstitutional (the conclusion of a successful valid rule facial challenge). Also, as noted above, severability analysis may be relevant when a statute contains numerous statutory rules, and the valid rule facial challenge accordingly is directed at one statutory section or provision within a larger statute. But this kind of severability analysis, like that in *Skinner*, is not relevant to the initial question whether a particular statutory rule or provision is constitutionally valid on its face. *See supra* notes 34, 129.

219. *See* Dorf, *supra* note 1, at 239 & n.15.

220. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 579-80 (1987) (holding that a facial challenge to state regulation based on preemption must demonstrate "that there is no possible set of conditions [the state] could place on its permit that would not conflict with federal law—that any state permit requirement is per se preempted"); City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984) (identifying First Amendment facial challenges that were based on the conclusion that the statute could "never be applied in a valid manner"); Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 & n.5 (1982) (holding that a facial challenge asserting unconstitutional vagueness cannot succeed unless the statute is "impermissibly vague in all of its applications").

221. *See supra* notes 183-84 and accompanying text.

222. *See, e.g.*, Dorf, *supra* note 1, at 267 (analyzing Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), and concluding that the Court's failure to inquire whether the litigant could have afforded to pay the poll tax that the Court invalidated "implicitly extended overbreadth analysis to a non-First Amendment, nonlitigation right"); *id.* at 272 & n.152 (citing Ap-

gest implicitly that, even if some applications of the statute could be constitutional, and hence the "no set of circumstances" claim would be inapposite, the statute could, nonetheless, be held facially invalid. Facial invalidity predicated on this sort of claim is the essence of overbreadth methodology. Therefore, to the extent overbreadth challenges have succeeded outside of the First Amendment context, *Salerno*'s claim that "no set of circumstances" governs all non-First Amendment facial challenges seems, as the critics maintain, plainly mistaken.[223]

Once the assumption that all facial challenges are overbreadth facial challenges is abandoned, however, many of the so-called "exceptions" to *Salerno* can be explained as standard applications of the facial challenge method later set forth in *Salerno*.[224] Undeniably, the Court has invalidated statutes facially even after stating that the particular features of the litigant's case did not affect its ruling.[225] But, as the cases recognizing two distinct forms of facial challenges within the First Amendment demonstrate, a facial challenge is not necessarily an overbreadth facial challenge merely because the litigant is not required to prove that his or her conduct is constitutionally protected.[226] More importantly, the crucial feature in identifying the kind of facial challenge at issue is not whether the Court is willing to overlook the particular features of the litigant's conduct, but rather,

---

theker v. Secretary of State, 378 U.S. 500, 515 (1964) as an example of "overbreadth analysis in fundamental rights cases involving rights other than abortions" because the Court invalidated a statute as "indiscriminately cast and overly broad"); *see also* RICHARD H. FALLON ET AL., HART & WESCHLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 211-12 (4th ed. 1996) (suggesting that *Aptheker* may be an example of overbreadth analysis outside of the First Amendment).

223. *See* Dorf, *supra* note 1, at 282.

224. That is not to say that every case can be reinterpreted in this way. Indeed, the abortion cases present perhaps the strongest case that the Court has applied something resembling the First Amendment overbreadth doctrine outside of the First Amendment. *See* Dorf, *supra* note 1, at 271-76; Fallon, *supra* note 2, at 859 n.29. The point here is simply that the broad assertion that *Salerno* is fundamentally at odds with the Court's prior facial invalidation precedents outside of the First Amendment is overstated and rests on the erroneous assumption that all facial challenges are structured as overbreadth challenges. In other words, one can explain cases of facial invalidation in valid rule terms without also rejecting the possibility that the Court may have extended overbreadth doctrine in certain constitutional contexts.

225. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (determining that a poll tax is invalid, regardless of the litigant's own ability to pay the tax, because it introduces capricious or irrelevant factors that violate the Equal Protection Clause); Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964) (holding that the denial of passports to particular members of Communist organizations, irrespective of the facts of the litigant's case, is unconstitutional because it violates one's fundamental right to travel); *infra* notes 231-243 and accompanying text.

226. *See* New York v. Ferber, 458 U.S. 747, 768 n.21 (1982) ("Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face.").

the basis upon which the Court invalidates the challenged statute.[227] An overbreadth facial challenge is indeed asserted by an "unprotected" litigant, but the Court resolves such a challenge by analyzing the constitutionality of statutory applications against third parties not before the Court.[228] The analysis is, in Monaghan's terms, a fact-dependent claim of privilege,[229] and one that belongs to a different party. A valid rule facial challenge, on the other hand, does not involve any fact-dependent privilege claim at all, whether of the particular litigant or absent third parties. Instead, valid rule facial challenges direct constitutional scrutiny to the validity of the statutory rule itself when measured against the relevant constitutional doctrine.[230] Thus, a court's decision to overlook factual evidence pertaining to the privileged character of persons subject to statutory applications is the distinctive feature of a valid rule facial challenge and the precise method of constitutional scrutiny that *Salerno* prescribes.

A close examination of the principal "exception" cases reveals that the Court, consistent with *Salerno*, based its facial invalidations on a constitutional defect inhering in the statutory terms, and not on an implicit extension of overbreadth methodology. Thus, in *Harper v. Virginia State Board of Elections*,[231] the Court invalidated the State of Virginia's poll tax requirement as inconsistent with the Equal Protection Clause.[232] "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever it makes the affluence of the voter or payment of any fee an electoral standard.* Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax."[233] Importantly, the Court did not require a showing from the challengers that the poll tax particularly burdened

227. Indeed, the current First Amendment overbreadth doctrine denies "protected" litigants standing to assert overbreadth facial challenges and thus requires courts to adjudicate an as-applied facial challenge first to determine whether the litigant is entitled to the advantages of the overbreadth doctrine. *See* Board of Trustees of the State Univ. v. Fox, 492 U.S. 469, 484-85 (1989); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502-03 (1985). A court's willingness to invalidate a statute irrespective of the particular features of a litigant's case is no longer a case in which First Amendment overbreadth doctrine formally applies. To the extent that the argument for extending overbreadth doctrine draws support from pre-*Brockett* case law ignoring the circumstances of the litigant's conduct, *see, e.g.*, *Harper*, 383 U.S. at 668, the doctrinal extension would be a more robust overbreadth doctrine than currently exists in the First Amendment. This is an important detail that proponents of extending overbreadth doctrine have not addressed.

228. *See Brockett*, 472 U.S. at 502-03.

229. *See* Monaghan, *supra* note 29, at 8 ("[T]he more a statute is cut down to state a permissible subrule that is general enough to cover the facts of a litigant's case, the more the substance of the litigant´s claim becomes a fact-dependent claim of constitutional privilege.").

230. *See id.*

231. 383 U.S. 663 (1966).

232. *See id.* at 666.

233. *Id.* (emphasis added).

their right to vote because of its economic effect on individuals in their financial situation.[234] Rather, the Court held that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process," and that "to introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor" burdening the individual's exercise of the right to vote.[235] *Harper* invalidated the statute because its incorporation of a poll tax itself violated the dictates of the Equal Protection Clause and thus rendered the statute constitutionally invalid in every conceivable statutory application.[236] Therefore, *Harper* is an example of, and not an exception to, *Salerno*'s "no set of circumstances" descriptive conclusion. To subject any litigant to such a statute would violate the litigant's right to be judged by a constitutionally valid rule of law.[237]

Similarly, in *Aptheker v. Secretary of State*,[238] the Court held unconstitutional a federal statute preventing certain Communist organizations and their members from obtaining a passport on the grounds that the statute infringed upon the fundamental right to travel, and

---

234. *See id.* at 668 ("We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it."). The dissent paid particular attention to, and expressed considerable disagreement with, the Court's per se prohibition of a state's use of a poll tax. *See id.* at 672 (Black, J., dissenting) (criticizing the Court for interpreting the Equal Protection Clause in such a way as to "necessarily bar[] all States from making payment of a state tax, any tax, a prerequisite to voting").

235. *Id.* at 668.

236. *Harper* may thus be seen as an example of a successful valid rule facial challenge under a "forbidden-content" doctrinal test. *See infra* notes 372-74 and accompanying text.

237. Dorf explains the decision in *Harper* instead as an example of overbreadth methodology employed outside of the First Amendment context. *See* Dorf, *supra* note 1, at 267. He argues that the Court's inattention to Harper's ability to pay the tax implicitly extended overbreadth analysis, and that the Court invalidated the tax on its face based on a concern for the possible chilling effect that could have resulted from upholding the poll tax in any form, irrespective of its effect on Harper himself. *See id.* at 266-67. Recognizing that the chilling effect rationale is at best an implicit rationale which the Court in *Harper* nowhere acknowledged, Dorf argues that interpreting *Harper* as an instance of a litigant's own right to be judged by a constitutionally valid rule of law "ignores the basis for the Court's holding in *Harper*." *Id.* at 267. However, this statement seems mistaken, given that the Court in *Harper* made it clear that the Equal Protection Clause, as a categorical matter, precludes a state's imposition of a poll tax. *See Harper*, 383 U.S. at 666. Dorf's assertion that the "Constitution does not privilege free voting for its own sake," Dorf, *supra* note 1, at 268, seems similarly beside the point, given that the right that the Court protected in *Harper* was the right to vote without reference to irrelevant factors of wealth or payment of a fee and not the right to vote for free as an end in itself. *See Harper*, 383 U.S. at 666. Moreover, Dorf's reliance on *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959), for the proposition that the real constitutional concern in such cases is the unbounded discretion that would be required to administer a poll tax reflecting individual circumstances, *see* Dorf, *supra* note 1, at 268 n.132, ignores the fact that the Court in *Harper* specifically distinguished the constitutionality of the literacy tests at issue in *Lassiter*, which have "some relation to standards designed to promote intelligent use of the ballot," *Harper*, 383 U.S. at 666, with the poll tax at issue in *Harper*, which introduced a "capricious or irrelevant factor" into the vote and was therefore forbidden as a categorical matter, *id.* at 668.

238. 378 U.S. 500 (1964).

was not narrowly tailored to serve a compelling state interest.[239] Again, the Court in *Aptheker* followed the mode of analysis employed in *Harper* and *Salerno*: it measured the statute against the relevant constitutional standards, independent of particular applications, and concluded that the statute was insufficiently precise to serve the State's admittedly compelling interest of protecting national security.[240] Contrary to the suggestion of some commentators, a court's mere invocation of the concept of an overbroad statute sweeping in too many statutory applications is not equivalent to a court's application of the overbreadth doctrine.[241] The Court in *Aptheker* held that imprecise statutory measures rendered the statute constitutionally infirm in all of its applications, even assuming, as the Court was willing to assume, that the particular defendants could have been constitutionally prosecuted under a more narrowly tailored law.[242] Thus, *Aptheker* is, like *Harper*, a fairly typical instance of *Salerno*'s valid rule facial challenge methodology.[243]

---

239. *See id.* at 504-14.

240. *See id.* at 514 ("The [statutory provision] *judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and indiscriminately* across the liberty guaranteed in the Fifth Amendment.") (emphasis added).

241. *See* Dorf, *supra* note 1, at 272 & n.152. If it were true that the mere mention of statutory "sweep" was tantamount to an application of the overbreadth doctrine, then every non-First Amendment context implementing some version of a narrow tailoring test would represent an extension of overbreadth methodology outside of the First Amendment. In fact, however, the narrow tailoring requirement is a constitutional requirement imposed on the content of rules and is perfectly consistent with valid rule facial challenges. *See* Ford, *supra* note 2, at 1461 (noting that, under valid rule theory, a litigant who can demonstrate that a statute fails a narrow tailoring requirement "will have proved that the law is rotten at its core and, therefore, incapable of sustaining her conviction"); Monaghan, *supra* note 29, at 36-39; *infra* notes 390-91 and accompanying text. Even so, the Court has not spoken with a consistent voice, and sometimes suggests that the narrow tailoring requirement is itself indistinguishable from the overbreadth test. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973) (identifying narrow tailoring claims with overbreadth claims (citing Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964))).

242. *See id.* at 517 (holding that, because the right to travel is a fundamental right, the litigants "should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel"); *see also* Grayned v. City of Rockford, 408 U.S. 104, 106 n.1 (1972).

> Since the appellant's sole claim in this appeal is that he was convicted under facially unconstitutional ordinances, there is no occasion for us to evaluate either the propriety of these selective arrests or the sufficiency of evidence that appellant himself actually engaged in conduct within the terms of the ordinances.

Id.

243. The puzzling aspect of the *Aptheker* opinion is that the Court considered the government's argument that the statute could be constitutionally applied against the litigants *after* the Court already had concluded that the statute was invalid on its face for failing to satisfy the narrow tailoring requirement. *See Aptheker*, 378 U.S. at 515-17. This approach can be explained in part on the ground that the statute at issue was a federal statute to which the Court could have offered an authoritative narrowing construction that would have eliminated the facial constitutional defect. The Court refused to offer such a saving construction, however, because it found that it could not do so without perverting the purpose of the statute and judicially rewriting it. *See id.* at 515. Although that should have been enough to end the matter, the Court went on to

In addition, this analysis of *Aptheker* substantially undermines the widely held view that the Court's abortion jurisprudence represents a tacit extension of overbreadth doctrine outside of the First Amendment.[244] It is important to understand that commentators have largely based this claim on the assumption that a reference to an overbroad statutory sweep is itself proof of judicial implementation of the overbreadth doctrine.[245] Before the Court revamped substantive due process jurisprudence in *Planned Parenthood v. Casey*[246] with the introduction of the "undue burden" test,[247] however, statutes burdening a woman's fundamental right to choose to have an abortion were subject to traditional strict scrutiny review, with its corollary narrow tailoring requirement.[248] To the extent that the Court's facial invalidations in the abortion context fit within the narrow tailoring rubric, these cases, like *Aptheker*, are perfectly consistent with *Salerno*.[249]

S*alerno* is thus supported by a much more formidable body of precedent than its critics have recognized. The overbreadth assumption has led commentators to overlook the Court's use of a *Salerno*-type facial challenge methodology in a number of constitutional con-

---

justify its refusal to offer a narrowing construction by referring to the First Amendment overbreadth cases. *See id.* at 515-17. The Court's concluding commentary on the importance of facial invalidation when fundamental rights are at stake should not obscure the fact that the Court had already, and without any reference to overbreadth doctrine, concluded that the statute was facially invalid for failing the narrow tailoring requirement. *See id.* at 514; s*ee also* Coates v. City of Cincinnati, 402 U.S. 611, 613-15 (1971) (invalidating an ordinance on vagueness and First Amendment grounds due to constitutional infirmity inhering in the ordinance itself and not based on constitutional scrutiny of particular statutory applications).

244. *See* Dorf, *supra* note 1, at 271-77; Fallon, *supra* note 2, at 859 n.29; Ford, *supra* note 2, at 1450-55.

245. *See* Dorf, *supra* note 1, at 272 (stating that the Court's conclusion in *Roe v. Wade*, 410 U.S. 113, 164 (1973), that the statute could not survive constitutional attack because of its broad sweep, represented "an analysis indistinguishable from First Amendment overbreadth doctrine"); Ford, *supra* note 2, at 1450 (concluding on the same basis that *Roe* "appealed to the overbreadth doctrine"); *see also* Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of cert.) (acknowledging that the Court in *Roe* "seemingly employed an 'overbreadth' approach—though without mentioning the term and without analysis").

246. 505 U.S. 833 (1992).

247. *See id.* at 878 (determining that a law constitutes an undue burden and is therefore invalid if its "purpose or effect" is to place a substantial obstacle in the path of women seeking an abortion before viability).

248. *See Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.").

249. A complete reappraisal of the Court's pre-*Casey* abortion jurisprudence is beyond the scope of this Article. It may well be that the Court has in fact adopted a version of the overbreadth doctrine in the abortion context. The central point here is that one cannot support this conclusion simply on the basis of a court's reference to imprecise regulatory measures or overbroad statutory sweep. To do so is to ignore the distinctive structure of valid rule facial challenges and to assume erroneously that all facial challenges are structured as overbreadth challenges.

texts and to mistake examples of valid rule invalidations for tacit extensions of overbreadth doctrine outside of the First Amendment.

4. Salerno *is not draconian nor does it unjustifiably privilege First Amendment challengers*

Salerno's test faces criticisms that it is draconian and that it unjustifiably privileges First Amendment facial challengers. Both of these criticisms flow from the supposed dichotomy, evident in *Salerno* itself, between *Salerno*'s draconian "no set of circumstances" "test" and the more lenient First Amendment overbreadth test.[250] But this dichotomy cannot plausibly be maintained. The Court has recognized that valid rule facial challenges are a distinct alternative to overbreadth facial challenges within the First Amendment context.[251] The relevant distinction between the First Amendment overbreadth test and *Salerno*'s "no set of circumstances" is decidedly not the leniency of the former as compared with the draconian quality of the latter. Instead, the crucial difference between the two is that each is designed for a qualitatively distinct form of facial challenge. *Salerno*'s "no set of circumstances" may well impose a "heavy burden" on the facial challenger,[252] but it is a qualitatively distinct kind of burden from the overbreadth challenger's burden, and not a draconian version of it.

In a similar vein, although the overbreadth doctrine does indeed privilege First Amendment facial challengers, it does so by providing an *additional* method of asserting facial invalidity that the third-party standing bar ordinarily forecloses. Admittedly, this observation does not affect the arguments that critics have made in favor of extending overbreadth outside of the First Amendment. Even if one understands an overbreadth facial challenge as an additional mechanism for asserting facial challenges, and not the sole means through which such a challenge may succeed, one might still argue that additional mechanisms should be available to all litigants asserting certain kinds of fundamental rights.[253] This may well be so, but it is an argument directed at a question (the appropriate scope of overbreadth doctrine) quite distinct from the questions implicated by the valid rule facial challenges governed by *Salerno*. As discussed, valid rule facial challenges can succeed in a variety of constitutional contexts. Any unjustifiable privileging of First Amendment challengers is not *Salerno*'s doing.

250. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).
251. *See* New York v. Ferber, 458 U.S. 747, 768 n.21 (1982).
252. *See Salerno*, 481 U.S. at 745.
253. *See* Dorf, *supra* note 1, at 264-78.

C. The Limits of Valid Rule Theory: Overbreadth Doctrine and the Narrow Tailoring Requirement

The dual structure of facial challenges within constitutional adjudication assumes that each type of facial challenge is subject to distinct methods of judicial resolution. In response to the assumption that all facial challenges are structured as overbreadth facial challenges, Part B above demonstrated the structure of, and appropriate method for resolving, valid rule facial challenges under *Salerno*. In demonstrating that valid rule facial challenges are a qualitatively distinct form of facial challenge, however, this Article's analysis took for granted the Court's implicit rejection of Monaghan's claim that the First Amendment overbreadth doctrine is not a special standing rule but can instead be explained in valid rule terms.[254] This Part considers in somewhat more detail whether that rejection can be sustained in light of this Article's defense of valid rule facial challenges.

It may be true, as a matter of precedent, that the Court repeatedly holds that the First Amendment overbreadth doctrine is a special standing rule and that such an exception, if taken seriously, leads to the conclusion that the overbreadth doctrine involves a qualitatively distinct facial challenge methodology.[255] The Court's repeated reliance on the special standing theory, however, does not respond to the substance of Monaghan's claim that the difference between the First Amendment "overbreadth" test and the general requirement of regulatory precision (or narrow tailoring) is one of words alone.[256] In addition, although the Court has repeatedly distinguished between two qualitatively distinct forms of facial challenges within the First Amendment,[257] and indeed has recognized on at least one occasion that the narrow tailoring requirement can form the basis of a valid rule facial challenge,[258] the Court also has suggested that "over-

254. *See* Monaghan, *supra* note 29, at 39.

255. *See* Fallon, *supra* note 2, at 872 (arguing that Monaghan's theory does not adequately account for what courts actually do in overbreadth cases); *supra* notes 137-38 and accompanying text.

256. *See* Monaghan, *supra* note 29, at 38 n.157 ("Judicial conclusions of overbreadth or of less restrictive alternatives are equivalents. They are simply different statements that other, more finely tuned means exist to vindicate any presumably valid state policies.").

257. *See supra* note 145.

258. *See Joseph H. Munson Co.*, 467 U.S. at 960-68 (facially invalidating a statute that failed in all of its applications to advance adequately the state's asserted interests); *id.* at 966 n.13 (citing Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n, 447 U.S. 557, 565 (1980); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637-39 (1979); First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); and Zwickler v. Koota, 389 U.S. 241, 250 (1976) as examples of cases in which a litigant challenges a statute "that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest").

breadth" and "narrow tailoring" are different expressions for precisely the same constitutional defect.[259] Unless one can articulate a conceptual distinction between the narrow tailoring requirement and the First Amendment overbreadth doctrine, the claim that there are two distinct forms of facial challenges within the First Amendment, each with a distinctive methodology for resolving the challenge, seems to be overstated. It may be that the prevailing assumption about facial challenges, including facial challenges under the First Amendment overbreadth doctrine, is exactly backwards, and that virtually all First Amendment facial challenges are best understood as valid rule facial challenges.

At least one proposition is clear: both the overbreadth doctrine and the narrow tailoring requirement are concerned with identifying overly broad statutory measures.[260] The distinction between the two tests, if any, stems from the manner in which a court identifies such a statute. The narrow tailoring test, both within and outside of the First Amendment, measures the statutory terms against the asserted government interest; if the statutory terms encompass more statutory applications than is reasonably necessary to effectuate the government's asserted interest, the statute fails the narrow tailoring requirement and may be deemed constitutionally invalid on its face.[261] The First Amendment overbreadth test, on the other hand, instructs courts to compare the "plainly legitimate sweep" of a statute with its potentially illegitimate sweep, and authorizes facial invalidation only if the applications within the "illegitimate sweep" are substantially

---

259. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) (using the narrowly tailored requirement interchangeably with the substantial overbreadth requirements); *Joseph H. Munson Co.*, 467 U.S. at 959, 965 n.13 (treating substantial overbreadth and narrow tailoring requirements identically, and noting that the term "overbreadth" is appropriate for either one); Grayned v. City of Rockford, 408 U.S. 104, 114-20 (1972) (merging overbreadth and narrow tailoring analyses); *see also* National Treasury Employees Union v. United States, 990 F.2d 1271, 1274 (D.C. Cir. 1992) (noting that there does not seem to be an apparent difference between the two tests and that any difference is one of the "quality of fit" demanded by the two doctrines); Monaghan, *supra* note 29, at 37 ("[T]he Court has reacted interchangeably to 'overbreadth' and 'least restrictive alternative' challenges both inside and outside the First Amendment context.").

260. *See* NAACP v. Button, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . .") (citations omitted); *National Treasury Employees Union*, 990 F.2d at 1274 ("[B]oth doctrines invalidate a statute that imposes 'substantial' burdens that are not supported by the statute's justifications; i.e., both invalidate statutes that are unduly 'overinclusive.'"); Monaghan, *supra* note 29, at 37 (suggesting that even when used interchangeably both doctrines invalidate overbroad statutes).

261. *See* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (stating that narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation . . . Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.").

greater in number than the applications within the legitimate sweep.[262]

Whether these two tests identify the same degree of statutory imprecision in a given case depends on the meaning given to the terms "illegitimate" and "legitimate" under the First Amendment overbreadth doctrine. In certain cases, the Court has invoked the overbreadth doctrine to explain potential constitutional defects in content-neutral statutes regulating the "time, place, and manner of expressive or communicative conduct."[263] In these cases, the legitimate statutory applications are those that fall within a statute whose scope is reasonably necessary to effectuate the government's asserted interests.[264] Thus, in these cases the overbreadth doctrine seems to do the same analytical work as the narrow tailoring requirement: a finding of substantial overbreadth identifies the same set of statutory applications embraced by a non-narrowly tailored statute.[265] If that is true, Monaghan is surely right that the litigant does not need a special standing exception to assert the facial claim:[266] any claim that could otherwise have been brought under the overbreadth doctrine could be recharacterized and asserted as a valid rule facial challenge under the narrow tailoring requirement.[267]

The Court, however, has also used the overbreadth doctrine to refer to a quite distinct form of statutory overbreadth. In *New York v. Ferber*,[268] for example, the "plainly legitimate sweep" of the statute covered statutory applications against those engaged in conduct—distribution of child pornography—that the Court deemed to be outside of First Amendment protection altogether.[269] On the other hand, the Court found that the potentially illegitimate sweep of the statute, which was not substantial enough to warrant an overbreadth invalida-

---

262. *See Ferber*, 458 U.S. at 769-70.
263. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).
264. *See Grayned*, 408 U.S. at 114-21.
265. *See Joseph H. Munson Co.*, 467 U.S. at 959, 965-66 & n.13.
266. *See* Monaghan, *supra* note 29, at 39.
267. Within the First Amendment context, it will often make little practical difference whether such a claim is classified as an overbreadth facial challenge or a valid rule facial challenge asserted under the narrow tailoring requirement. The logic, however, of including such cases within the overbreadth rubric would seem to dictate that similar claims outside of the First Amendment also be regarded as overbreadth claims. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 515-17 (1964) (invalidating an act on its face for failing the narrow tailoring requirement of the Fifth Amendment's liberty guarantee). If this is true, however, then the Court's repeated insistence that it has never recognized an overbreadth doctrine outside of the First Amendment is false. *See* United States v. Salerno, 481 U.S. 739, 745 (1987). If the Court wants to cabin the overbreadth doctrine, it may have to be more precise about which claims it embraces within that doctrine.
268. 458 U.S. 747 (1982).
269. *See id.* at 773-74.

tion, included statutory applications covering conduct at least arguably within the First Amendment's protection.[270] The Court thus drew the line between legitimate and illegitimate applications on the basis of the First Amendment's categorical approach—some speech is constitutionally protected, and some speech is not—a line that bears no evident relationship to the narrow tailoring test's interest in identifying a set of statutory measures that reasonably further the government's regulatory ends.

Indeed, one can conclude with relative certainty that, in a case such as *Ferber*, the overbreadth and narrow tailoring tests do not identify the same constitutional defect. Suppose that a future defendant, who engages in conduct protected under the First Amendment but prohibited under the challenged statute, attacks the statute as unconstitutional as applied to him. The statute, which regulates expressive conduct on the basis of content, would be subject to strict scrutiny, and the state, therefore, would have to demonstrate that the content-based statutory restriction was narrowly tailored to further a compelling state interest.[271] The state likely would satisfy the compelling state interest requirement pursuant to the very same claim it had made in *Ferber*: a compelling interest in preventing the sexual exploitation and abuse of children.[272] Thus, unless one assumes that the weight of the government's interest varies from case to case, the future litigant would have to demonstrate that the statute was not sufficiently precise in furthering the admittedly compelling state interests in order to succeed. But if the *Ferber* court's determination that the statute was not substantially overbroad was the equivalent of a determination that the statute was also narrowly tailored, presumably there would be nothing left to litigate in these future prosecutions.[273] And yet, the

---

270. *See id*. at 773. Importantly, the Court did not explicitly conclude that these statutory applications were in fact illegitimate; it simply reserved that question for later, case-by-case adjudication. *See id*. at 773-74; Fallon, *supra* note 2, at 858 n.28.

271. *See* Boos v. Barry, 485 U.S. 312, 334 (1988).

272. *See Ferber*, 458 U.S. at 757; *id*. at 774-75 (O'Connor, J., concurring) (noting that the state's compelling state interest might well render constitutional future statutory applications covering works of social value). Justice Brennan apparently thought that, in subsequent prosecutions involving conduct within the ambit of First Amendment protection, the government's interest in supporting the regulation would be correspondingly less. *See id*. at 776 (Brennan, J., concurring in the judgment).

273.

> It is readily apparent that [the narrow tailoring] question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity. Even if there were no advancement as applied in that manner—in this case, as applied to [the litigant before the court]—there would remain the matter of the regulation's general application to others . . . .

United States v. Edge Broad. Co., 509 U.S. 418, 427 (1993); *see* Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989) ("[T]he validity of the regulation depends on the relation it bears to

Court in *Ferber* explicitly reserved judgment on the question of the constitutionality of such applications, concluding that such determinations were best made on a case-by-case basis.[274] Unless one concludes that the Court's rejection of the overbreadth claim can be conceptually distinguished from the conclusion that the statute also satisfied the narrow tailoring requirement, the Court's justification for declining to rule on these third-party applications makes little sense.

Even if one can draw an analytical distinction between overbreadth and narrow tailoring in these cases, the practical question is why any litigant would assert a facial challenge under the overbreadth doctrine. If, as valid rule theory contends, a litigant always has a right to be free from sanction under a constitutionally invalid rule of law, irrespective of the privileged nature of his conduct, the "unprotected" nature of the defendant's conduct in *Ferber* should not have prevented a valid rule facial challenge to the statute based on the narrow tailoring requirement.[275] This alternative method for asserting the identical challenge would create an embarrassing loophole in the Court's insistence that the overbreadth doctrine does not apply in cases involving litigants whose conduct is constitutionally protected[276] or in cases involving commercial speech.[277] It is hard to see why the availability of one facial challenge method does not substantially negate the need for the other.

One possible resolution of this quandary is that, although a litigant always has standing to *assert* a valid rule facial challenge,[278] the circumstances in which such challenges can succeed are limited in important ways by the structural features of constitutional adjudication. Part IV of this Article develops this idea and shows that the relationship between the statutory terms and the underlying constitutional doctrine sometimes structures constitutional adjudication so that a

---

the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case.").

274. *See Ferber*, 458 U.S. at 773-74 (citing Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973)).

275. *See* Monaghan, *supra* note 29, at 38 n.157 (noting the possibility for a facial challenge under the narrow tailoring requirement, whether or not the litigant's conduct is "protected").

276. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502-03 (1985).

277. *See* Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n, 447 U.S. 557, 565 n.8 (1980) (asserting that the ordinary concern for chilling protected speech is not sufficiently strong in the commercial speech context to justify application of the overbreadth doctrine). In *Central Hudson*, the Court facially invalidated a statute regulating commercial speech in part on the grounds that the regulation failed the commercial speech doctrine's requirement for narrowly tailored regulatory measures. *See id.* at 569-71; *cf. id.* at 606 (Rehnquist, J., dissenting) (criticizing the majority for facially invalidating the regulation at issue).

278. *See* Monaghan, *supra* note 29, at 8.

valid rule facial challenge cannot succeed. But whether it is possible to preserve an independent role for First Amendment overbreadth doctrine in light of valid rule facial challenges is an extraordinarily difficult question that may be put aside for present purposes. Even if the narrow tailoring requirement renders null the need for an overbreadth doctrine within the First Amendment context, the main thesis of this Article—that *Salerno*'s "no set of circumstances" language governs the adjudication of valid rule facial challenges—is strengthened, not weakened.

Unfortunately, however, recognizing the distinctions between valid rule facial challenges and overbreadth challenges, the limits of valid rule theory, and the respective methods for resolving each facial challenge, are only the first steps in clearing up the current confusion surrounding facial challenge adjudication. Once the distinction is recognized, the crucial task becomes identifying those cases in which facial invalidation pursuant to a valid rule facial challenge is warranted. In other words, the main question is: in what situations can it be said that "no set of circumstances" exists under which a statute may constitutionally be applied? Part IV seeks to provide the beginning of a conceptual framework for answering that question.

IV. THE PRECONDITIONS FOR A SUCCESSFUL VALID RULE FACIAL CHALLENGE

Judicial and scholarly discussion about the differences between as-applied and facial constitutional adjudication has mainly, if not exclusively, focused on the relative costs and benefits of each method of holding statutes unconstitutional. Thus, proponents of as-applied adjudication assert that case-by-case adjudication limited to particular factual circumstances should dominate constitutional adjudication because that method minimizes interference with legislative preferences and seeks to correct constitutional error only insofar as it is necessary to remedy constitutional rights violations in particular cases.[279] On the other hand, proponents of a more liberal use of facial invalidation criticize the piecemeal approach of the as-applied regime and raise concerns that that approach operates to underprotect certain constitutional guarantees.[280] Whether these argu-

279. *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 789 (1988) (White, J., dissenting) ("[O]ur tradition has been to discourage facial challenges, and rather, to entertain constitutional attacks on local laws only as they are applied to the litigants."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) ("[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.").

280. *See, e.g.*, *Plain Dealer Publ'g Co.*, 486 U.S. at 757-59 (justifying use of facial challenges in

ments are put forth as matters of sound judicial policy[281] or constitutional necessity,[282] the ultimate conclusion rests on a judgment about the practical effects of each type of constitutional adjudication.

The difficulty with this approach is that, in its exclusive focus on the practical effects of facial or as-applied adjudication, it assumes that, absent the identified practical effect, either form of constitutional adjudication would be appropriate in a particular case. In other words, it assumes a more-or-less uniform set of conditions under which constitutional adjudication arises. Of course, this approach does not require endless reconsideration of the propriety of facial invalidation and permits generalizations about the circumstances under which each type of challenge, given an assessment of practical effects, ordinarily is appropriate. These generalizations, however, do not provide concrete guidance in particular cases about the appropriate scope, if any, of a court's constitutional invalidation. Thus, constitutional adjudication gropes forward with generalized

---

cases involving standardless licensing statutes on the grounds that the evils engendered by such a statute "can be effectively alleviated only through a facial challenge"); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 474-75, 477 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that facial invalidation would have been the appropriate course in order to place primary responsibility for tailoring and updating the unconstitutional ordinance with the city council); United States v. Grace, 461 U.S. 171, 184 (1983) (Marshall, J., dissenting) ("Since the continuing existence of the statute will inevitably have a chilling effect on freedom of expression, there is no virtue in deciding its constitutionality on a piecemeal basis.").

281. *See, e.g.*, Board of Trustees of the State Univ. v. Fox, 492 U.S. 469, 484-85 (1989) (holding that as-applied challenges should generally be resolved before consideration of overbreadth challenges because "the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it . . . requires consideration of many more applications than those immediately before the court"); *see also* Renne v. Geary, 501 U.S. 312, 344-45 (1991) (Marshall, J., dissenting) (questioning the *Fox* approach as one prudential consideration among many and concluding that, in certain situations, it is appropriate to resolve the overbreadth challenge first); United States v. Raines, 362 U.S. 17, 21-23 (1960) (describing the third-party standing bar and associated rules as rules of practice to which, in situations involving "weighty countervailing policies," certain exceptions may be created); Evans v. Kelley, 977 F. Supp. 1283, 1313 n.31 (E.D. Mich. 1997) (arguing that both *Salerno* and *Casey* are unsatisfactory facial challenge standards, and advocating a compromise standard, shaped by principles of federalism, in which an abortion statute may be invalidated if it is unconstitutional in a "substantial percentage" of cases); Adler, *supra* note 2, at 121-52 (discussing the moral implications and other entailments of the remedial choice between facial and partial invalidation); Stern, *supra* note 34, at 101 (stating that the Court should examine what policy a statute advocates and whether "partial application" or "complete nullification" will best serve that purpose).

282. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) (suggesting that the rules precluding third-party standing are rooted in constitutional limitations on the power of Article III courts); Dorf, *supra* note 1, at 277-78 (arguing that overbreadth doctrine is required by the Constitution in order to avert a chilling effect); Fallon, *supra* note 2, at 868 n.94 (noting that "prophylactic" justifications for overbreadth doctrine may in some sense be mandated by the Constitution); Monaghan, *supra* note 23, at 278-89 (criticizing the reduction of third-party standing rules to "discretionary rules of judicial practice" and stating that "*Yazoo* reflected a powerful and pervasive view of the nature of constitutional adjudication, the animating premise of which denied that courts possessed a general commission to make pronouncements on the meaning of the Constitution or to enforce public norms").

and often conflicting judicial preferences,[283] unresolved arguments for doctrinal extensions,[284] and no clear set of rules governing an important feature of resolving constitutional challenges.

This Part seeks to shift the debate away from the relative effects of facial and as-applied adjudication and toward the structural features of constitutional adjudication under which constitutional challenges arise. A court's decision whether to hold a statute unconstitutional "on its face" or "as-applied" is neither a matter of pure judicial discretion nor constitutional command. Rather, a court's choice between facial and as-applied invalidation is constrained by the structural relationship between the kind of constitutional challenge asserted, the way in which the statute is written and authoritatively construed, and the substantive constitutional doctrine on which the challenge is based. These structural features, which are aspects of any constitutional adjudication, combine in certain circumstances to establish what this Article terms the preconditions for a successful valid rule facial challenge. This Part offers the beginning of a conceptual framework for identifying and describing these preconditions.[285]

A. Identifying an Invalid Rule of Law

The distinctive feature of a valid rule facial challenge is that such a challenge predicates facial invalidity on the basis of a constitutional infirmity on the face of the statute, independent of constitutional defects arising from the statute's application to particular cases.[286] Again, a valid rule facial challenge is a challenge that "puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves the facts only insofar as it is necessary to establish that the rule served as a basis of decision."[287] But to state this very distinc-

283. *Compare* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447 (1985) (stating that as-applied adjudication is "the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments"), Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-07 (1985) (stating that facial invalidation is an exception to the Court's normal practice of partial invalidation), and *Broadrick*, 413 U.S. at 613 (noting that overbreadth should be employed "sparingly, and only as a last resort"), *with City of Cleburne*, 473 U.S. at 477 (Marshall, J., concurring in the judgment in part and dissenting in part) ("When a presumption is unconstitutionally overbroad, the preferred course of adjudication is to strike it down.").

284. *See supra* notes 95-97 and accompanying text.

285. The goal in this Part is to identify and to describe the necessary preconditions only for a successful valid rule facial challenge. Failure to satisfy these preconditions does not limit a litigant to an as-applied constitutional challenge. Overbreadth facial challenges, assuming that the litigant has standing to assert such a challenge based on inseverability grounds or the First Amendment overbreadth doctrine, may still prevail.

286. *See supra* notes 171-218 and accompanying text.

287. BATOR ET AL., *supra* note 201, at 662; *see* Adler, *supra* note 2, at 36 (explaining that a court only looks at the "predicate and history" of the challenged rule when analyzing a facial challenge).

tion between facial and overbreadth challenges presents the need to articulate a distinction along a quite different axis; namely, the distinction between valid rule facial challenges and as-applied challenges. In other words, identifying this feature of a valid rule facial challenge raises, but does not resolve, the further question of how a court can identify constitutional infirmity that is independent of particular statutory applications but is common to them all. It becomes necessary to delineate those cases in which a court can identify constitutional infirmity inhering in the statute itself, which makes possible successful valid rule facial challenges, and those cases in which a determination of constitutional infirmity necessarily turns on the constitutionality of particular statutory applications, which are limited to as-applied adjudication.

It might be argued, however, that it is not even necessary to make such a distinction because valid rule facial challenges dominate, if not cover, the constitutional field. In this regard, Adler argues that the very notion of an as-applied constitutional challenge rests on a fundamentally incorrect understanding of the nature of constitutional adjudication. In Adler's view, constitutional rights are rights against rules and not rights that shield or privilege certain behavior.[288] Constitutional adjudication never involves complete moral scrutiny of a litigant's conduct, but rather focuses almost exclusively on the history and predicate of statutory rules.[289] Indeed Adler goes further and claims that "[t]here is no such thing as a true as-applied constitutional challenge" and flatly rejects the notion that "rule applications can be properly described as unconstitutional."[290]

Much of Adler's thesis is consistent with this Article's identification and elaboration of valid rule facial challenges. Adler's work provides an exhaustive inquiry into the reasons why the scrutiny of rules under doctrinal tests is so central to constitutional adjudication—an inquiry that this Article does not purport to undertake. It is important to note, however, that the distinction between as-applied and facial challenges does not depend on the theory that some constitutional claims seek to shield privileged conduct from state control—the theory that Alder principally seeks to discredit. As-applied challenges, as Adler recognizes, can be understood more narrowly as challenges that depend upon some fact particular to the litigant before the court and that do not exclusively target the history and predicate of the chal-

288. *See* Adler, *supra* note 2, at 14-39.
289. *See id.* at 127-28, 157-58.
290. *Id.* at 157.

lenged rule.[291] Whereas Adler treats this distinction as one relating to remedy alone,[292] this Part shows that the practical features of constitutional adjudication—prior to a court's identification of a constitutional defect—structure constitutional challenges into the facial or as-applied mode.[293]

This Part attempts to distinguish cases warranting as-applied invalidation from cases warranting facial invalidation by identifying the three preconditions for a successful valid rule facial challenge. The three preconditions are: (1) the litigant's facial challenge must fairly be identified as a valid rule facial challenge; (2) the terms of the statute, as authoritatively construed, must trigger constitutional scrutiny under the applicable doctrinal test; and (3) the test triggered by the statute must analyze the constitutional validity of the statutory terms and not the validity of particular statutory applications. If any of these three preconditions is lacking, any identified constitutional infirmity will be dependent upon features of particular statutory applications, and a valid rule facial challenge cannot succeed. On the other hand, even if all three preconditions are satisfied, the practical result is that a successful valid rule facial challenge is possible. Whether the valid rule facial challenge ultimately will succeed depends on the merits of the challenge as determined by the underlying substantive constitutional law. But when all three preconditions are satisfied, a court's conclusion that the statute is unconstitutional is simultaneously a conclusion that "no set of circumstances" exists in which the statute can be constitutionally applied, and that facial invalidation is warranted. In other words, if and only if the preconditions are satisfied, a successful claim on the merits renders *Salerno*'s descriptive conclusion appropriate.

1. The litigant's facial challenge must fairly be identified as a valid rule facial challenge

The first precondition for a successful valid rule facial challenge is that the litigant's facial challenge must fairly be identified as a valid rule facial challenge—a facial challenge asserting that the challenged statute is unconstitutional in all of its potential applications. It is well-established that a litigant has the primary responsibility for controlling the contours of his or her constitutional case through the claims

---

291. *See id.* at 36-37, 156-57 & n.541.

292. *See infra* notes 433-36 and accompanying text.

293. Because it is not necessary to decide whether an as-applied challenge is act-shielding, or simply a claim of right against a partial rule, in order to maintain the distinction between the facial and as-applied modes of adjudication, this Article takes no position on the more provocative aspects of Adler's theory.

asserted in the complaint.[294] This should be no less true for the scope of a court's ultimate constitutional invalidation—whether it is as-applied or on its face—than it is for determining the substantive constitutional claims that a court will resolve in the first instance.[295] Thus, a court should only invalidate a statute on its face if the litigant's constitutional challenge can fairly be identified as a valid rule facial challenge.

There are at least two circumstances in which this precondition clearly will not be met. First, the litigant may expressly limit the constitutional challenge to an as-applied challenge and may not assert a facial challenge at all. In such cases, a court need not even address the issue of facial invalidity and should limit its constitutional scrutiny to the particular features of the litigant's case that are alleged to render the statute unconstitutional in application.[296] Second, the litigant may assert a facial challenge that, given the arguments offered in support of the challenge, make it plain that the facial challenge in question is an overbreadth facial challenge predicating constitutional invalidity on some number of unconstitutional applications of an otherwise valid rule. Thus, if the litigant concedes that the application against him is constitutional and bases the facial challenge on the alleged unconstitutionality of statutory applications to parties not before the court, a court can conclude that the facial challenge at issue is not a valid rule facial challenge. In such instances, absent a First Amendment or statutory inseverability exception, a court should dismiss the facial challenge for lack of standing.[297] In any event, be-

294. *See* FED. R. CIV. P. 8 (requiring complaints to include "a short and plain statement of the claim showing that the pleader is entitled to relief").

295. The Court has, on at least one infamous occasion, converted a clear facial challenge into an as-applied challenge because of its view that the particular features of the litigant's case warranted adjudication only on an as-applied basis. *See* Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986) (transforming, without explanation, a facial constitutional challenge to a statute criminalizing sodomy to an as-applied challenge to the statute's application against "consensual homosexual sodomy"); *see also* Edenfield v. Fane, 507 U.S. 761, 780 (1993) (O'Connor, J., dissenting) (criticizing the majority for avoiding an examination of the rule itself by classifying respondent's claim as an as-applied challenge).

296. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 802-03 (1984) (holding that, because the litigants acknowledged that the ordinance could be validly applied in some instances, the litigants' challenge was "basically a challenge to the ordinance as applied to their activities" and did not state a valid rule facial challenge); *cf.* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 623-24 (1996) (limiting the decision to an as-applied basis given that neither the parties nor the lower courts had specifically addressed the issues necessary for an overbreadth facial invalidation).

297. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 210 n.13 (1992) (rejecting a claim of facial invalidation predicated on isolated applications to third parties not before the Court); H.L. v. Matheson, 450 U.S. 398, 405-17 (1981) (denying standing for a facial challenge to a statute that required parental notification for all minors seeking an abortion, given that the facial challenge was predicated on the alleged unconstitutionality of the statute as-applied to mature and emancipated minors, and the class asserting the challenge did not include any mature or emanci-

cause these challenges are not valid rule facial challenges at all, they should not be subject to scrutiny under *Salerno*.[298]

Little would be gained, however, from developing a complex pleading doctrine governing the assertion of facial challenges. Because the distinction between kinds of facial challenges is not widely understood, many litigants simply assert a generalized "facial challenge" without specifying the grounds on which they predicate the claim of facial validity. A reasonable rule would be one that entitles the generalized facial challenger to adjudication under *Salerno* as long as the litigant does not specifically concede the constitutionality of some constitutional applications. In the First Amendment context, the Court has expressed a willingness to be rather flexible in this regard, analyzing generalized facial challenges under both of the available facial challenge tests,[299] and, on one occasion, construing a facial challenge as a valid rule facial challenge to establish its jurisdiction over the claim.[300] Outside of the First Amendment context, the Court has on occasion facially invalidated statutes even though the litigant (so far as one can tell from the opinion) did not specify that the constitutional claim was even a facial challenge.[301] Finally, some lower courts have analyzed facial challenges under *Salerno*, even though the litigants had not specifically asserted a facial challenge, solely on the ground that the constitutional challenge lacked specific references to

---

pated minors); Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 218-20 (1912) (denying litigant standing to challenge the statute as-applied to other cases not before the Court).

298. Some courts reach the same result by applying *Salerno* and concluding that either the application of the statute against the litigant, or a hypothetical application against some third party, is the one constitutional application sufficient to defeat the challenge under *Salerno*. *See* United States v. Sage, 92 F.3d 101, 106 (2d Cir. 1996); United States v. Gluzman, 953 F. Supp. 84, 92 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998). Although this method reaches the correct result, courts should reject it not only as inconsistent with *Salerno*'s facial challenge methodology, but also for ignoring the threshold matter that such a litigant has no standing outside the First Amendment even to assert such a facial challenge.

299. *See* New York State Club Ass'n v. City of New York, 487 U.S. 1, 11-15 (1988).

300. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381-83 n.3 (1992) (facially invalidating an ordinance that impermissibly prohibited unprotected speech on the basis of its content even though the petitioner articulated the facial challenge in his certiorari petition in overbreadth terminology). Justice White argued that the Court had no jurisdiction to entertain a valid rule facial challenge given that the Supreme Court's rules limit consideration to those questions "fairly included" within the questions presented in the certiorari petition. *See id.* at 398 n.2 (White, J., concurring in the judgment) (citation omitted). Justice Scalia, writing for the majority, concluded instead that:

> [petitioner's facial challenge] was *not* just a technical "overbreadth" claim—i.e., a claim that the ordinance violated the rights of too many third parties—but included the contention that the ordinance was "overbroad" in the sense of restricting more speech than the Constitution permits, even in its application to him, because it is content based.

Id.

301. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966).

particular statutory applications.[302] Accordingly, although the distinction between valid rule facial challenges and overbreadth facial challenges has thus far not achieved widespread recognition, the courts have adopted a flexible method that permits adjudication of a facial challenge under *Salerno* when the litigant's constitutional claim presents the main attributes of a valid rule facial challenge.

2. The statutory terms themselves must trigger constitutional scrutiny under the applicable doctrinal test

The second precondition for a successful valid rule facial challenge is that the statutory terms must themselves trigger constitutional scrutiny under the applicable doctrinal test (that is, the doctrinal test on which the litigant's challenge is based). If, on the other hand, the litigant can only trigger constitutional scrutiny under the applicable doctrinal test by pointing to a constitutional defect arising from particular statutory applications, any constitutional infirmity ultimately identified obviously will not be independent of the specific facts of particular cases. In those circumstances, a valid rule facial challenge cannot succeed, irrespective of the manner in which the litigant asserts the claim.

This second precondition is perhaps unremarkable in light of traditional, and fairly commonsensical, notions about facial challenges. A valid rule facial challenge is a challenge to a statute based on a constitutional infirmity evident in the written words of the statute itself.[303] Such general observations about facial challenges, however, assume that a constitutional flaw inheres in the text of the statute without explaining how a court identifies such a flaw in the first place. As Professor Fallon has recently argued, a basic feature of constitutional adjudication is that the Court implements the Constitution's meaning through judicially-crafted doctrinal tests.[304] Before a court can undertake constitutional scrutiny under a doctrinal test in the context of actual constitutional adjudication, however, the test must be triggered in some manner.[305] A valid rule facial challenge is a challenge alleging that the statutory terms themselves, and not particular statutory applications, trigger constitutional scrutiny under the applicable

302. *See* Sam & Ali, Inc. v. Ohio Dep't of Liquor Control, 158 F.3d 397, 398 (6th Cir. 1998); Davidson v. Mann, 129 F.3d 700, 702 (2d Cir. 1997); Florida League of Prof'l Lobbyists v. Meggs, 87 F.3d 457, 459 (11th Cir. 1996); National Fed'n of Fed. Employees v. Greenberg, 983 F.2d 286, 293-94 n.2 (D.C. Cir. 1993).

303. *See supra* notes 20, 200-01 and accompanying text.

304. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term--Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 61 (1997).

305. *See, e.g.*, *id.* at 84 (discussing how a litigant triggers an "effects test").

doctrinal test.

Whether statutory terms do, in fact, trigger constitutional scrutiny under the applicable doctrinal test depends in the first instance on a federal court's determination of what the statute, as authoritatively construed, actually means.[306] The meaning of a law for a federal court is the meaning that courts charged with enforcing the law give to it, and not the bare statutory words that the legislature enacted.[307] Thus, a statute whose terms seem to trigger constitutional scrutiny ultimately may not do so if a court provides an authoritative construction that eliminates the objectionable statutory feature.[308]

It is well established that state courts, or the officials responsible for enforcing state statutes, have near-absolute freedom to offer narrowing constructions.[309] A federal court might ultimately conclude that a state court's narrowing construction is insufficient to remedy an alleged constitutional defect.[310] If the construction is adequate to remedy the alleged constitutional defect on the face of the statute, however, the state court's authoritative narrowing construction is binding

306. *See* Broadrick v. Oklahoma, 413 U.S. 601, 618 n.16 (1973) ("[A] federal court must determine what a state statute means before it can judge its facial constitutionality.").

307. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (stating that the construction of an ordinance in jury instructions "is a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance").

308. *See, e.g.*, Watson v. Perry, 918 F. Supp. 1403, 1413-14 (W.D. Wash. 1996) (construing a federal statute in such a manner as to eliminate constitutional infirmity on the face of the statute and to narrow the question presented to an as-applied challenge), *aff'd*, 124 F.3d 1126 (9th Cir. 1997).

309. *See* Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989). There are limits, however. Although narrowing constructions can be applied to conduct occurring before the construction, application of the statute must provide sufficiently fair warning of the possibility of such a construction to satisfy due process requirements. *See* Osborne v. Ohio, 495 U.S. 103, 115 (1990). A second limitation is that, if a state court saves the statute through a narrowing construction after the conviction, "the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written . . . ." *Id.* at 118.

310. *See Osborne*, 495 U.S. at 128-39 (Brennan, J., dissenting) (scrutinizing the statute to show that that state's narrowing construction was inadequate to save the statute from an overbreadth challenge). Alternatively, a federal court may decline facially to invalidate a statute under the *Pullman* abstention doctrine. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498-502 (1941) (permitting a federal court to abstain from deciding a constitutional claim if state court resolution of a difficult and unsettled question of state law would avoid the necessity of deciding the federal constitutional claim); *see also* Dorf, *supra* note 1, at 286-87 (noting abstention possibilities in facial challenge adjudication).

Abstention is an exceptional doctrine, however, and is available only if the state statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." Houston v. Hill, 482 U.S. 451, 468 (1987) (quoting Harman v. Forssenius, 380 U.S. 528, 534-35 (1965)). If such a construction is unavailable, a federal court may not abstain, even if the statute has never been interpreted by a state court. *See id.* at 468. Moreover, the abstention doctrine is generally disfavored in the First Amendment context. *See Houston*, 482 U.S. at 468. Another possibility for a federal court confronted with a state statute whose meaning is unclear is to certify the question to the state court for a determination of the statute's meaning. *See* Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 397-98 (1988).

on the federal courts.[311] Likewise, if the state court fails to supply the requisite narrowing construction, a federal court ordinarily cannot save a state statute through its own narrowing construction.[312] On the other hand, when the statute subject to facial scrutiny is a federal statute, federal courts have considerably more leeway to avoid facial invalidation through narrowing constructions.[313] But whatever permutation presents itself to a federal court, the important point is that the statutory terms, for the purposes of constitutional scrutiny, are the statutory terms remaining after an appropriate court, in appropriate circumstances, offers an authoritative construction of the statute. Valid rule facial challenges are directed at a constitutional infirmity inhering in the statutory terms after a court has supplied such an authoritative construction.[314] "The operative rule, either as enacted or construed, must conform to the Constitution."[315]

Once the actual statute is defined, the question whether the statutory terms themselves trigger constitutional scrutiny under the applicable doctrinal test will depend on the relationship between the content of the statutory terms and the underlying substantive constitutional law. In the equal protection context, this precondition is often satisfied given that the underlying constitutional doctrine supplies a doctrinal test for any legislative distinction among classes of people.[316] Whenever such a distinction is evident on the face of the statute, the classification triggers a doctrinal test, the severity of which varies with the identity of the class that the legislative classification covers.[317] The fact that a potential constitutional defect inhering in

311. *See Osborne*, 495 U.S. at 103, 113-14 n.10.

312. *See American Booksellers Ass'n*, 484 U.S. at 397; Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984); New York v. Ferber, 458 U.S. 747, 767 (1982).

313. *See Ferber*, 458 U.S. at 769 n.24. This leeway is not unlimited, however. The Court occasionally invokes the principle that it will not "rewrite" a federal law in the interest of saving it from constitutional invalidation. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 884-85 (1997); United States v. National Treasury Employees Union, 513 U.S. 454, 479-80 (1995); Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964). As commentators have long remarked, it is difficult to justify invocation of this principle, given that all narrowing constructions involve some measure of judicial rewriting of legislative enactments. *See* Stern, *supra* note 34, at 95.

314. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 380-81 (1992) (adopting a state narrowing construction that limited the reach of a potentially overbroad ordinance to conduct amounting to unprotected "fighting words" and then facially invalidating the narrowed ordinance on the grounds that it set forth an impermissible content-based restriction on speech).

315. Monaghan, *supra* note 29, at 8; *see id.* at 3-4.

316. Scrutiny under the Equal Protection Clause is, of course, not limited to statutes that make classifications among groups of people. Constitutional scrutiny is also triggered by statutes that, by their own terms, burden a so-called fundamental right. In these cases, too, the terminological trigger makes possible valid rule facial challenges. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (holding that statutory discrimination burdening the right to interstate movement is facially invalid); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (invalidating a poll tax for infringing on the fundamental right to vote).

317. A classification on the basis of a "suspect class" triggers strict scrutiny, under which the

the statutory terms[318] ordinarily triggers equal protection review structures most equal protection adjudication in the facial challenge mode.[319]

The First Amendment poses a much more intricate relationship between the statutory terms and the underlying constitutional doctrine, which makes generalizations about the possibility for successful valid rule facial challenges difficult. In at least certain cases, however, the relationship is sufficiently clear. For example, in *Boos v. Barry*,[320] the Court held facially unconstitutional a statute prohibiting the display of signs within 500 feet of a foreign embassy that tended to bring a foreign government into "public odium" or "public disrepute."[321] Because the statutory terms created a content-based restriction on speech,[322] and because content-based restrictions trigger constitutional scrutiny under the First Amendment's strict scrutiny test,[323] the defendant was not required to direct the Court's attention to particular features of specific applications in order to trigger the kind of

---

state must demonstrate that the classification is necessary to further a compelling state interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Classifications on the basis of non-suspect classes ordinarily trigger rational basis review, under which the state need only show that the classification furthers a legitimate governmental interest. *See* Vacco v. Quill, 521 U.S. 793, 809 (1997). The Court has also, on occasion, recognized an intermediate level of scrutiny for certain classifications. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728-30 (1982) (applying intermediate scrutiny to gender classification).

318. In certain circumstances, the Court will treat a statute that does not explicitly set forth the kind of classification that the litigant challenges as if the statute actually did so because the statute cannot be explained on any other grounds. *See* Miller v. Johnson, 515 U.S. 900, 905 (1995) (citing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977)). The Court uses this kind of purpose or motive analysis not only to read a neutral statute as if it actually contained a suspect classification such as race, as in *Miller*, but also to determine whether an explicit classification that triggers rational basis review was enacted with a legitimate governmental interest. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996). In both situations, the constitutional defect alleged inheres in the statute itself, not in its applications, and thus satisfies the second precondition.

319. *See, e.g.*, *Romer*, 517 U.S. at 631; Caban v. Mohammed, 441 U.S. 380, 393 (1979); Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954); *see also* Jordan v. Jackson, 15 F.3d 333, 353 n.20 (4th Cir. 1994) (noting that, in the equal protection context, facial and as-applied challenges are indistinguishable, but treating the challenge at hand as a facial challenge). The one exception to this generalization is *City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 U.S. 432 (1985), in which the Court invalidated a zoning ordinance requiring a special use permit for homes for the mentally retarded as applied to the litigant asserting the constitutional claim. *See id.* at 448. This seemingly novel use of as-applied adjudication in the equal protection context prompted a vigorous dissent from Justice Marshall, *see id.* at 476 (Marshall, J., concurring in the judgment in part and dissenting in part) ("To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis."). To date, *Cleburne* appears to be, as one commentator predicted, an unexplained anomaly unlikely to generate new "as-applied" equal protection decisions. *See* John D. Wilson, Comment, Cleburne*: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163, 186-91 (1986).

320. 485 U.S. 312 (1988).

321. *Id.* at 321-29.

322. *See id.* at 318-19.

323. *See id.* at 321-22.

constitutional scrutiny that he sought.[324] As a result, the Court was able to base its ultimate determination that the statute was constitutionally invalid under the strict scrutiny test on a constitutional infirmity inhering in the statute itself and independent of particular statutory applications. The Court's constitutional holding, therefore, supported facial invalidation.[325]

By contrast, some statutes do not contain statutory terms that trigger constitutional scrutiny under the applicable doctrinal test, and thus, do not satisfy the second precondition. The clearest example of such a statute is a generally applicable conduct-regulating statute, such as a breach of the peace or trespass statute. Generally applicable statutes do not by their own terms implicate First Amendment protection; such protection arises, and thus triggers constitutional scrutiny under the applicable doctrinal test, only when the state seeks to apply such a statute to prohibit activity protected by the First Amendment.[326] The potential constitutional infirmity in such cases is dependent on particular statutory applications and thus makes impossible the requisite valid rule challenge conclusion that the statute is necessarily unconstitutional in all of its conceivable applications.

Monaghan attempts to incorporate even these cases within his valid rule reconstruction of the First Amendment overbreadth doctrine.[327] He argues, as a general proposition, that "the point at which to determine whether any statute is facially defective is *at the time and in the*

---

324. Of course, the same conclusion would follow if the statutory restriction were content-neutral, given that the First Amendment subjects content-neutral statutes to constitutional scrutiny under a less strict balancing test. *See* Grayned v. Rockford, 408 U.S. 104, 115 (1972). The important point for the present purposes is not the level of scrutiny that the constitutional test dictates, but that the substantive doctrine subjects the statutory terms themselves to the kind of constitutional scrutiny that potentially could invalidate the statute.

325. *See* Boos v. Barry, 485 U.S. 312, 321-29 (1988); *see also* Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971).

> The ordinance [criminalizing conduct on sidewalks found annoying to passersby] before us makes a crime out of what under the Constitution cannot be a crime. It is *aimed directly at activity protected by the Constitution*. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

Id. (emphasis added).

326. *See* Monaghan, *supra* note 29, at 28.

> General criminal statutes . . . are potentially applicable in a wide variety of settings which, in turn, implicate a correspondingly wide range of First Amendment principles . . . . Plainly, the statute cannot be evaluated, *ex ante*, in a vacuum, as it sits on the statute books. Nor should it. "The pinch of the statute is in its application."

Id. (quoting Terminiello v. Chicago, 337 U.S. 1, 5 (1949)).

327. *See* Monaghan, *supra* note 29, at 27–30.

terms in which it is applied to a litigant."[328] Thus, Monaghan argues that the valid rule requirement attaches, not to the statute itself, but rather to the "contextually specific construction" that a court gives to such a statute when it is "in fact applied to anything embraced within the constitutional definition of speech."[329] Others question whether this formulation can adequately explain the First Amendment overbreadth doctrine,[330] especially given that some overbreadth facial challenges have succeeded in declaratory judgment actions brought in federal district court in which the court offered no "contextually specific construction" prior to invalidating the statute on its face.[331]

Monaghan's formulation, however, seems equally incapable of explaining a valid rule facial challenge that potentially invalidates the statute in all of its conceivable applications. Indeed, Monaghan specifically acknowledges that the constitutional infirmity identified after a "contextually specific construction" extends only to the statute as construed in the particular context, and thus leaves the remainder of the statute intact.[332] Of course, if this is true, the constitutional challenge is structurally identical to an as-applied challenge in the important sense that the court's disposition of the challenge necessarily leaves intact those aspects of the statute that are not included within the contextually specific construction.[333] In other words, if constitu-

---

328. *Id.* at 29.

329. *Id.*

330. *See, e.g.*, Fallon, *supra* note 2, at 873 (arguing that Monaghan has a more "forgiving view of what should count as an adequate narrowing construction than does the Supreme Court" and that the Court's approach is characterized by a more forward-looking view aimed at averting chill).

331. *See id.* (discussing Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 575-76 (1987)).

332. *See* Monaghan, *supra* note 29, at 29 ("If [the contextually specific construction is not valid], the statute is to that extent—and to that extent only—invalid as a matter of constitutional law."). Adler argues more generally that any so-called "as-applied" challenge is more properly characterized as a "partial invalidation" given that constitutional adjudication never involves a moral inspection of the litigant's conduct, but rather scrutiny of rules under doctrinal tests. *See* Adler, *supra* note 2, at 157 & n.541.

333. One should distinguish "contextually specific constructions" from authoritative narrowing constructions that pertain to the statute as a whole. In both instances, the state court's narrowing construction of a statute is an interpretation of state law that is binding on the federal courts. In the case of a contextually specific construction of a generally applicable statute, however, the narrowing construction obviously applies only to the particular circumstances of the case before the court. Thus, in *NAACP v. Button*, 371 U.S. 415 (1963), although the Court accepted the state court's authoritative construction of the state statute as part of the statute itself, *see Button*, 371 U.S. at 432, the Court adopted a construction of the statute "as applied in a detailed factual context" that included consideration of the particular activities of the litigants before the Court. *Id.* This being so, the Court's ultimate constitutional holding was predetermined to be an as-applied holding. *See id.* at 428-29; *see also* Terminiello v. Chicago, 337 U.S. 1, 4-6 (1949) (adopting a court's jury instruction as an authoritative narrowing construction of a breach of the peace ordinance but ultimately confining its decision to overturning the defendant's conviction rather than invalidating the statute on its face). By contrast, an ordinary narrowing construction is not limited to the particular circumstances of the litigant's case, but in-

tional scrutiny attaches only to a contextually specific construction of a generally applicable statute, a court could never conclude that "no set of circumstances" exists under which the statute could constitutionally be applied. Because distinct statutory applications would trigger quite different contextually specific constructions, they would raise distinct constitutional issues capable of resolution only in future as-applied adjudications.[334]

Examples of statutory terms that fail to trigger constitutional scrutiny are not limited to generally applicable statutory measures. Statutes of less sweeping scope may also fail the second precondition if the statutory terms do not trigger constitutional scrutiny under the applicable doctrinal test. In *Texas v. Johnson*,[335] for example, the defendant was convicted of violating a statute that criminalized the act of desecrating a venerable object, including a state or national flag.[336] The Court observed that, as a threshold matter, it "must first determine whether [the defendant's] burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction."[337] Because the statutory terms themselves did not proscribe expressive conduct, but instead proscribed a broader set of conduct (desecration of venerable objects) of which expressive acts of flag burning formed a subset,[338] the constitutional challenge depended upon a particularized showing that the defendant's actual conduct constituted expressive conduct sufficient to trigger First Amendment scrutiny.[339] Therefore, the claim did not sat-

---

stead limits the potential reach of the statute in all possible applications. In cases involving such narrowing constructions, a valid rule facial challenge may succeed. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 380-81 (1992) (adopting a narrowing construction that limited the reach of a potentially overbroad ordinance to conduct amounting to unprotected "fighting words" and then facially invalidating the narrowed ordinance on the grounds that it set forth an impermissible content-based restriction on speech in all cases).

334. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946) (invalidating a trespass law only "[i]nsofar as the State has attempted to impose criminal punishment" on those distributing literature on the streets of a company town); Cantwell v. Connecticut, 310 U.S. 296, 298 (1940) (partially invalidating a breach of the peace statute as construed and applied to prevent the peaceful distribution of religious literature on the streets).

335. 491 U.S. 397 (1989).

336. *See id.* at 400.

337. *Id.* at 403 (discussing contexts in which symbols can be interpreted as expressive (citing Spence v. Washington, 418 U.S. 405, 409-11 (1974))).

338. *See id.* at 403 n.3

> [The challenged statute] regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one 'knows' that one's physical treatment of the flag 'will seriously offend one or more persons likely to observe or discover his action,' this fact does not necessarily mean that the statute applies only to expressive conduct protected by the First Amendment.

Id. (emphasis omitted) (citations omitted).

339. The Court ultimately determined that the defendant's act of burning the flag as part of a political demonstration was sufficiently expressive to trigger First Amendment scrutiny. *See id.*

isfy the second precondition for a successful valid rule facial challenge, and the Court properly limited its resolution of the constitutional question (given its interpretation of the statute as not itself prohibiting expressive conduct) to an as-applied constitutional invalidation.[340]

Statutes failing the second precondition are not limited to statutes implicating First Amendment interests.[341] Indeed, the principal cases in which the Court articulated the rule barring the assertion of non-First Amendment overbreadth challenges involved statutes whose

---

at 403-06.

340. *See id.* at 406-07, 410-20. In declining to resolve the constitutional challenge to the statute on its face, the Court in *Texas v. Johnson* cited Justice White's concurrence in the judgment in *Smith v. Goguen*, 415 U.S. 566, 588 (1974). *See Johnson*, 491 U.S. at 403 n.3. In *Goguen*, the majority invalidated on its face on void-for-vagueness grounds a provision of a Massachusetts flag misuse statute that criminalized "contemptuous" treatment of the United States flag. *See Goguen*, 415 U.S. at 582. Justice White disagreed with the majority's void-for-vagueness analysis, *see id.* at 583 (White, J., concurring in the judgment), but concurred in the majority's facial invalidation because a statute that, by its own terms, criminalized "contemptuous" treatment of a flag could not be applied consistent with the First Amendment. *See id.* at 589-90. Because the statute in *Goguen* contained statutory terms that necessarily covered expressive conduct, the statute triggered First Amendment scrutiny without reference to the particular features of the case at hand. *See id.* at 573. Thus, the difference between the as-applied and facial holdings in *Johnson* and *Goguen*, respectively, turned on the content of the statutory terms in relation to the relevant constitutional doctrine. It seems necessary, then, to qualify Fallon's assertion that "[s]crutiny under the *O'Brien* formula is triggered by an effects test; a statute's effect in burdening conduct undertaken for expressive purposes launches judicial scrutiny under the First Amendment." Fallon, *supra* note 304, at 74 (discussing application of United States v. O'Brien, 391 U.S. 367 (1968)). Although this is often true, as in *Johnson*, if the statutory terms themselves burden expressive conduct, as in *Goguen*, the court need not look to effects in particular applications in order to subject the statute to constitutional scrutiny.

341. But the prevalence of as-applied adjudication under the First Amendment, *see* Adler, *supra* note 2, at 37 n.144, indicates the special problems that this doctrinal area poses for valid rule facial challenges. Free exercise adjudication prior to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 876-90 (1990), presents another example of constitutional claims failing the second precondition. In the pre-*Smith* free exercise regime, a litigant could subject a generally applicable statute to strict scrutiny upon a showing that the effect of the generally applicable statute in his particular case interfered with his free exercise of religion. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). Because such claims invoked constitutional scrutiny based on the alleged unconstitutionality of statutory applications (or more precisely, a statute's failure to create an exemption in particular applications), and not because of a constitutional defect in the terms of the statute itself, much of the free exercise constitutional adjudication in the pre-*Smith* regime was predetermined to proceed within the as-applied mode. *See Yoder*, 406 U.S. at 234 (holding that a state compulsory school attendance law was unconstitutional as applied to Amish respondents). *Smith* altered this regime by holding that, at least with respect to generally applicable, religiously-neutral, criminal statutes, a litigant cannot subject the statute to strict scrutiny by demonstrating the effect of the statute in inhibiting his free exercise of religion. *See Smith*, 494 U.S. at 877-82. After *Smith*, absent certain exceptions preserving the pre-*Smith* regime, free exercise claims structure challenges into the facial mode, under which a litigant must assert that the purpose or aim of a statute is to inhibit the free exercise of religion, and that the statute is thus unconstitutional in all of its applications. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). As-applied adjudication under the Establishment Clause's *Lemon* test is similarly explained as a failure of the second precondition. *See* Bowen v. Kendrick, 487 U.S. 589, 601 (1988) (noting prior cases in which the Court recognized that "an otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible").

terms did not themselves subject the statute to the constitutional scrutiny that the litigant sought. In *Yazoo & Mississippi Valley Railroad Company v. Jackson Vinegar Company*,[342] the Mississippi statute at issue required railroads, corporations, and individuals engaged as common carriers "to settle all claims" for lost or damaged freight within sixty days of a claimant's filing of a written claim, and imposed a $25 penalty on defendants who failed to settle such claims within the allotted time period.[343] The defendant railroad challenged the constitutionality of the statute on the ground that it violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[344] Importantly, however, neither the railroad nor the Court considered the constitutional challenge to be directed at the statutory terms themselves.[345] Instead, the basis for the railroad's constitutional claim was the alleged unconstitutionality of the statute in particular applications—specifically, applications imposing a penalty against a railroad for failure to settle claims that were "excessive or extravagant" in relation to the claimant's expected recovery.[346]

The Court in *Yazoo* declined to reach the merits of this constitutional challenge because of the third-party standing bar—the claim that the defendant railroad refused to settle was concededly neither extravagant nor excessive.[347] Even if the claim had been an extravagant one (eliminating the third-party standing bar), however, the relationship between the statutory terms and the underlying constitutional doctrine would have foreclosed a successful valid rule facial challenge. Although the statute utilized the broad term "all claims" to regulate claim settlement, reasonableness is the constitutional touchstone for statutes regulating economic interests, and no substantive constitutional test requires regulatory precision or narrow tailoring in such statutes.[348] Given this relationship between the scope of the statutory terms and the underlying constitutional doctrine, the railroad could only hope to trigger the constitutional scrutiny it would seek by appealing to the particular features of statutory applications, including its own, involving the subset of extravagant claims

342. 206 U.S. 217 (1912).
343. *See id.* at 218.
344. *See id.*
345. The Court observed that the statute "merely provides a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment." *Id.* at 219. Implicit in this observation, of course, is the notion that the statutory terms themselves satisfied whatever minimal scrutiny for reasonableness that the Due Process and Equal Protection Clauses require for economic regulation.
346. *See id.* at 219.
347. *See id.*
348. *See* Jones v. Helms, 452 U.S. 412, 424-25 (1981).

that the broad "all claims" classification embraces. To alter this conclusion, one need only imagine a slightly different, however unrealistic, statute whose terms impose a penalty for a railroad's failure to pay only those claims deemed "extravagant or excessive." In such a case, the statutory terms themselves would trigger the very constitutional scrutiny that the railroad previously could only invoke by reference to particular statutory applications. Altering the scope of the statutory terms from "all claims" to "extravagant claims" renders the alleged infirmity one that inheres in the statutory terms and that is independent of any infirmity arising from particular statutory applications.[349]

Finally, the second precondition may not be satisfied in certain circumstances if the statutory terms trigger multiple doctrinal tests, each of which involves a distinct form of constitutional analysis, and which therefore precludes resolution of the entire question of constitutional validity. For example, in *United States v. Grace*,[350] the Court held unconstitutional, as-applied to public sidewalks, a statute that prohibited the display of "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" on the "Supreme Court building or grounds."[351] In *Grace*, the litigants sought a declaratory judgment that the statute was unconstitutional on its face, and thus satisfied the first precondition for a successful valid rule facial challenge.[352] Moreover, the case appeared to satisfy the second precondition as well, in that the statutory prohibition triggered constitutional scrutiny under a doctrinal test without reference to the particular features of the litigant's own activity.[353]

---

349. *United States v. Raines*, 362 U.S. 17 (1960), provides another example. In *Raines*, the Court considered a facial challenge to a statute that authorized the United States to enjoin "any person" who engages in any act or practice that would deprive a United States citizen of the right to vote in any election free from discrimination on the basis of race or color. *See id.* at 19-20 (describing the Civil Rights Act of 1957, 42 U.S.C. § 1971). The district court held that the statute was facially unconstitutional in all of its applications because the statutory terms authorized the government to enjoin "purely private action designed to deprive citizens of the right to vote on account of their race or color." *Id.* at 20. According to the district court, this authorization exceeded the scope of appropriate legislation under the Fifteenth Amendment. *See id.* (citing *Raines*, 172 F. Supp. at 558). As in *Yazoo*, the Court declined to accord the defendants standing to assert the facial challenge given that the statutory application at issue in *Raines* concerned discriminatory actions by state officials within the course of their official duties, and thus, was clearly state action within the ban of the Fifteenth Amendment. But again, the relationship between the broad statutory terms ("all persons") and the absence of a constitutional doctrine that subjects that kind of broad legislative act to constitutional scrutiny, foreclosed the possibility of a successful valid rule facial challenge. If, on the other hand, the statutory terms had prohibited only private action, the statute itself would have triggered the relevant constitutional scrutiny and could have supported a successful valid rule facial challenge.

350. 461 U.S. 171 (1983).

351. *See id.* at 175.

352. *See id.* at 174.

353. *See id.* at 176-77. The Court did make a passing reference to the kind of activity that the litigants engaged in—leafleting and picketing—which might suggest that it was the litigant's

The Court properly recognized, however, that the constitutional analysis, and the level of constitutional scrutiny, ultimately would depend on a crucial factual feature of particular statutory applications: the location in which the protected expression occurred. The statute prohibited protected expression on the "Supreme Court grounds," which the statute defined[354] to include both the public sidewalks—a traditional public forum implicating one doctrinal test[355]—and the rest of the Supreme Court grounds—a non-public forum, implicating a distinct doctrinal test giving the government greater freedom to regulate.[356] Because constitutional invalidation under the public forum test would not necessarily resolve the question of the statute's validity under the non-public forum test,[357] it thus made eminent sense for the Court to resolve the constitutional challenge only insofar as the litigants' planned conduct on the public forum sidewalk required.[358]

3. The doctrinal test triggered must analyze the constitutional validity of the statutory terms and not the validity of specific statutory applications

The third precondition for a successful valid rule facial challenge is that the doctrinal test triggered must analyze the constitutional valid-

---

conduct, and not the statutory terms, that triggered the constitutional scrutiny. However, it seems unlikely that any activity falling within the terms of a statute prohibiting the display of messages "designed or adapted to bring into public notice a party, organization, or movement" would not constitute expressive activity within the reach of the First Amendment. *See id*. at 176; *see also* Smith v. Goguen, 415 U.S. 566, 589 (1974) (White, J., concurring in the judgment).

354. *See Grace*, 461 U.S. at 179 n.8.

355. *See id*. at 177 (stating that in a public forum, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication'" (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983))).

356. *See id.* at 178 (noting that, under the non-suspect content test for non-public fora, courts must merely determine that the statutory restrictions are reasonable "in light of the use to which the buildings and grounds are dedicated" and that the statute does not impose any content-based discrimination).

357. It is important to note that the occurrence of multiple doctrinal tests results in the first instance from the scope of the statutory terms and not because of the nature of the doctrinal test. There is nothing about the First Amendment's forum tests that predetermines constitutional adjudication under such tests to the as-applied mode. If the statutory terms themselves had regulated expression only on the Supreme Court sidewalk, and thus implicated only the public forum test, the Court could have invalidated the statute on its face. *See id*. at 179-80.

358. *See id*. at 181 n.10. Justice Marshall disagreed and claimed that the statute should have been invalidated on its face. *See id*. at 184 (Marshall, J., concurring in part and dissenting in part). He argued that the statute did not itself distinguish between the public sidewalks and the rest of the grounds and that the statute would fail constitutional scrutiny even under the more permissive test for a non-public forum. *See id*. at 184-88. Perhaps in recognition of the fact that his analysis would have required the Court to adjudicate the rights of third parties not before the Court who planned to speak on the non-public forum grounds, but not on the sidewalks, Justice Marshall appealed to the Court's overbreadth jurisprudence to support his argument for facial invalidation. *See id.* at 187 n.12.

ity of the statutory terms and not the validity of specific statutory applications. Even if the litigant asserts a facial challenge that can fairly be identified as a valid rule facial challenge, and even if the statutory terms themselves trigger constitutional scrutiny under the applicable doctrinal test, a valid rule facial challenge cannot succeed if the doctrinal test triggered depends upon an assessment of the constitutional validity of particular statutory applications to resolve the constitutional question presented. If, however, the first two preconditions are satisfied and the doctrinal test does not depend on particularized scrutiny of specific statutory applications, any constitutional infirmity identified under that test should support facial invalidation.

Close examination of the principal doctrinal tests that the Court uses to implement constitutional provisions[359] leads to a somewhat surprising conclusion, especially in light of the Court's expressed preference for as-applied, fact-specific, constitutional adjudication.[360] Namely, the doctrinal tests that constitute the main part of constitutional adjudication do not depend upon scrutiny of particular features of specific statutory applications.[361] The Court's choice to give meaning to constitutional provisions predominantly through these sorts of doctrinal tests[362] makes valid rule facial challenges more readily available than the Court, when invoking the indispensability of facts, might otherwise admit. That is not to say that facts and empirical assumptions about prospective statutory applications do not play an important part in the Court's implementation of the Constitution through the various doctrinal tests. As discussed below, certain doctrinal tests—such as tests that measure the fit between the government's regulatory means and ends—explicitly call upon courts to make fact-dependent judgments. Yet, resolution of the doctrinal tests

359. In much of the analysis that follows, this Article borrows heavily from Professor Fallon's typology of doctrinal tests that the Court uses to implement constitutional meaning. *See* Fallon, *supra* note 304, at 67-75.

360. *See* New York v. Ferber, 458 U.S. 747, 768 (1982) ("By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face 'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.'") (citations omitted).

361. *See* Adler, *supra* note 2, at 128 n.425 (claiming that "many, perhaps even most" of the cases in which the Court has sustained claims of constitutional rights against conduct-regulating rules have been facial invalidations rather than partial invalidations). However, satisfaction of the third precondition is not enough to ensure the success of a valid rule facial challenge. As the above discussion reveals, the observation that most doctrinal tests in constitutional law satisfy the third precondition is not equivalent to the claim that any case implicating such a test is suitable for facial invalidation. *See supra* Parts IV.A.1-2 (discussing the first two preconditions). For the purposes of analytical clarity, the discussion of doctrinal tests below assumes that the first two preconditions have been satisfied.

362. *See* Fallon, *supra* note 304, at 75-106 (discussing the relative prominence of different doctrinal tests); *id.* at 141-49 (discussing various values, including reasonable disagreement and fidelity to the Constitution, that the Court should consider in crafting constitutional doctrine).

does not typically depend on the kinds of facts raised by individual litigants challenging particular statutory applications. Rather, the question of constitutional validity often depends upon the kinds of facts common to all applications embraced by the statutory terms. Again, a valid rule facial challenge "puts into issue an explicit rule of law . . . and involves the facts only insofar as it is necessary to establish that the rule served as a basis of decision."[363]

a. Some straightforward doctrinal tests

Perhaps the paradigmatic instance of a doctrinal test satisfying the third precondition is the so-called "purpose" test, which assesses the legitimacy of the government's reasons for enacting a particular statute.[364] Although purpose tests are occasionally criticized for inviting an unmanageable judicial inquiry into the subjective motives of multimember governmental bodies,[365] they are by now a familiar part of the doctrinal landscape. Judicial scrutiny of governmental purpose is evident both in tests that explicitly authorize such an inquiry[366] and in tests whose doctrinal formulations may be regarded as "surrogates" for investigating the legitimacy of governmental purpose.[367] The important point about a purpose test in the context of valid rule facial challenges is that such a test, by focusing on the legitimacy of legislative "inputs,"[368] necessarily locates a constitutional infirmity that inheres in the statute and does not arise from particular statutory applications. When a court determines that the government's purpose is illegitimate, it follows that, consistent with *Salerno*, each and every statutory application is tainted by that illegitimate purpose and therefore unconstitutional.[369] Thus, it is no surprise that, with one curious

363. BATOR ET AL., *supra* note 201, at 662.

364. *See generally* Fallon, *supra* note 304, at 71-73.

365. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 556-59 (1993) (Scalia, J., concurring). Because of such concerns, Justice Scalia has endorsed a related test that investigates the objective "aim" or target of legislation, without inquiring into the legislature's subjective motives. *See id*.

366. *See* Fallon, *supra* note 304, at 90-94 (cataloguing the tests authorizing explicit inquiries into forbidden purpose).

367. *See id.* at 94-98 (discussing suspect classifications under the Equal Protection Clause, the content-neutrality requirement under the Free Speech Clause, the distinction between direct and incidental burdens on fundamental rights, and disproportionate burdens on interstate commerce under the Dormant Commerce Clause as plausible surrogates for forbidden purpose tests).

368. *See id.* at 71.

369. *See* FALLON ET AL., *supra* note 222, at 212 n.10. Dorf's extended argument to abandon *Salerno* led him even to reject *Salerno*'s applicability in the relatively straightforward context of purpose tests. *See* Dorf, *supra* note 1, at 279-80. Although Dorf acknowledges that *Salerno* is "technically appropriate" in such cases, he argues that its principle should be ignored to focus more directly on questions of illegitimate purpose: "the *Salerno* principle focuses on the application of the statute, not its purpose, and thus provides no guidance when a court examines the

exception,[370] all of the Court's notable decisions invalidating statutes on the grounds of illegitimate governmental purpose have been facial invalidations.[371]

Another example of a doctrinal test that satisfies the third precondition is the so-called "forbidden-content test," under which a statute can be deemed "absolutely unconstitutional based on [its] content."[372] Although forbidden-content tests are somewhat infrequent in constitutional law,[373] their absolute prohibition against certain forms of legislation presents a clear case in which the identified constitutional defect is one that does not depend upon scrutiny of par-

---

constitutionality of a statute's goal." *Id*. at 279. On the contrary, *Salerno* directs a court to assess the constitutionality of a statute against the applicable constitutional test, independent of the statute's application to particular cases. *See supra* notes 171-218 and accompanying text.

370. The one exception is *City of Cleburne v. Cleburne Living Ctr, Inc*., 473 U.S. 432, 447 (1985) (invalidating an ordinance enacted with an irrational prejudice against the mentally retarded as applied to a particular litigant). Justice Marshall, who rightly criticized the majority's as-applied equal protection holding, *see id*. at 474-78 (Marshall, J., concurring in the judgment in part and dissenting in part); *see also supra* note 319, had not linked constitutional invalidation under a purpose test with the concept of a valid rule facial challenge. He therefore failed to see how a judicial holding that an act contains an illegitimate purpose is itself a determination that the act is unconstitutional in all of its applications.

371. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (using a purpose test to invalidate facially a state constitutional amendment on equal protection grounds); Edwards v. Aguillard, 482 U.S. 578, 585-94 (1987) (facially invalidating a statute that had the primary purpose of promoting a particular religious belief); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (facially invalidating a statute enacted out of a desire to harm an unpopular group on equal protection grounds). This analysis of purpose tests provides an answer to Justice Scalia's complaint in *Romer* that the majority had incorrectly ignored *Salerno* by invalidating a state constitutional amendment denying certain legal protections to homosexuals. *See Romer*, 517 U.S. at 643 (1996) (Scalia, J., dissenting). Justice Scalia reasoned that, given the Court's prior holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that homosexual conduct could constitutionally be criminalized, the Colorado amendment would not be unconstitutional as applied to those individuals who engaged in homosexual conduct, and as such a facial challenge must fail. *See Romer*, 517 U.S. at 643. The difficulty with Justice Scalia's analysis, however, is that it overlooks the basis of the Court's constitutional holding. The Court held that the state had passed the amendment pursuant to an illegitimate animus to harm a class of citizens, and that such an animus could not serve as the requisite "legitimate" governmental interest to support a classification among persons under the Equal Protection Clause. *See id*. at 631-32. Because a holding of facial invalidity under a purpose test is tantamount to a conclusion that no set of circumstances exists under which a legislative act can be constitutionally applied, the majority's facial invalidation (given its constitutional holding) was proper. *See* Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture Wars, and* Romer v. Evans, 72 NOTRE DAME L. REV. 345, 353 (1997) (arguing that *Romer*'s purpose reasoning "positions the case squarely within the rule of *Salerno* and facial invalidation follows inexorably"). The ability of the state to criminalize homosexual sodomy under a constitutionally valid rule of law does not give it a license to subject such individuals to unequal constitutional treatment under a constitutional amendment that is invalid in all of its applications. To borrow Justice Scalia's own phrase from a different context implicating the same problem, he "confuses lawful application of the challenged [amendment] with lawful application of a different [amendment],"—i.e., one not enacted with an irrational and prejudicial animus. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting).

372. Fallon, *supra* note 304, at 67.

373. *See id*. at 83-84 (explaining that the Court rarely uses forbidden-content tests because, as a matter of prudence, the Court typically hesitates to claim that a state may never, regardless of the circumstances involved, enact certain forms of statutes).

ticular features of specific statutory applications. Once a court determines that the statutory terms trigger constitutional scrutiny under a forbidden-content test, and that the statute indeed contains such a forbidden content, the court will deem the statute unconstitutional on its face and incapable of any constitutional applications.[374]

Suspect-content tests, or tests that render statutes making certain classifications or distinctions presumptively invalid, provide yet another example.[375] Valid rule facial challenges may succeed under such tests because a court's disposition of the constitutional challenge does not require the court to examine the constitutional validity of particular statutory applications.[376] Instead, once the litigant demonstrates that the statutory terms make the kind of classification that, under the relevant constitutional doctrine, triggers a suspect-content test,[377] the suspect-content test dictates that the court may uphold the statute only if the government can demonstrate that the statutory measure furthers a compelling state interest.[378] Assuming the government can demonstrate a compelling state interest, the litigant cannot succeed on a facial challenge by demonstrating that, although the government's interest in making the suspect classification is compelling in the aggregate, the government's lesser interest in applying the statute in her particular case renders the statute constitutionally infirm. Nor should the litigant fail because the govern-

374. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966) (interpreting the Equal Protection Clause to forbid categorically any voting-related tax based on wealth or payment of a fee). Forbidden-content tests can also operate to forbid *omissions* in a statute that render the statute, without more, violative of constitutional requirements. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 132-33 (1992) (invalidating a licensing statute on its face because of its lack of standards to control officials' unfettered discretion in enforcement of the statute); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (invalidating a facially vague statute that specified no standard of conduct and thus authorized unbounded official discretion); Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928) (holding that in order to satisfy the Due Process Clause's requirement of a "reasonable probability" of notice, a statute authorizing personal jurisdiction over nonresident defendants must contain a notice provision).

375. *See* Fallon, *supra* note 304, at 68, 88-90.

376. If the statutory terms do not trigger a suspect-content test under the applicable constitutional law, valid rule facial challenges may still succeed under a less-searching "nonsuspect-content test," a test which imposes a less exacting burden on the state and reflects "strong presumptions of constitutional validity." *Id.* at 88.

377. In the First Amendment context, content-based distinctions trigger suspect-content tests, *see* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Police Dep't v. Mosley, 408 U.S. 92, 94-96 (1972), while in the Equal Protection context, such tests are triggered when the statutory terms classify on the basis of a "suspect class" or infringe on a "fundamental right." *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

378. *See Adarand*, 515 U.S. at 227; Burson v. Freeman, 504 U.S. 191, 198 (1992). In addition to demonstrating that a statute serves a compelling state interest, the government must also demonstrate that the statutory measure is narrowly tailored in order to survive scrutiny under a suspect-content test. *See Adarand*, 515 U.S. at 227; *Burson*, 504 U.S. at 198. The narrowly tailored requirement is slightly more difficult to explain consistently with valid rule theory and will be considered below. *See infra* notes 390-91 and accompanying text.

ment can hypothesize particular applications that would render an otherwise less-than-compelling interest compelling in a particular case. The reason is that the compelling state interest prong of a suspect-content test focuses on the overall weight of the government's interest in enacting a statute containing a suspect classification—the determination of which is independent of, and unaltered by, the particularities of individual statutory applications.[379] As with statutes enacted with an illegitimate purpose and statutes failing a forbidden-content test, statutes deemed constitutionally infirm by virtue of a less-than-compelling state interest supporting a suspect statutory classification are compatible with the third precondition.[380]

b. Harder doctrinal tests

There are no doubt other doctrinal tests that clearly satisfy the

379. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198-99 (1992) (holding that state interests in protecting the right of its citizens to vote freely for candidates of their choice and in preserving the integrity of its election process were sufficiently compelling to support a content-based restriction on political speech); Boos v. Barry, 485 U.S. 312, 323-24 (1988) (assuming, without deciding, that international law's interest in protecting the dignity of foreign officials is sufficiently compelling to support a content-based restriction on speech); Sam & Ali, Inc. v. Ohio Dep't of Liquor Control, 158 F.3d 397, 405 (6th Cir. 1998) (Krupansky, J., concurring in the result) (characterizing facial challenges on due process and equal protection grounds as focusing not on "essential material facts," but rather solely "upon the sensibility of the legislative categorizations per se").

380. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 100-01 (1972) (facially invalidating an ordinance because the city had no compelling justification for prohibiting all non-labor picketing within 150 feet of a school when the ordinance permitted peaceful labor picketing in the same area). The Court has explained at least some of the First Amendment licensing cases, in which it permitted facial invalidation, on these grounds. In *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-97 (1984), the Court considered its prior facial invalidations in *Lovell v. Griffin*, 303 U.S. 444 (1938), and *Stromberg v. California*, 283 U.S. 359 (1931), and noted that the constitutional infirmity in both statutes was the government's failure to justify the statutes with a governmental interest unrelated to the suppression of ideas. *See Taxpayers for Vincent*, 466 U.S. at 797 n.14.

The same might be said whenever the requisite governmental interest necessary to validate the statute under a doctrinal test is not satisfied. Thus, even in the case of a non-suspect content test, in which the government need only demonstrate a legitimate or important state interest, the government's failure to prove that its interests are legitimate or important ordinarily will render the entire statute invalid. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728-30 (1982) (holding that the state failed to show the "exceedingly persuasive justification" necessary to sustain a gender classification under the Equal Protection Clause). As a technical matter, the equal protection cases invalidating statutes enacted with an impermissible governmental purpose involved statutes that failed the legitimate state interest prong of a non-suspect content test. *See, e.g.*, Romer v. Evans, e.g., 517 U.S. 620, 635 (1996). The above analysis assumes that the strength of the government's asserted interest does not vary from case to case—an assumption the Court itself appears to make when facially invalidating statutes enacted without the requisite governmental interest. Occasionally, however, the Court suggests otherwise. *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 809 n.13 (1997) (stating that, although the government's asserted interests in enacting an assisted suicide ban were legitimate, rendering the statute facially valid, subsequent litigants could bring challenges presenting "stronger" arguments that might invalidate the statute as-applied).

third precondition,[381] and some that just as clearly do not.[382] A much more complicated analysis pertains to doctrinal tests that make explicit reference to statutory applications as part of their constitutional analysis, but which nonetheless may be compatible with valid rule facial challenges.

For example, some doctrinal tests incorporate a prediction about the manner in which the challenged statute is likely to be applied in particular cases. The Court has traditionally permitted litigants to invalidate licensing statutes on their face if the statute confers unbridled discretion on officials and effectively creates a prior restraint on speech.[383] Although the Court's approach contemplates a prediction about the risk of constitutional violations in future statutory applications, the determination of that risk takes place at the level of the statutory terms themselves, independent of a judicial assessment of the constitutionality of particular statutory applications. In determining whether a licensing statute may be invalidated on its face, the Court inquires whether the statutory terms explicitly set forth neutral standards that will adequately constrain the discretion of enforcing officials.[384] If the ordinance fails to set forth such standards, or if the

381. For example, doctrinal tests involving the scope of congressional power to enact legislation, *see, e.g.*, United States v. Lopez, 514 U.S. 549, 567-68 (1995) (holding that an act banning possession of a gun in a local school zone exceeds Congress' Commerce Clause authority), and cases involving separation of powers, *see, e.g.*, INS v. Chadha, 462 U.S. 919, 956-59 (1983) (holding the legislative veto unconstitutional as a violation of separation of powers), may satisfy the third precondition.

382. An example of such a test is the test used to determine whether a new law constitutes an unconstitutional ex post facto law. The Court has held that such a determination turns on whether the legal change "produces a sufficient risk" of greater punishment relative to the particular time and circumstances of the defendant's conduct, and thus must be made on a case-by-case basis. *See* California Dep't of Corrections v. Morales, 514 U.S. 499, 509 (1995). That being so, a valid rule facial challenge under *Salerno* cannot succeed because the doctrinal test necessarily directs a court to determine the constitutional validity of specific applications and, thus, channels constitutional scrutiny into the as-applied mode. *See* Raymer v. Enright, 113 F.3d 172, 174 (10th Cir. 1997) (concluding that a valid rule facial challenge asserting an unconstitutional ex post facto law cannot succeed).

Another example of a test that fails the third precondition is the doctrinal test governing prosecutorial misconduct. *See* Caplin & Drysdale v. United States, 491 U.S. 617, 634-35 (1989) (noting that due process claims asserting prosecutorial misconduct will generally fail under *Salerno* because the alleged constitutional violations arise only in particular cases of prosecutorial conduct); Deshawn E. v. Safir, 156 F.3d 340, 347 (2d Cir. 1998) (stating that, even if a litigant could facially challenge a detective squad's intention to use allegedly coerced statements of juveniles in subsequent criminal proceedings in violation of the Fifth Amendment, such a challenge would necessarily fail since the intention was not announced in every case).

383. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); Freedman v. Maryland, 380 U.S. 51, 56 (1965); *Lovell*, 303 U.S. at 450-51.

384. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988) ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."); *id.* at 760 ("[T]he Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered."); *id.* at 769-70 (holding that the ordinance, on its face, placed no explicit

standards set forth are at most "illusory constraints,"[385] the risk of suppression associated with *any* enforcement of the statute renders all such applications unconstitutional and will thus support facial invalidation.[386] This sort of doctrinal test, despite its reference to future statutory applications,[387] is also consistent with the third precondition because its resolution does not depend on adjudicating the constitutionality of any specific applications.[388] That each application is unconstitutional is the conclusion which follows from the court's determination that the rule itself, measured against the substantive constitutional standards, is an invalid one. To assume that the latter

limits on the mayor's exercise of discretion, and that "the doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice"). The Court in *Plain Dealer* also set forth a prerequisite for facial challenges, requiring that the statute bear "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Id.* at 759. The Court found that the statute at issue satisfied this requirement given that the ordinance in question was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." *Id.* at 759-60. The Court used this requirement to ensure that it was not authorizing facial invalidation against *any* statute that confers discretion on officials; in order for the First Amendment to be brought into play, the licensing scheme itself, by its own terms, must relate to expression or expressive conduct. *See id.* In terms of this Article, the Court was setting forth the second precondition: statutory terms that themselves subject the statute to constitutional scrutiny under the applicable doctrinal test.

385. *Id.* at 769-70 (rejecting a claim that limitation of an official's discretion to grant or deny licenses based on conditions that the official deems "necessary and reasonable" were adequate constraints to satisfy First Amendment requirements).

386. *See id.* at 769-71; *see also* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2176-79 (1998) (denying a facial challenge because the language of the statute itself did not create a substantial risk that its application would lead to the suppression of speech); City Council v. Taxpayers for Vincent, 466 U.S. 789, 797 (1984) (justifying facial invalidation when "*any* attempt to enforce [the statute] would create an unacceptable risk of the suppression of ideas") (emphasis added). As noted above, the applicable test is essentially a forbidden-content test. *See supra* note 374 and accompanying text. An alternative explanation for these cases is that the only governmental interest that could support a statute with non-neutral standards would be an interest related to the suppression of expression, which is nearly per se invalid. *See Taxpayers for Vincent*, 466 U.S at 797 n.14 (explaining licensing cases on these grounds). Finally, the Court in *Plain Dealer* suggested that the rationale for these cases may be a kind of prospective bar on impermissible content-discrimination. *See Plain Dealer*, 486 U.S. at 763-64. Any of these explanations is consistent with, and can support, a valid rule facial challenge.

387. *See, e.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 337, 340-42 (1969) (invalidating on due process grounds a prejudgment garnishment statute that authorized the taking of property without notice and a prior hearing, in part based on a judgment about the potential economic consequences of stripping a person of his or her wages).

388. The Court in *Plain Dealer* described the requirements it set forth as threshold requirements for the assertion of a facial challenge against a licensing statute. *See Plain Dealer*, 486 U.S. at 759, 769. This suggests that a facial challenge could not even be asserted absent satisfaction of these requirements—a kind of standing bar similar to the bar against third-party standing. But, as explained above, a valid rule facial challenge, through which a litigant claims the right to be free from punishment under a constitutionally invalid rule of law, may always be asserted. The Court had, prior to *Plain Dealer*, explained its licensing cases as cases that did not, like overbreadth doctrine, require a special standing rule. *See Taxpayers for Vincent*, 466 U.S. at 797-98 (stating that the Court's licensing cases "invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court").

determination is instead based on a court's view that too many individual applications would be unconstitutional is to assume that all constitutional scrutiny proceeds in the as-applied mode. Put differently, in the context of facial challenges, it is to make the overbreadth assumption.[389]

The requirement that statutes subject to suspect-content tests must be "narrowly tailored" to further the government's asserted interest is also difficult to fit within the third precondition. The difficulty can be stated as follows: the third precondition requires resolution of constitutional questions independent of the validity of particular statutory applications, yet the narrow tailoring requirement measures the permissible scope of statutory applications that the statutory terms embrace. But this tension is only apparent because the narrow tailoring requirement directs a court to evaluate, in light of the government's asserted interests in enacting the suspect statutory measure, whether the statutory terms are an insufficiently precise means of achieving that interest.[390] The question is not whether the statute embraces too many unconstitutional applications, as in overbreadth challenges, because the question of the constitutional validity of the statutory terms is not resolved by analyzing the constitutionality of particular applications. Instead, the inquiry is directed solely at the relationship between the statutory terms and the ends the government seeks to further. Even though this inquiry necessarily involves an empirical judgment about the world, means/end scrutiny is a generalized inquiry that does not involve an assessment of particular, fact-dependent features of specific statutory applications.[391]

---

389. Although the Court sometimes classifies these cases within the overbreadth rubric, they are better explained as examples of successful valid rule facial challenges. *See supra* notes 156, 380. The difference might be expressed as follows: instead of a determination that 75% of the statutory applications would be unconstitutional (which is overbreadth methodology), the test asks whether there is a 75% chance in each application that the statute would be unconstitutional, and answers that question solely by analyzing the statutory terms.

390. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

391. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 429 (1993) (holding that, under the narrow tailoring requirement, "the validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case" (quoting Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989))); Boos v. Barry, 485 U.S. 312, 324-29, 333 (1988) (invalidating a statute on its face for failing the narrow tailoring requirement and reaching this conclusion by evaluating the possibility of a less restrictive regulatory alternative); Roe v. Wade, 410 U.S. 113, 155-66, 164 (1973) (invalidating facially a statute prohibiting abortion on narrow tailoring grounds); Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964) (invalidating on its face a statute infringing on the right to travel under narrow tailoring requirement). *Cf.* Pennell v. City of San Jose, 485 U.S. 1, 18 (1988) (Scalia, J., dissenting) (stating that particular details of the litigant's property were irrelevant in resolving a facial claim alleging that a state's asserted interest could not be furthered by its regulation of the property); Dorf, *supra* note 1, at 263 n.106 (noting that *Edge Broadcasting* supports a valid rule explanation for overbreadth doctrine);

The narrow tailoring requirement has been categorized as a specialized instance of the more general classification of balancing tests,[392] which pose still greater problems for valid rule theory. A balancing test typically proceeds in three steps: "The Court first identifies constitutional values threatened by governmental action; next it assesses the degree of their implication in a particular case; then the Court weighs the harm to protected values against the interests that the government has endeavored to promote."[393] Of course, thus stated, a balancing test is inherently incompatible with the third precondition because the second step of the balancing test seems to require a judicial assessment of the degree of governmental intrusion in a particular case.[394] If the specific features of particular statutory applications are an essential component of a balancing test, a valid rule facial challenge under such a test should always fail.[395]

Monaghan, *supra* note 29, at 3, 37-39 (explaining narrow tailoring as a substantive constitutional requirement for judging the content of statutory rules). *But cf.* Board of Trustees of the State Univ. v. Fox, 492 U.S. 469, 482 (1989) (asserting that a litigant invoking the narrow-tailoring test in the commercial speech context asserts that "the acts of *his* that are the subject of the litigation fall outside what a properly drawn prohibition could cover") (emphasis added). The generalized nature of the narrow tailoring requirement becomes especially clear in as-applied challenges invoking the requirement where the Court requires the litigant to do more than simply prove a constitutional defect in the case at hand. *See, e.g.,* Edge Broad. Co., 509 U.S. at 429-31.

392. *See* Fallon, *supra* note 304, at 78 n.129.

393. *Id.* at 68.

394. *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 4, 14-16 (1991) (holding a prejudgment attachment statute to violate due process as applied to the particular litigant, mainly because the risk of erroneous deprivation was especially great given the particular facts of the litigant's case).

395. The Supreme Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), provides an example within the First Amendment of a balancing test that seems predetermined to the as-applied mode. The Court had previously adopted a special balancing test for government restrictions on government employees' speech that weighed the interests of the employee-citizen in commenting on matters of public concern against the state-employer's interest in promoting efficiency in the workplace. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). The Court's early applications of this test were necessarily as-applied rulings because each involved a "post hoc analysis of one employee's speech and its impact on the employee's public responsibilities." *National Treasury Employees Union*, 513 U.S. at 466-67. But in *National Treasury Employees Union*, the Court had to apply this test, slightly reformulated, to a "sweeping statutory impediment to speech"—a congressional ban on receipt of honoraria by government employees. *See id.* The Court concluded that such a sweeping restriction on speech would require the government to meet a much more exacting standard to tip the balancing test in its favor and sustain the statute. *See id.* at 468 ("The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." (quoting *Pickering*, 391 U.S. at 571)). The balancing test itself dictated that the Court carefully scrutinize the particular circumstances involved in applying the ban to the litigants before the Court: lower-level employees of the executive branch. *See id.* Accordingly, the Court paid particular attention to the nature of the executive employees' speech, the kinds of burdens that the ban imposed on executive employees, and whether the government could support the ban with actual evidence that the ban's application against lower-level executive officials furthered the government's asserted interests. *See id.*, at 470-77. It is thus no surprise that, after concluding that the ban could not pass constitutional

However, it would be wrong to conclude that balancing tests are necessarily tethered to the particular circumstances of particular cases. The Court's use of the narrow tailoring requirement facially to invalidate statutes is one prominent counter-example.[396] In addition, the Court has made clear that the second step of the procedural due process balancing test—measuring the risk of erroneous deprivation and the probable value of additional procedural safeguards—is a generalized inquiry that does not turn on particular features of individual litigants.[397] Thus, although definitive statements about the compatibility of balancing tests and valid rule facial challenges seem difficult, one can at least conclude that, despite initial appearances, valid rule facial challenges are not per se precluded under such tests.

One final test that bears consideration is the so-called "effects" test. An effects test measures constitutional validity, or at least triggers heightened constitutional scrutiny, on the basis of particular features of statutory applications,[398] and thus seems plainly incompatible with

---

muster, *see id.* at 477, the Court limited its holding to the ban's application against executive branch officials at the same level of seniority as the litigants before the Court. *See id.* at 478. Application of the ban against high-level executive branch officials would have presented a quite different constitutional analysis under the balancing test. *See id.* The application-specific nature of the *Pickering* balancing test precluded the possibility of a *Salerno* invalidation in all conceivable applications. *Cf.* Sanjour v. EPA, 56 F.3d 85, 91-93 (D.C. Cir. 1995) (en banc) (arguing that the distinction between a facial and as-applied challenge under the *Pickering/National Treasury Employees* balancing test is largely irrelevant, but concluding, for different reasons, that any invalidation "cannot go so far as to include every possible application" of the contested legislation).

396. *See, e.g.*, *Aptheker*, 378 U.S. at 514 (holding a statute invalid because it "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment").

397. *See* Mathews v. Eldridge, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of the error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."); *id.* at 340-41 (holding that Due Process did not require an evidentiary hearing prior to the termination of disability benefits and comparing the hardship imposed upon the erroneously terminated disability recipient with that of welfare recipients); *see also* Schall v. Martin, 467 U.S. 253, 274 (1984) (stating the question presented by a facial challenge in general terms as "whether the procedures afforded juveniles detained prior to factfinding [under the statute] provide sufficient protection against erroneous and unnecessary deprivations of liberty"); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (facially invalidating prejudgment garnishment procedures against wage-earners that did not provide for notice and a prior hearing); Aronson v. City of Akron, 116 F.3d 804, 810-13 (6th Cir. 1997) (applying *Mathews*' balancing test in the context of a *Salerno* facial challenge to a statute that required forfeiture of property used in furtherance of illegal activity); Jordan v. Jackson, 15 F.3d 333, 344 (4th Cir. 1994) (rejecting a facial challenge on procedural due process grounds to statutory provisions authorizing protective removal of children from their homes).

398. *See* Fallon, *supra* note 304, at 69 ("Effects tests either hold statutes or policies unconstitutional or, more commonly, target them for more or less searching judicial review based on their effects on constitutional rights or values, on particular groups, or on both."). Effects tests are quite rarely applied in constitutional adjudication because of the Court's judgment that invalidating "every governmental act that incidentally burdens constitutional rights or disproportionately disadvantages minorities would infringe too far on powers that must, as a matter of good sense, be vested in government." *Id.* at 85-86 & n.169.

the third precondition.[399] In *Bowen v. Kendrick*,[400] however, the Court explicitly recognized the possibility for successful facial challenges asserted under the *Lemon* test,[401] and in particular, under its "primary effect" prong.[402] The Court's recognition of the distinction between as-applied and facial challenges under *Lemon*'s "primary effect" prong[403] poses a seemingly intractable question: how can a court analyze the constitutional validity of statutory terms, independent of particular applications, under a doctrinal test that purports to evaluate the validity of the effects that particular statutory applications produce?

Although the Court in *Kendrick* did not pose the question in these terms, its constitutional analysis suggests an answer. Much to the chagrin of Justice Blackmun, the Court evaluated the statute's "primary effect" of advancing religion almost exclusively by analyzing the terms of the statute, independent of the evidence in the record as to how the state had been administering the statute.[404] Thus, the major-

---

399. Indeed, the very premise of an effects test is that constitutional scrutiny is triggered, not by the terms of the statute itself, but by the effect that the statute has when applied in particular cases. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 110-28 (1997) (invalidating a fee requirement as applied to an individual unable to pay the fee in part because of the statute's disproportionate effects on the poor); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (holding that a state may not deny judicial dissolution of marriage through statutory imposition of fees required to gain access to courts because of its effects on the indigent); United States v. O'Brien, 391 U.S. 367, 376 (1968) (observing that the effect of a statute on expressive conduct triggers First Amendment scrutiny). Thus, the principal reason that effects tests cannot support successful valid rule facial challenges is that such tests typically are invoked in circumstances that fail the second precondition.

400. 487 U.S. 589 (1988).

401. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (explaining that "the statute must have a secular legislative purpose . . . its principle or primary effect must be one that neither advances nor inhibits religion . . . and [it] must not foster 'an excessive government entanglement with religion'") (citations omitted); *see also* Agostini v. Felton, 521 U.S. 203, 218 (1997) (acknowledging continued validity of *Lemon*).

402. *See Kendrick*, 487 U.S. at 601.

403. *See id.* at 600-01 (discussing how previous Establishment Clause cases had failed to distinguish between facial and as-applied challenges under the *Lemon* effect test).

404. Justice Blackmun protested at length:

> While the distinction [between facial and as-applied adjudication] is sometimes useful in constitutional adjudication, the majority misuses it here to divide and conquer appellees' challenge. By designating appellees' broad attack on the statute as a "facial" challenge, the majority justifies divorcing its analysis from the extensive record developed in the District Court, and thereby strips the challenge of much of its force and renders the evaluation of the *Lemon* "effects" prong particularly sterile and meaningless. By characterizing appellees' objections to the real-world operation of the [challenged statute] an "as-applied" challenge, the Court risks misdirecting the litigants and the lower courts toward piecemeal litigation continuing indefinitely throughout the life of the [statute] . . . . *Whether we denominate a challenge that focuses on the systematically unconstitutional operation of a statute a "facial" challenge—because it goes to the statute as a whole—or an "as-applied" challenge—because we rely on real world events—the Court should not blind itself to the facts revealed by the undisputed record.*

Id. at 627-28 (Blackmun, J., dissenting) (emphasis added).

ity analyzed the statutory scheme, which authorized "grants to institutions that are capable of providing certain care and prevention services to adolescents,"[405] for terminological evidence that its funding provisions were "inherently religious."[406] After concluding that the "statutory framework" did not itself constitute a violation of the Establishment Clause,[407] the Court rejected the claim that the statute had the "primary effect" of advancing religion because of its express recognition of the role that religious organizations could play in addressing the problems associated with teenage sexuality. Congress' mere recognition that religious organizations can influence values, the Court said, does not itself have the primary effect of advancing religion.[408] The Court also rejected the contention that the statute was invalid because it implicitly authorized religiously affiliated organizations to participate as grantees or sub-grantees,[409] reasoning that, although the "primary effect" prong might be violated if government aid flows to "pervasively sectarian" institutions,[410] there was no indication on the face of the statute that these institutions would receive significant amounts of federal monies.[411] Despite the possibility that aid could be given to "pervasively sectarian" institutions, the Court declined to hold, as facial invalidation would have required, that the Constitution placed a total prohibition on grants under the statute.[412]

The majority construed the "primary effect" test more or less consistently with the dictates of valid rule facial challenges and the third precondition. *Kendrick* thus stands for the somewhat clumsy proposition that a facial challenge under the effect prong of the *Lemon* test can be resolved without scrutinizing the validity of particular statutory applications. The harder question, however, is whether it makes any sense at all to construe an effects test such that a court's constitutional scrutiny of a "primary effect" is restricted to an analysis of statu-

405. *Kendrick*, 487 U.S. at 604.
406. *See id.*
407. *See id.* at 602-05.
408. *See id.* at 605-06.
409. *See id.* at 608.
410. *See id.* at 609-10 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).
411. *See id.* at 610. The Court reached this conclusion by pointing to the statute's "facially neutral grant requirements, the wide spectrum of public and private organizations which are capable of meeting the [statute's] requirements, and the fact that, of the eligible religious institutions, many will not deserve the label of 'pervasively sectarian.'" *Id.* In this latter prediction about the likely character of future grantees, the Court deviated from its express intention to decide the claim without reference to record citations and referred explicitly to statistics about the statute's prior administration. *See id.* at 610 n.12.
412. *See id.* at 611. The Court further concluded that, as to the as-applied challenge under the "primary effect" prong, the case should be remanded to the lower court to identify any particular statutory applications that created an impermissible effect of advancing religion. *See id.* at 622.

tory terms, "blind [] to the facts revealed by the undisputed record."[413] The Court seemed to suggest that, at least in a facial challenge, "primary effect" measures the risk that the statutory terms will advance religion in any given case, and that the determination of this risk is made solely by analyzing the content of the statutory terms.[414] However, the Court also appeared to suggest that "primary effect" measures the number of potential statutory applications that would impermissibly advance religion,[415] and that the statute survived facial scrutiny because only a "small portion" of the foreseeable grant recipients would be "pervasively sectarian" ones.[416] In this Article's terminology, the former analysis is consistent with valid rule facial challenge methodology, whereas the latter seems conceptually indistinguishable from overbreadth methodology. This ambiguity suggests that there may be something inherently incompatible between valid rule facial challenges and effects tests. The Court's interpretation of the effect prong of *Casey*'s "undue burden" test, which seems to require constitutional scrutiny of the validity of particular applications to determine whether a facially invalid "effect" exists,[417] might be read as an implicit acknowledgment of this tension and a rejection of the *Kendrick* approach. In the Conclusion, this Article returns to this question and suggests possible ways in which to resolve the current controversy in the abortion context.

B. The Preconditions and the Question of Remedy

The account offered above argues that successful facial challenges are structured by certain practical features of constitutional adjudication. A court's choice between facial and as-applied invalidation is a

413. *Id.* at 628 (Blackmun, J., dissenting).

414. *See Kendrick*, 487 U.S. at 610 ("In this lawsuit, nothing on the face of the [statute] *indicates* that a significant proportion of the federal funds *will be disbursed* to 'pervasively sectarian' institutions." (emphasis added)); *id.* at 610 (rejecting the contention that the Act created a "substantial risk" that pervasively sectarian institutions would receive direct aid because of the statute's "facially neutral grant requirements"). An effects test reinterpreted as an estimation of the risk of an Establishment Clause violation in every case would thus be similar to the test used in the licensing cases. *See supra* notes 384-89 and accompanying text.

415. *See Kendrick*, 487 U.S. at 610 ("[A] relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions.").

416. *See id.* at 611.

417. *See* Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of application for stay and injunction pending appeal) (noting that the plurality opinion in *Casey* "specifically examined the record developed in the district court in determining that [the statute] did not create an undue burden" and interpreting the undue burden test to require facial invalidation of statutes that place a substantial obstacle to a woman's choice to have an abortion in a "large fraction" of the statute's applications).

choice that is, in important part, constrained by a series of prior choices that channel a litigant's constitutional claim into the as-applied or facial mode. First, the Court chooses to implement the Constitution through doctrinal tests that, in the main, do not depend upon constitutional scrutiny of the validity of particular statutory applications. Furthermore, the legislature that enacted the challenged statute and the officials charged with authoritatively construing the statute choose the content of the statutory terms—terms that may or may not, depending on the underlying constitutional doctrine, trigger constitutional scrutiny under the applicable doctrinal test. Finally, the litigant chooses the manner in which to assert a claim for facial invalidation—whether to base that claim on a constitutional defect inhering in the statute itself, or one that depends upon a particular feature of specific statutory applications.

The prevailing view, however, is that the choice between facial and as-applied invalidation is a choice that the reviewing court resolves on its own, unmediated by the prior choices that form the practical features of a constitutional adjudication. The choice is resolved according to the reviewing court's own assessment of the appropriate scope of constitutional invalidation in a given case, guided by the judiciary's general preference for as-applied adjudication. In other words, the current view is that the question of invalidation is a subset of the question of crafting appropriate judicial remedies for identified constitutional violations. A court's identification of a constitutional defect precedes, and is independent of, a court's determination of how far it should go in eliminating the identified constitutional defect from the challenged statute.

But this Article's analysis shows that constitutional scrutiny under doctrinal tests is integrally connected with the question of how much of a statute ought to be preserved following the conclusion that a statute violates some constitutional requirement. *Salerno's* "no set of circumstances" is a descriptive claim about a statute deemed unconstitutional in the course of a constitutional adjudication that satisfies the necessary preconditions for a successful valid rule facial challenge. In such a case, a court's holding that the statute is unconstitutional is, *at the same time*, a holding that the statute cannot be constitutionally applied in any case. The preconditions for a successful valid rule facial challenge structure constitutional adjudication in a manner that fuses a court's identification of constitutional invalidity and its determination of the scope of the appropriate invalidation. A court's choice is more or less predetermined from the outset.

This structured account of constitutional adjudication is not meant

to negate altogether a court's discretion in properly disposing of a case after facial invalidity is identified. For example, the right to be judged by a constitutionally valid rule of law is not equivalent to the right to have one's case dismissed when and if the Supreme Court ultimately concludes that a state court erred in its interpretation of the controlling constitutional law.[418] Thus, in certain circumstances, the Supreme Court may choose against facial invalidation and instead vacate the judgment and remand the case to the state court to give that court an opportunity to formulate, and then to apply, a constitutionally valid rule of law.[419] Moreover, if a question of state statutory severability is unclear, and severability could cure the otherwise facially invalid rule, the Court may, in certain limited circumstances, remand the case to allow the state court to make that determination.[420] Finally, if the legislature repeals or amends the challenged statute after the defendant's initial conviction, the Court has held that facial invalidation may not be appropriate.[421]

Other examples of a court's use of this kind of remedial discretion to avoid unnecessarily invalidating a statute on its face might be identified. But it is important to distinguish this kind of remedial discretion, which concerns the appropriate method for disposing of a case *after* a court concludes that the statute states a facially invalid rule of law, from the claim that a court's determination of facial invalidity is itself a remedial question.[422] This latter claim, like the critique of *Salerno* identified and rejected in Parts II and III, appears to follow from the assumption that all facial challenges are structured as over-

418. *See* Fallon, *supra* note 2, at 874.

419. *See* Time, Inc. v. Hill, 385 U.S. 374, 397-98 (1967); *see also* Fallon, *supra* note 2, at 874 (discussing *Time* and explaining that such a decision is based on the rule that a court may offer a narrowing construction in the context of a litigation). This remedial technique of a remand is obviously available only in Supreme Court cases on direct appeal from the state's highest court.

420. *See* Skinner v. State of Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542-43 (1942) (employing that strategy in the context of under-inclusive Equal Protection challenges); *supra* note 215.

421. *See* Pope v. Illinois, 481 U.S. 497, 501-02 (1986) (noting that facial invalidation, in light of prior repeal, would not "serve the purpose of preventing future prosecutions under a constitutionally defective standard," and thus, the conviction under the previously invalid law could stand under harmless error doctrine). *But see* Monaghan, *supra* note 130, at 195 (arguing that the decision in *Pope* is incompatible with valid rule theory).

422. *See, e.g.*, United States v. National Treasury Employees Union, 513 U.S. 454, 477 (1995) (treating the issue of facial invalidation as a remedial issue); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985) (determining that federal courts should not invalidate laws more broadly than necessary for the circumstances of the case); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 456, 474-78 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (criticizing the Court's "narrow, as-applied remedy" and advocating instead the remedy of facial invalidation); Law, *supra* note 10, at 327 ("The *Salerno* rule uses the remedial phase of constitutional adjudication to enshrine substantive constitutional principles wholly deferential to state power.").

breadth facial challenges predicating facial invalidity on some aggregate number of unconstitutional statutory applications.[423] It is thus a claim that has no bearing on the appropriate judicial treatment of valid rule facial challenges.

The remedial account of facial challenge adjudication draws in significant part from *Brockett v. Spokane Arcades, Inc.*,[424] in which the Court held that a litigant whose own conduct is protected under the First Amendment, and who thus can succeed on an as-applied challenge, is not entitled to assert an overbreadth challenge.[425] The Court defended this rule in part on the grounds that the prophylactic interests underpinning the overbreadth doctrine's special standing exception are unavailing when "[t]here is no want of a proper party" to argue the case.[426] Even if the *Brockett* approach is ultimately unconvincing as a matter of precedent or constitutional principle,[427] it is at least conceptually coherent as implemented in the First Amendment overbreadth doctrine. The statutory rule subject to an overbreadth facial challenge is an otherwise valid rule of law that becomes constitutionally infirm on its face because of a judicial assessment about the constitutional invalidity of most statutory applications.[428] If a court decides not to undertake that assessment, an as-applied constitutional invalidation is unproblematic in terms of the structure of facial challenges. As does a court that declines to entertain an overbreadth facial challenge outside of the First Amendment,[429] a court following *Brockett* simply limits its constitutional inquiry to the validity of the statutory application at hand.

But the Court in *Brockett* also defended its limitation of the overbreadth doctrine as an instance of the more general rule "that a federal court should not extend its invalidation of a statute further than

---

423. *See* Law, *supra* note 10, at 324-41 (discussing *Salerno* as the least defensible, approach to the question of "devising judicial remedies for laws that violate the constitutional rights of some, but not all, of those to whom they apply").

424. 472 U.S. 491 (1985).

425. *See id.* at 504-06.

426. *Id.* at 504.

427. The Court's approach following *Brockett* has not been entirely consistent, and the Court has entertained overbreadth challenges without assuring itself that the litigant's own conduct was constitutionally "unprotected." *See, e.g.*, Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573-74 (1987); Houston v. Hill, 482 U.S. 451, 458-67 (1987); *see also* Renne v. Geary, 501 U.S. 312, 345 (1991) (Marshall, J., dissenting) (concluding that courts are not bound to resolve as-applied challenges before permitting overbreadth challenges) (citing *Board of Airport Comm'rs*, 482 U.S. at 573-74). The Court's approach produces the curious anomaly that the unprotected litigant gets the benefit of more searching judicial scrutiny than does the "protected" litigant. *See* FALLON ET AL., *supra* note 222, at 207.

428. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

429. *See* Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 220 (1912).

necessary to dispose of the case before it."[430] Although this statement is unobjectionable under traditional principles limiting the role of Article III courts to deciding actual cases and controversies, it cannot be taken as a license to convert all claims of facial invalidity by "protected" litigants to as-applied, fact-dependent claims of constitutional privilege. But the Court has suggested as much by invoking this principle in a recent case within the First Amendment that did not involve an overbreadth facial challenge.[431]

If a statute is attacked as unconstitutional because of a constitutional flaw that potentially invalidates all conceivable statutory applications, a court cannot circumscribe its inquiry to the particular features of the litigant's case. When a litigant asserts such a claim, the very concept of a "protected" or "unprotected" litigant loses its meaning. A court's decision that a statute is constitutionally invalid under *Salerno*—that is, when all three preconditions are satisfied and the challenge succeeds on the merits—is a ruling on the whole of the statutory rule's constitutional validity. A partial invalidation in response to a successful valid rule facial challenge is thus a futile response, cloaked in the inapposite garb of judicial restraint, that preserves for future constitutional scrutiny that which has already been determined in the case at hand to be constitutionally invalid.[432]

The remedial account of facial challenges also draws support from Professor Adler's recent work. For Adler, the debate over facial challenges and *Salerno* is, properly understood, *only* a debate about the appropriate scope of a court's remedy *after* identifying a constitutional defect.[433] Whether a court invalidates a statute in whole, in part, or re-writes the statute in order to eliminate the invalid rule, is a question that for Adler depends upon institutional and moral concerns that attend to judicial invalidation of legislative acts.[434] Far from operating on the overbreadth assumption, Adler's remedial conception of facial challenges derives from his thesis that constitutional adjudication is centrally focused on evaluating the validity of rules, and does not involve scrutiny of particular litigants' conduct. Having

---

430. *Brockett*, 472 U.S. at 502.

431. *See* United States v. National Treasury Employees Union, 513 U.S. 454, 477-78 (1995) ("[A]lthough the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.") (citations omitted).

432. *See* Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 966 n.13 (1987) ("[T]here is no reason to limit challenges to case-by-case 'as-applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands.").

433. *See* Adler, *supra* note 2, at 158.

434. *See id.* at 121-52.

identified *Salerno* with the latter conception of constitutional adjudication,[435] which he rejects, Adler assumes that the breadth of a court's invalidation of an invalid rule must be a question of remedy alone.

But as this Article has shown, the scope of the rule subject to constitutional scrutiny depends in the first instance on practical features of constitutional adjudication: the way in which the litigant asserts the challenge, the content of the statutory terms, and the underlying constitutional doctrine that the challenge invokes. Partial invalidation occurs primarily because these practical features narrow the rule subject to constitutional scrutiny *before* the constitutional defect is identified. The conclusion that the rule is invalid necessarily leaves other aspects of the rule intact, subject to constitutional scrutiny, if at all, in subsequent challenges. On the other hand, complete or facial invalidation occurs when these features structure the challenge such that the entire statutory rule, independent of particular features of individual statutory applications, is drawn into question. In cases in which the preconditions for a successful valid rule facial challenge are met, the conclusion that the statutory rule is invalid leaves nothing left to be litigated—no set of circumstances exists in which the rule constitutionally can be applied. It is the way that courts identify constitutional defects, not their exercise of remedial discretion after that identification takes place, that dictates whether an invalidation is facial (complete) or as-applied (partial).[436]

CONCLUSION: A PROPOSAL

This Article concludes with a brief consideration of how the analysis of valid rule facial challenges might shed light on the current debate over the proper facial challenge standard in the abortion context. The abortion case law is notoriously complex, and no attempt will be made here to achieve broad coherence, or to answer the question of how facial challenges in the abortion context ultimately should be resolved. Instead, this conclusion aims to identify the errors of the current debate and to formulate the appropriate questions for judicial resolution.

In light of the main thesis of this Article, the controversy over *Salerno*'s applicability in the abortion context is misguided and doomed to achieve unsatisfactory, if any, conceptual resolution. Two Justices and several courts of appeals have settled on the view that the

435. *See id.* at 39-40 & n.148, 154-55.

436. Again, there may be some room for such remedial discretion after facial invalidity is identified. *See supra* notes 418-21 and accompanying text.

"undue burden" test of *Planned Parenthood v. Casey*[437] displaces *Salerno* in the abortion context and sets forth a less restrictive facial challenge test modeled on the First Amendment overbreadth doctrine.[438] Justice Scalia and the Fifth Circuit take the contrary view but primarily do so on the ground that the Court has not formally extended the overbreadth doctrine outside of the First Amendment, and that, unless and until it explicitly does so, *Salerno* remains the governing facial challenge standard in the abortion context.[439]

In the first place, the postulated choice *between Salerno* and *Casey* is a false one that misstates the relevant problem. This Article has shown that this false conflict stems from a previously unexamined, and indefensible, assumption that all facial challenges are structured as overbreadth facial challenges, and that *Salerno* is a particularly stringent facial challenge test for adjudicating non-First Amendment overbreadth facial challenges. Instead, *Salerno*'s "no set of circumstances" is a descriptive claim about a statute whose terms state an invalid rule of law, which accordingly directs a court to evaluate the validity of the challenged statute against the substantive constitutional requirements, independent of its application to particular cases. Thus, *Salerno* cannot conflict with, much less displace, any rule of substantive constitutional law.

The issue of *Casey*'s effect on the possibility for facial challenges in the abortion context should be separated into two discrete, albeit related, questions. The first question is whether *Casey* should be interpreted as extending the overbreadth doctrine beyond the First Amendment to cases involving alleged infringement of a woman's constitutionally protected right to choose to have an abortion. In other words, the question is whether *Casey* created an *additional* vehicle for asserting facial challenges in the abortion context, so that, like the First Amendment facial challenger, the litigant asserting a facial challenge against an abortion-regulating statute can choose between two qualitatively distinct forms of facial challenges. The second question relates to the necessary conditions under which a valid rule facial challenge under *Salerno* may succeed: in what circumstances can a

437. 505 U.S. 833, 878 (1992) (stating that abortion regulations would be invalid if they constitute an undue burden on a woman's right to choose to have an abortion).

438. *See, e.g.*, Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1013 (1993) (O'Connor, J., joined by Souter, J., concurring in the denial of application for stay and injunction pending appeal); Planned Parenthood v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995); Casey v. Planned Parenthood, 14 F.3d 848, 863 n.21 (3d Cir. 1994).

439. *See, e.g.*, Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012-13 (1992) (Scalia, J., dissenting from denial of cert.); Barnes v. Mississippi, 992 F.2d 1335, 1342 (5th Cir. 1993).

valid rule facial challenger successfully argue that, measured against *Casey*'s "undue burden" test and independent of any particular statutory applications, a statute regulating abortion is invalid on its face and incapable of any constitutionally valid applications?

It seems rather hard to quarrel with the conclusion that *Casey* employed some version of the overbreadth doctrine in facially invalidating the spousal notification provision of the challenged statute. The Court predicated its conclusion of facial invalidity on the number of statutory applications—a "large fraction"—deemed to constitute an unconstitutional undue burden under the substantive doctrinal test.[440] Even if one concludes that *Casey* did not extend the overbreadth doctrine, the arguments in favor of extending overbreadth to the abortion context are not entirely rooted in precedent; they also involve claims about creating doctrinal tests that adequately enforce constitutional guarantees.[441] On the other hand, prudential concerns might counsel against extending a doctrine whose justification and application remain confused to this day.[442] But whether the abortion right, like First Amendment guarantees, warrants the special standing doctrine that the overbreadth doctrine provides, ultimately is a question of substantive constitutional principle and not a question affected by *Salerno*'s valid rule methodology.[443] It is a question, moreover, sufficiently weighty to warrant Supreme Court consideration in a more authoritative context than the ongoing saga of certiorari denials.[444]

It is fairly clear, however, that the main impetus for promoting *Casey*'s "large fraction" standard[445] to an official overbreadth doctrine is the perceived lack of an alternative means of successfully asserting facial challenges in the abortion context under *Salerno*'s allegedly "draconian" standard. Once *Salerno*'s "no set of circumstances" is prop-

---

440. *See Casey*, 505 U.S. at 895 (concluding that the provision effected an undue burden, and was therefore invalid, because it would operate as a "substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction" of the cases in which the statute is "relevant"); *see also Miller*, 63 F.3d at 1458 ("We choose to follow what the Supreme Court actually did—rather than what it failed to say—and apply the undue burden test."); Karlin v. Foust, 975 F. Supp. 1177, 1204-05 (W.D. Wis. 1997) (arguing that *Casey*'s method of analysis is most clearly associated with overbreadth methodology); *see also* Ford, *supra* note 2, at 1466 (exploring the possible differences between *Casey*'s "large fraction" test and the First Amendment overbreadth test).

441. *See* Dorf, *supra* note 1, at 268-71; *see also* Ford, *supra* note 2, at 1454-60.

442. *See* Fallon, *supra* note 2, at 853 ("More than fifty years after its inception, First Amendment overbreadth doctrine remains little understood."); Hill, *supra* note 36, at 1065 (noting that the doctrine remains "shrouded in mystery").

443. *See* Fallon, *supra* note 2, at 869 n.96 (linking overbreadth doctrine's concern for prophylactic protection with more traditional, substantive First Amendment principles).

444. *See supra* notes 11-12, 16.

445. *See Casey*, 505 U.S. 833, 895 (1992).

erly understood as a descriptive claim about a statute whose terms state an invalid rule of law, this impetus is significantly lessened. Given the complexities implicated by the first question, courts and future facial challengers might turn to the second question as a more fruitful source for successful facial challenges.

The Court currently implements the substantive due process guarantee of the Fourteenth Amendment in the abortion context pursuant to the following doctrinal test: "An undue burden exists, and therefore a provision of law is invalid, if its *purpose or effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[446] The purpose prong of this doctrinal test provides the basis for successful valid rule facial challenges under *Salerno* and the analysis provided above.[447] If a facial challenger can demonstrate that a particular statute was enacted with the purpose of placing a substantial obstacle in the path of a woman seeking an abortion, the constitutional infirmity will be unrelated to any defect arising from particular statutory applications, and a court may properly conclude that "no set of circumstances" exists in which the statute may be constitutionally applied.[448] All other things being equal, *Casey*'s purpose prong should support successful valid rule facial challenges in a manner similar to purpose tests in other constitutional contexts.

All other things may not be equal, however, in the abortion context. One difficulty presented is the *Grace* problem of multiple doctrinal tests embraced within the "undue burden" standard.[449] A statute regulating abortion, depending on the scope of its statutory terms, might trigger at least two doctrinal tests, each of which involves a distinct constitutional analysis, thus foreclosing the possibility of a successful valid rule facial challenge to the entire statutory measure. Although the Court in *Casey* formally abandoned the rigid trimester approach of *Roe v. Wade*,[450] the Court also reaffirmed *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even pro-

446. *Id.* at 878 (emphasis added).

447. *See supra* notes 364-71 and accompanying text.

448. This assumes that the litigant does not fail the first precondition by asserting an overbreadth facial challenge as the basis for facial invalidity. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 405 (1980) (denying standing to a class of minors, none of whom was mature or emancipated, challenging a parental notification statute on its face based on the statute's unconstitutional applications against mature and emancipated minors).

449. *See* United States v. Grace, 461 U.S. 171, 175 (1983); *supra* notes 350-58 and accompanying text.

450. *See* Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992) (rejecting the trimester framework because it is not a part of the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973)).

scribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[451] Moreover, the Court expressly limited the undue burden test to preventing undue burdens imposed prior to the point of viability.[452] A statute imposing restrictions on the abortion right that does not, by its own terms, distinguish between pre- and post-viability restrictions (if it did make such a distinction there would be two distinct statutory rules) may be incapable of satisfying the second precondition for a successful valid rule facial challenge. To trigger the "undue burden" test, rather than the test for post-viability regulations, a litigant presumably would have to show that the particular features of her case involved the imposition of the pre-viability statutory restrictions. Thus, even though the purpose test triggered would identify a constitutional infirmity in the legislature's enactment of the statute, the necessity of application-specific constitutional scrutiny arguably would limit the ultimate constitutional holding to the legislature's purpose in enacting the statute as applied to restrict pre-viability abortions.[453] In such a case, a court could not conclude that "no set of circumstances" exists under which the restrictions at issue could constitutionally be applied.[454]

It should be emphasized, however, that the problem of multiple doctrinal tests is, in the first instance, a function of the scope of the statutory terms and not of the constitutional doctrine itself.[455] Thus, as long as a statutory measure is clear that its restrictions apply only in the pre-viability period, the statute will trigger the undue burden test alone, and make possible a successful valid rule facial challenge under *Casey*'s purpose prong. But the substantive law is relevant, too, as evidenced by the greater protection from facial invalidation that this

---

451. *Id*. at 879 (quoting *Roe*, 410 U.S. at 164-65).

452. *See id*. at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability*.") (emphasis added).

453. The doctrinal test for post-viability restrictions, as noted, does not seem even to permit an inquiry into governmental purpose. *See id*. at 879. The sole question is whether the statute provides an exception from its regulation or proscription of abortion in cases in which an abortion is necessary for the preservation of the life or health of the mother. *See id.* In any event, it is difficult to see how a court's conclusion that a statute was enacted with the purpose of imposing pre-viability burdens could simultaneously demonstrate invalidity under the post-viability test.

454. On the other hand, to the extent that courts interpret *Casey* as authorizing overbreadth methodology, the possibility for facial invalidation arguably would not turn on the pre/post-viability distinction. *See* Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 196 (6th Cir. 1997) (concluding that *Casey*'s "large fraction" overbreadth test should be applied to post-viability abortion regulations even though such regulations do not themselves trigger scrutiny under the undue burden test), *cert. denied*, 118 S. Ct. 1347 (1998).

455. *See Grace*, 461 U.S. 181-84; *supra* notes 350-58 and accompanying text.

analysis would give to broadly drafted statutory measures. That seemingly anomalous result is the direct consequence of the Court's abandonment of its prior doctrinal approach in which statutory measures restricting the abortion right had to be narrowly tailored to further a compelling state interest.[456] By replacing a requirement of regulatory precision with a requirement precluding pre-viability "undue burdens,"[457] the Court may have limited the availability of successful valid rule facial challenges.

Casey's effect prong presents a greater problem for valid rule facial challenges.[458] As explained above, effects tests in constitutional law often turn on the constitutionality of specific statutory applications and thus seem inconsistent with the preconditions for a successful valid rule facial challenge.[459] The one exception to this general rule is the "primary effect" prong of the Establishment Clause's *Lemon* test,[460] which supports facial challenge adjudication only because, as construed by the Court in *Kendrick*,[461] a statute's primary effect of advancing religion can be ascertained on the face of a statute, independent of the constitutional validity of particular statutory applications.[462] The Court in *Casey* departed from the *Kendrick* approach, however, and evaluated the constitutionality of specific statutory applications in determining whether the statute had the "effect" of imposing an "undue burden" on the large fraction of the women against whom the statutory restrictions were relevant.[463] The "large fraction" aspect of the Court's analysis most closely resembles overbreadth methodology in that it predicates facial invalidity on an aggregate number of unconstitutional applications. Unlike *Kendrick*'s use of an effects test, *Casey*'s facial invalidation of the spousal notification provision was premised on the Court's assessment of a detailed factual record demonstrating the effect that the statute would have on women seeking abortions.[464] By contrast, the informed consent provision survived facial challenge scrutiny under *Casey*'s effect test because the litigants had not supplied record evidence about the practical effects of the statute in operation.[465] If *Casey*'s effect prong supports a successful

456. *See Roe*, 410 U.S. at 156.
457. *Casey*, 505 U.S. at 878.
458. *See id*.
459. *See supra* notes 398-99 and accompanying text.
460. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1970).
461. 487 U.S. 589 (1988).
462. *See id.* at 600-02.
463. *See Casey*, 505 U.S. at 879-901.
464. *See id.* at 887-94.
465. *See id.* at 884-85 ("Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial

valid rule facial challenge, it is a valid rule facial challenge unlike any other currently available in constitutional law.[466] Indeed, because it would be a valid rule facial challenge predicating facial invalidity on some aggregate number of unconstitutional statutory applications, it would be a facial challenge deeply incompatible with the concept and structure of a valid rule facial challenge as developed in this Article.

Two alternatives present themselves. First, it could be argued that *Casey* mistakenly looked to particular statutory applications in evaluating a facial challenge asserted under the effect prong of the undue burden test. The Court could rectify this situation by adopting the *Kendrick* approach in the abortion context—that is, analyzing a statute's effect in burdening the abortion right solely from the terms of the statute itself, and not based on its application in specific cases. This remedy would require abandoning the "large fraction" method that *Casey* employed to resolve the facial challenge under the effect prong, but would not require changing the doctrinal test itself.[467]

Alternatively, the Court might conclude that *Casey*'s effect test, viewed in light of the method the Court used to implement that test, is best understood as an overbreadth facial challenge doctrine outside of the First Amendment. In other words, *Kendrick*'s curious application-independent approach to facial challenges under an effects test might appear to be thin support for a general approach to effects tests within constitutional law. Instead of distorting the very conception of a valid rule facial challenge by extending *Kendrick*, the more straightforward approach might be to acknowledge that valid rule facial challenges cannot succeed under the "undue burden" test's effect prong (at least as construed by the Court). Consequently, the combination of the effect prong and *Casey*'s "large fraction" language could be used to buttress the case for an extension of First Amendment overbreadth doctrine to a new constitutional context.

Ultimately, the possibility for successful valid rule facial challenges in the abortion context, as in all contexts, depends on the convergence of the practical features of constitutional adjudication that sat-

---

obstacle to a woman seeking an abortion, we conclude that it is not an undue burden."); *see also id.* at 885-87 (upholding a statutory waiting period because the factual evidence of the statute's effects did not demonstrate an undue burden).

466. For a detailed account of how the federal courts have applied *Casey*'s undue burden test, see Sandra Lynne Tholen & Lisa Baird, *Con Law Is As Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State And Federal Courts*, 28 LOY. L.A. L. REV. 971, 1004-29 (1995).

467. Indeed, the Court set forth the undue burden test without any mention of the "large fraction" language on which proponents of extending overbreadth have principally relied. *See Casey*, 505 U.S. at 878. The disconnect between the Court's articulation of the substantive test and its method for resolving a facial challenge invoking that test may, more than anything else, be responsible for the confusion in this area.

isfy the necessary preconditions elaborated in Part IV. The abortion context complicates the typical valid rule inquiry because of the *Grace* problem of multiple doctrinal tests and because of the still unresolved problem of reconciling effects tests with valid rule facial challenges. Although this analysis admittedly complicates the matter more than it yields definitive answers, it at least demonstrates that the relevant decision before the Court is significantly more complex than the false choice between *Salerno* and *Casey*. Overbreadth can be extended as a doctrinal matter without affecting valid rule facial challenges under *Salerno*. But a coherent approach to facial challenge adjudication cannot be developed unless the preoccupation with overbreadth methodology as the exclusive form of facial invalidation is overcome.