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A persistent trope in free speech doctrine is that overbroad laws chill protected expression and compromise the breathing room needed for a vibrant marketplace of ideas. The conventional restrictions on facial challenges of measures that sweep beyond legitimate regulatory zones are relaxed. Whether and to what extent this liberal approach to judicial review actually governs in free speech law and not elsewhere, and whether this is constitutionally or normatively defensible, have been the subject of considerable and exceptionally insightful scholarship. Yet the United States Supreme Court has given the best of this work slight notice.

This Article proposes a new path forward. It first describes the constitutional and normative puzzle presented by the conventional account of the overbreadth doctrine of the First Amendment and synthesizes the leading works that address this puzzle. It also identifies emerging doctrinal trends that may compel the Court to square its rhetoric with its doctrinal reality and to align both with constitutional dictates.

This Article then sets forth a straightforward test, under which facial challenges of overbroad laws that chill fundamental rights are treated uniformly. Free speech overbreadth doctrine illustrates the proper approach to analyzing all facial challenges to unconstitutionally overbroad laws. Moreover, this approach is grounded in due process principles that would govern in federal and state courts alike. The proposed test would not trigger a cascade of successful facial challenges, but would provide a constitutionally sound, rigorous, and intellectually accessible

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tool for courts to uproot patently and egregiously overbroad laws that threaten to ice fundamental rights.

INTRODUCTION

Constitutional law is not known for bright lines that are easily identified and heeded. Legislators and city councils thus can be forgiven if they pass overbroad laws aimed at punishing purveyors of videos that depict illegal animal abuse,[1] keeping material with violent sexual content from minors,[2] or seeking to root out criminal gang activity,[3] but that sloppily scoop up

1. United States v. Stevens, 559 U.S. 460 (2010).
2. Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).
3. Richard Fausset, *Confrontation with Black Partygoers Leads to Gang*

constitutionally protected activities along with the targeted unprotected activities.[4] Forgiveness, though, does not mean these overbroad laws should go unchallenged.

Five questions arise almost immediately when an unconstitutionally overbroad law is challenged. First, *how soon* can the litigation testing the government act proceed,[5] and second, *by whom* may the challenge be brought? Third, can the act be challenged *facially,* or *only as applied*? Fourth, does it matter in answering these questions *what constitutional right* is allegedly chilled by the law? For example, should free speech claims be treated with more solicitude than other constitutional claims? Finally, if subject matter does matter to overbreadth analysis, *is this different treatment justifiable*?

This Article outlines the basic rules that govern the first three issues, then zeroes in on the last two questions. It shows that challenges to laws on overbreadth grounds may be treated more favorably in free speech cases than in cases that involve other fundamental rights. This differential treatment is not constitutionally or normatively justifiable. The Article then proposes a theoretically coherent test that treats all constitutionally overbroad laws uniformly.

The Article opens with a topography of the "how soon" and "by whom" jurisdictional questions that federal courts confront in all overbreadth cases, to put the free speech anomaly into perspective. For example, standing rules in federal court typically require that a litigant must have suffered, or imminently will suffer, a concrete injury for a federal court to have Article III power to hear the dispute.[6] This is both a "how

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Charges for White Group, N.Y. TIMES (Oct. 12, 2015), at A13 (discussing indictment of members of Respect the Flag group for yelling racial slurs and brandishing weapons and flags while driving by African-Americans at public park under state law criminalizing "criminal gang activity").

4. Even when constitutional lines are quite clear, some lawmakers are willing to test them. For example, the City of Coolidge, Arizona recently voted to have only Christian prayers at city council meetings, despite contrary advice from legal counsel. Joey Chenowith, *Coolidge City Council Meetings: Prayers Planned, but Christian Only,* COOLIDGE EXAMINER (Sept. 15, 2015). The Council later thought better of the policy.

5. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution,* 62 STAN. L. REV. 1209, 1224 (2010) (noting that "[a] violation of the Constitution is an event . . . [that] *must be located in time*") (emphasis in original).

6. *See infra* text accompanying notes 91–109. *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 DUKE L.J. 1219 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of Powers,* XVII SUFF. L. REV. 881(1983).

soon" and a "by whom" inquiry.

Related to the standing issue is a general presumption against facial challenges of laws, versus as-applied challenges.[7] Facial challenges seek to strike down a law in its entirety. They are theoretically disfavored because courts prefer to address only actual applications of a law, not hypothetical or speculative disputes. A facial challenge anticipates future applications, and thus may occur "too soon." It also may be asserted by a party who did not suffer all of the alleged harms of the overbroad law. Facial challenges to overbroad laws additionally may ask courts to do "too much." Where a law has unconstitutional and constitutional applications, courts may opt to "enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact."[8] This last step is about judicial husbandry. Yet it has timing implications given the judicial preference to wait until the unconstitutional applications have occurred.[9]

Finally, a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[10] This is a "by whom" jurisdictional question. But it also is a merits question about the scope of first party rights. Specifically, it asks what a plaintiff's "own legal rights and interests" entail when government passes facially blunderbuss laws that cast shadows over constitutionally protected activities.

All of these limits on judicial review of overbroad laws are subject to departures that belie the general rules and make the judicial applications of the rules hard to reconcile.[11] This

7. Richard Fallon's extremely important article disputes the conventional wisdom that facial challenges are in fact strongly disfavored. *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 91 (2011). *See infra* text accompanying notes 87–89.

8. Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328–29 (2006) (citations omitted).

9. Facial challenges also risk blurring the line between a personal and a generalized grievance, where the litigant cannot adequately distinguish herself from "all who breathe." *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 682 (1973). *See* Scalia, *supra* note 6, at 896 (critiquing this passage as inconsistent with individualized harm limits on standing, and observing that remedying such generalized grievances is better left to the political processes).

10. Warth v. Seldin, 422 U. S. 490, 499 (1975).

11. Some commentators argue that the rules are not rules at all, and are manipulated in service of substantive and other preferences. *See, e.g.*, Lee A.

Article, however, is not principally about these intra-doctrinal gnarls, their alleged seriousness, or their provenance.

Rather, this Article focuses on how these rules may be *categorically* eased in free speech cases[12]—though how much

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Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1154 (1977) ("[G]eneralized articulations of injury isolated from the claim invite charges of inconsistency, selectivity, and ad hoc decision making; judicial expressions of skepticism about the merits, predictably commonplace in such standing decisions, provide further support for such charges."); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59 (1982) (noting that "the decision whether to grant standing necessarily implicates the merits of the case to some degree."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) [hereinafter Fletcher, *Structure of Standing*] (noting that the law is incoherent); William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 286–87 (2013) [hereinafter Fletcher, *Who Can Sue*] (arguing that environmental standing decisions "respond to the Court's perception of political reality" and tend to find standing for individuals and groups with "increasing political influence"); Stefanie A. Lindquist & Pamela C. Corley, *The Multiple-Staged Process of Judicial Review: Facial and As Applied Constitutional Challenges to Legislation before the U.S. Supreme Court*, 40 J. LEGAL STUD. 467, 470 (arguing that congressional preferences over the substance of legal challenges, the legal basis for the constitutional challenge, and other factors systematically affect the Court's decision to invalidate legislation); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380 (1973) (commenting that "the criteria [for standing] have become confused and trivialized."); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 68–69 (1984) (observing that commentators "regularly accuse the Supreme Court of applying standing principles in a fashion that is not only erratic, but also eminently frustrating in view of the supposed threshold nature of the standing inquiry.") (footnote omitted); Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009) (arguing that the Roberts Court preference for as-applied challenges in election law cases is designed to make these challenges harder to launch); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C.L. REV. 1741, 1743 (1999) (stating that "[t]he doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts."); Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's The Structure of Standing*, 65 ALA. L. REV. 289, 290 (2013) (critiquing scholars during the era of the Burger and Rehnquist Courts, on the ground that they "[m]ost often . . . accused" the Justices of "manipulating standing rules to achieve the conservative goal" of denying relief to certain types of plaintiffs); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (arguing that "[d]ecisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim."); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (quoting "Professor Freund's testimony to Congress that the concept of standing is 'among the most amorphous in the entire domain of public law.'").

12. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (holding petitioners had standing to challenge an Ohio law that criminalized certain false

they actually are eased is vigorously disputed.[13] Chilling speech, the argument goes, not only is presumptively bad, it is worse than chilling other constitutional rights.[14]

Jurisdiction laws therefore treat this constitutional zone as *analytically separate* from conventional rules under the overbreadth doctrine.[15] Specifically, the free speech overbreadth doctrine may treat all of the foregoing jurisdictional inquiries more generously than they are treated in cases that involve other fundamental rights.[16] Although this generosity is unevenly applied, even within the free speech cases,[17] the judicial rhetoric and some judicial conduct reflect a free speech exceptionalism[18] that presents a legal puzzle.

This puzzle is foundational. Where the rhetoric about more liberal treatment of overbreadth challenges in the free speech zone is matched by reality, it raises several problems. It may (1) conflict with Article III,[19] (2) be based on limited evidence about the actual deterrent effect that overbroad laws have on speakers,[20] (3) reflect normatively indefensible favoritism of

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statements made during a political campaign, on the ground that the measure had a chilling effect on their political expression). For an early and influential discussion of the doctrine, see *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). *See also* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685 (1978). Of course, even very precise laws can impermissibly chill constitutionally protected behavior if they exceed government power in other respects. Say, for example, government passes a law that quite clearly and precisely prohibits persons from engaging in peaceful protests in a traditional public forum where their speech embraces matters of public concern. The proper argument against this law would be that it is facially invalid as a matter of straightforward free speech doctrine. Overbreadth doctrine adds nothing to this scenario. This Article is about the laws that regulate conduct or speech in a very clumsy or scattershot fashion, where too much of the protected ends are scooped up with the unprotected ends. That is, laws that chill rights and thus may be facially challenged come in multiple forms.

13. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853, 877–83 (1991) (challenging conventional wisdom that overbreadth doctrine is potent).

14. *See infra* text accompanying notes 44–70.

15. Under the First Amendment, facial challenges look to whether overbreadth is "real . . . [and] substantial . . . judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). *See generally The First Amendment Overbreadth Doctrine*, *supra* note 12 (discussing doctrine and distinctiveness of free speech cases).

16. *See infra* text accompanying notes 42–79.

17. *See infra* note 44.

18. *See* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983).

19. *See infra* text accompanying notes 199–203.

20. *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. &

free speech over other constitutional rights,[21] and (4) create unnecessary doctrinal confusion. This calls for one of two responses: reconciliation of free speech overbreadth law with the rest of doctrine that applies to judicial review of facially unconstitutional statutes, or an especially compelling argument for its outlier treatment.[22]

This Article urges reconciliation. It argues that the free speech overbreadth tail should wag the whole constitutional dog. That is, facial challenges of laws that are substantially overbroad and may chill constitutionally protected conduct all should receive the same "how soon" and "by whom" treatment that overbroad laws receive in free speech cases. The free speech overbreadth exception should become the general overbreadth rule.

This proposed step is less dramatic than it might appear. In several recent cases, the Court has narrowed the analytical gap between the free speech overbreadth doctrine and the general jurisdiction rules that govern facial challenges of

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MARY L. REV. 1633, 1657 (2013) (arguing evidence of chilling effect is based on "little more than a collection of unsubstantiated empirical judgments"). *But see* Lyrissa B. Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 888 (2000) (discussing silencing through self-censorship); Alex Marthews & Catherine E. Tucker, Government Surveillance and Internet Search Behavior 18 (Apr. 29, 2015) (unpublished paper), https://www.ftc.gov/system/files/documents/public_comments/2015/10/00023-97629.pdf [https://perma.cc/TNJ2-EC8T] (finding a chilling effect on internet users where they believed certain search terms might get them into legal trouble); Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 UNIV. MD. L.J. OF RACE, RELIGION, GENDER, & CLASS, 375, 375 (2007) (reporting that many Muslim-Americans believe they are being monitored by the government, and some have altered their internet activities accordingly). *Cf.* Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465 (2015) (noting that evidence supports view that surveillance undermines marketplace of ideas and democratic self-governance goals of First Amendment by fostering conformity among those whose views on a topic are not yet firm).

21. Other constitutional rights also may be chilled by laws—even if the laws are written to respect constitutional boundaries. *See, e.g.*, Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095 (2015) (finding that laws that forbid late-term abortions also result in reduction of constitutionally protected near late-term abortions in ways that may be traced to these laws rather than to other causes, and providers "self-censor").

22. *See, e.g.*, Rosenkranz, *supra* note 5 (justifying the distinctive treatment of First Amendment cases on textual grounds). *Cf.* Nicholas Cornell, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749 (2010) (arguing that the outlier treatment of overbreadth in free speech cases can be justified by examining listeners' rights, not just speakers' rights).

overbroad measures.[23] It also has clamped down on judicial discretion not to hear cases on prudential standing grounds. None of these cases directly addressed the free speech overbreadth doctrine. Yet they lend significant support to the proposed unified approach to all facial challenges on overbreadth grounds.

This Article proceeds in four parts. Part I sets forth the conventional rules regarding constitutional challenges to facially overbroad statutes as a backdrop to the free speech outlier cases. It then shows how the free speech overbreadth doctrine departs from these customary rules.

Part II describes the tension between the free speech overbreadth doctrine and Article III, and seeks to resolve that tension. This discussion builds on seminal scholarship that details the constitutional and analytical flaws in prevailing doctrine. Part II then extends that analysis to frame a new, theoretically sound, basis for a unified approach to overbreadth challenges.

Part II first notes that Henry Paul Monaghan argued almost thirty-five years ago that the overbreadth doctrine is properly understood as "simply an examination of the merits of the substantive constitutional claim."[24] The free speech litigant is not pursuing the third party's claim after all; she is asserting her own constitutional right not to be burdened by an overbroad law.[25] All enjoy a right not to be governed by laws

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23. *See infra* text accompanying notes 196–227.

24. Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (1981).

25. *See* Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912) (noting that "if the statute embraces [unconstitutional] cases as are supposed, it is void as to them, and if so void, is void *in toto*."). *See generally* Monaghan, *supra* note 24, at 3 (arguing that the overbreadth doctrine is best understood as requirement that one be judged by a valid rule of law). *See also* Kermit Roosevelt III, *Valid Rule Due Process Challenges:* Bond v. United States *and* Erie's *Constitutional Source*, 54 WM. & MARY L. REV. 987, 1003–10 (2013) (arguing this is a substantive due process and First Amendment limit). The relationship between standing and the merits was explored in the influential article by Judge Fletcher. *See* Fletcher, *Structure of Standing*, *supra* note 11. Fletcher described the relationship as follows:

> If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it. If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it. Congress should have some, but not unlimited, power to grant standing to enforce constitutional rights. The nature and extent of that power

that cast a pall on freedom of speech, and all can allege an injury sufficient for standing purposes in cases that challenge the law on overbreadth grounds.

Richard Fallon and Michael Dorf then extended the Monaghan insight to third-party standing law more generally. In Fallon's view, "[t]he due process clause or, more generally, the rule of law" undergirds the overbreadth doctrine.[26] He also analyzed the actual pattern of decided cases and found conventional wisdom about facial challenges to be largely wrong.[27] Facial challenges happen far more often than the arguments intoned against them admit, and successful ones already occur beyond the free speech context.[28] That is, the overbreadth doctrine of the First Amendment can be seen as a subset of a wider practice of overturning laws on facial challenges when the laws cannot be saved by sensible narrowing constructions.

Finally, Kermit Roosevelt illuminated the overlooked substantive due process features of the overbreadth doctrine. The free speech overbreadth doctrine is but one piece of a larger substantive due process mosaic that permits litigants to test laws for validity in all cases in which the laws transgress constitutional boundaries, both facially and significantly.[29]

Part II then expands upon these crucial scholarly insights to reframe the theoretical underpinnings of the free speech overbreadth doctrine and place it firmly within Article III. Under this new, harmonized approach, free speech overbreadth cases no longer would be doctrinal or constitutional sore thumbs.

Part III shows why the current Court may be ready for this unified approach to overbreadth. *Lexmark International, Inc. v. Static Control Systems*[30] suggests the United States Supreme

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should vary depending on the duty and constitutional clause in question. *Id.* at 223–24. *See also* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

26. Fallon, *supra* note 13, at 862. *See also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238 (1994) (noting that "no one may be judged under an unconstitutional rule of law").

27. Fallon, *supra* note 13.

28. *See, e.g.*, Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); Bowen v. Kendrick, 487 U.S. 589 (1988); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

29. Roosevelt, *supra* note 25.

30. 134 S. Ct. 1377 (2014).

Court may accept arguments about overbreadth as a first-party claim, though it does so only implicitly. This Article makes the connection explicit.

In *Lexmark* the Court ruled that an ostensibly "prudential" limit on standing—the "zone of interests" or "statutory standing" rule—should be redefined as a merits question in statutory cases, not as a jurisdictional question.[31] *Lexmark* supports treatment of the overbreadth doctrine and its rules about facial challenges of constitutionally overbroad laws as the baseline for *all* facial challenges asserted on this ground.

In the second case, *Spokeo v. Robins*,[32] the Court confronted whether and when Congress can create a new, statutory injury that may expand the "concrete harm" element of Article III. It restated that Congress must color within the constitutional standing lines. This was a fairly unremarkable claim, post-*Lujan v. Defenders of Wildlife*[33]—but one that has nonetheless been extremely controversial.[34] The Roberts Court firmly embraced a *Lujan* inspired "no discretionary bubbles" approach to standing. This reinforces an idea central to the proposal advanced here: the overbreadth doctrine cannot extend beyond an Article III hard stop. The Court's approach to free speech overbreadth cases therefore must be reconciled with Article III or jettisoned.

Part IV proposes reconciliation. It sets forth the elements of a new unified test under which all facial challenges of overbroad measures that chill fundamental constitutional rights receive the same treatment. This proposal rests on a normative assertion: free speech rights do not merit

31. *Id.* at 1387–88.

32. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

33. 504 U.S. 555 (1992).

34. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen's Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (discussing how the case altered standing law in ways not necessarily dictated by Article III); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142 (1993) (critiquing *Lujan* on ground that injury-in-fact is not required by Article III). *But see* Roberts, *supra* note 6 (defending *Lujan*). *Cf.* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 309 (2008) (noting the confusion caused by *Lujan* and other cases about "injury-in-fact" and how the Court has effaced material, historical differences between public law and private rights cases, and observing that "[i]n private rights cases, the cognizability inquiry is whether the plaintiff has alleged the violation of a private right. In public law cases, the inquiry, by and large, is whether the factual injury the plaintiff identifies is a personal, material, quantifiable harm resulting from the government's alleged misconduct.").

preferential treatment in jurisdictional matters. It also is based on a practical observation: the case law on overbreadth is subject to internal caveats that have sowed unnecessary confusion and cry out for a revised approach. Moreover, the Court allows facial challenges in non-speech cases far more often than the Court's rhetoric about avoiding facial challenges suggests. Thus, it is time for a new test that better matches judicial practice and rhetoric—one that avoids potential constitutional problems, and brings the free speech overbreadth cases into explicit alignment with overbreadth challenges in other fundamental rights cases. This proposed reform of the overbreadth doctrine achieves all of these goals.

The proposal also is timely and judicially manageable.

It is timely because the highlighted recent cases make the analytical fissures within the law on facial challenges harder to ignore. Also, recent trends in free speech law are likely to make the puzzling theoretical gap between speech and non-speech cases more apparent. Free speech protection is being extended in regulatory zones that once operated without serious First Amendment scrutiny.[35] As free speech protection expands, litigants likely will raise more overbreadth challenges to laws that chill protected speech. This means speech outlier cases will grow in number and the analytical tension between them and other fundamental rights cases will grow as well. Courts may be hard-pressed to ignore that tension.

The proposal is judicially manageable because it is analytically straightforward, can mend the doctrinal fissures without unduly disrupting settled case law, and is non-esoteric.[36] The proposal respects the practical and constitutional limits on judicial authority to upend legislation. Properly understood, the overbreadth doctrine would remain very "strong medicine"[37] reserved for worst case drafting

35. *See infra* text accompanying note 57. *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015); Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015).

36. *See* RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 43 (2016) (noting how legal scholarship has become esoteric in ways that widen the communication gap between the academy and the judiciary and that defeat the aims of academics who seek to influence case law).

37. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). *See also* United States v. Williams, 553 U.S. 285, 293 (2008). *See generally* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564 (2002); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997); Osborne v. Ohio, 495 U.S. 103 (1990).

scenarios. Facial challenges of even very poorly crafted laws still would be quite difficult to mount and would encounter stiff standing, ripeness, and severability headwinds.

What would change—and this matters—is that the basic test for facial challenges on overbreadth grounds would be uniform across constitutional contexts. Further, the test would be based on firmer analytical and constitutional struts. It also would apply in federal and state court actions alike. Overbreadth under the First Amendment no longer would be an arcane and puzzling Article III one-off understood only by jurisdiction insiders, but an illustration of a basic, substantive due process baseline that disciplines lawmakers and protects individuals and other protected entities from the chilling effect of especially ham-fisted legal measures. Where laws are worth saving, however imprecise, courts can and should still oblige by pruning, rather than upending, them. But where laws are grossly and transparently unmindful of the need to tailor them to legitimate government ends, these laws can and should be pulled up by their roots whether they chill speech or non-speech rights. This Article sets forth the analytical and doctrinal steps to that normatively worthy end.

I. CHILLING RIGHTS—CONVENTIONS AND DEPARTURES

Challenges to government acts[38] that chill constitutional rights must observe four jurisdictional conventions. The first involves how courts treat facial challenges to statutes. The second involves how facial challenges and severability principles interact. The third involves Article III limits on litigant standing in federal courts. The fourth involves the relationship of third-party standing to Article III limits.

This Section describes each set of rules, explains how the overbreadth doctrine of the First Amendment may alter the analysis under each, and discusses how free speech departures from customary jurisdictional rules have been justified.

38. *See* Rosenkranz, *supra* note 5, at 1221 (arguing that "[t]o say that 'a statute violates the constitution' [sic] is to perpetuate a pathetic fallacy that is profoundly analytically misleading. . . . Judicial review is not the review of statutes at large; judicial review is constitutional review of government *action*.") (emphasis added).

A. The Context

Assume that a city council adopts the following policy: "No First Amendment activity is allowed in the public parks without prior approval by park officials."

Speech or expressive activity is a significant part of the government's target, and the policy is quite plainly facially and substantially overbroad.[39] In short, this is not a valid law[40] absent a judicial construction of it that would defy the drafter's imagination and intentions. Any judicial severing or saving constructions would be truly heroic, perhaps absurd. There simply is no constitutionally sound text to save. Instead, the court would need to write a new public park speech ordinance, essentially from scratch.

A litigant challenging such an overbroad law would need to navigate the following complicated prudential and jurisdictional questions: Who can challenge this facially infirm policy in federal court, if anyone? Does it matter whether the person who wishes to challenge the rule wants to make illegal threats versus engage in protected political speech? What timing restraints apply? Does it matter whether the government ever has applied the measure to the party who challenges the measure, or to anyone else? If so, how long must a party wait until he or she can file the suit? The complicated and arcane precedent that governs these questions, explored in the next Section, could baffle even the most sophisticated litigant.

B. The Jurisdiction Pieces

Answering these "how soon" and "by whom" questions has multiple parts.

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39. *See* Bd. of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987) (striking down resolution banning all First Amendment activity at the Los Angeles International Airport). It also is unconstitutionally vague.

40. Some commentators think there are actually two qualitatively distinct types of facial challenges. An overbreadth challenge is one that "predicates facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law" whereas others are "valid rule challenges" that "predicate[] facial invalidity on a constitutional defect inhering in the terms of the statute itself." Marc. E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement,* 48 AM. U. L. REV. 359, 363–64 (1998).

1. Merits Inquiry

First is a merits inquiry: Does the rule on its face prohibit constitutionally protected speech? This public park policy plainly does so. A public park is a quintessential public forum. Political rallies often may be held there, among other protected First Amendment activities. The policy runs roughshod over indisputably protected speaker rights. We will return to the significance of the merits question below.

2. Facial versus As-Applied

Second, is the rule fatally overbroad on its face, or is it merely unconstitutional as applied to the litigant? This implicates a related question: Can the measure be saved by a narrowing construction?

As this Section explains, the Court often has distinguished between facial and as-applied challenges in ways that bear directly on the overbreadth question. It favors as-applied challenges across the board. But it has developed two approaches to facial challenges: one for free speech cases, and one for all others. In free speech cases, facial challenges are subject to a more liberal test than are challenges of measures based on other fundamental rights.

Or so the Court says. The actual judicial practice is not in total synch with judicial rhetoric.[41] Yet the rhetoric about a more forgiving test in free speech cases persists, and is sometimes matched by a practice of treating speech and non-speech facial challenges differently.

The result is substantial confusion about the general governing rules and uncertainty about how they should be applied.

a. Facial Challenges in Free Speech Cases

In a free speech case, the Court eases the test for when a

41. As Fallon has noted, "all challenges to statutes begin as as-applied challenges, with the distinguishing mark of facial challenges involving the nature and breadth of the reasons that challengers offer in seeking a ruling that a statute cannot validly be applied." Fallon, *supra* note 7, at 964. That is, the distinction between as-applied and facial challenges actually is much fuzzier than many recognize.

facial challenge on overbreadth grounds may succeed. Specifically, the Court asks whether the overbreadth is "real . . . [and] substantial . . . judged in relation to the statute's plainly legitimate sweep."[42] As explained below,[43] the normal rule regarding a facial challenge of a measure on overbreadth grounds is ostensibly much stricter; it requires that there be *no set of circumstances* in which the law might be constitutionally applied.

The free speech solicitude[44] may stem in part from the ways in which free speech is a rainbow right favored across the political spectrum. Progressives tend to object to chilling of expression caused by government surveillance,[45] mandatory

42. *Broadrick*, 413 U.S. at 615. *See also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (noting that to prevail on a facial challenge the party "must demonstrate a substantial risk that the application of the provision will lead to the suppression of speech"). *See generally The First Amendment Overbreadth Doctrine*, *supra* note 12.

43. *See infra* text accompanying notes 71–79.

44. The Court is inconsistent in applying the overbreadth doctrine, even within free speech cases. In *Laird v. Tatum*, a group sought to challenge a domestic army surveillance program because it chilled their expression. 408 U.S. 1, 2 (1972). The Court acknowledged that the chilling effect of the program might render it unconstitutional, but still held that the chill was insufficient to confer standing. *See id.* at 12–14; *cf.* Meese v. Keene, 481 U.S. 465, 473 (1987) (finding there was standing to challenge the classification of a film as political propaganda on the ground that such classification would not merely cause a "subjective chill" but also would impact reputation). Justice Scalia once stated that a "'[c]hilling effect' is . . . the reason why the governmental imposition is invalid" under the First Amendment "rather than . . . the harm which entitles the plaintiff to challenge it." United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1378 (D.C. Cir. 1984). This might suggest he would have been receptive to the valid-rule-of law type defense of the overbreadth doctrine, though his disdain for substantive due process likely would have led him to reject a due process justification for the principle. He might instead have warmed to the Rosenkranz view of why First Amendment overbreadth challenges are textually distinctive. *See* Rosenkranz, *supra* note 5 (discussing significance of the amendment statement that *Congress* shall make no law). The Court also has resisted applying the overbreadth doctrine in commercial speech cases. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 380–81 (1977); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978); Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496–97 (1982). But as Justice Scalia stated in *New York v. Fox*, that "means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground—our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators. . . . [A]lthough the principal attack upon the resolution concerned its application to commercial speech, the alleged overbreadth (if the commercial-speech application is assumed to be valid) consists of its application to *non-commercial speech*, and that is what counts." 492 U.S. 469, 481–82 (1989) (emphasis added) (citations omitted).

45. *See, e.g.*, Wikimedia Found. v. Nat'l Sec. Agency, 143 F. Supp. 3d 344 (D.

pre-abortion scripts,[46] laws that prohibit physicians from inquiring into patients' gun ownership,[47] and "ag-gag" laws that forbid undercover recording of activity at private agricultural facilities.[48] Civil libertarians worry about the chilling effect of Securities and Exchange Commission ideologically inflected disclosure rules,[49] regulations that restrict truthful and non-misleading commercial speech,[50] workplace laws that restrict dissenting expression,[51] Lanham Act restrictions on "disparaging" trademarks,[52] and limits on corporate campaign expenditures.[53]

Freedom of expression also has powerful defenders that cross the ideological spectrum of the United States Supreme Court.[54] Justice Kagan and the late Justice Scalia agreed that California cannot restrict access to violent interactive videos to minors absent parental consent.[55] Chief Justice Roberts and Justice Sotomayor agreed that the Westboro Baptist Church could not be prevented from peacefully picketing a military funeral from a public sidewalk.[56] Other examples of strange political bedfellows abound in the realm of free speech case

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Md. 2015) (rejecting facial challenge).

46. *See, e.g.*, Pruitt v. Nova Health Sys., 292 P.3d 28 (Okla. 2012) (*per curium*) (holding Oklahoma law that required, inter alia, a mandatory pre-abortion script, facially unconstitutional under *Casey*).

47. *See, e.g.*, Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014) (upholding a law on the ground that it satisfied strict scrutiny, but declining to rule on whether all content-specific laws that restrict professional speech should trigger strict, versus intermediate scrutiny).

48. *See, e.g.*, Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2014) (holding ALDF had standing to assert free speech claim against state "ag-gag" law).

49. *See, e.g.*, Nat'l Ass'n Mfrs. v. Sec. Exch. Comm'n, 748 F.3d 359 (D.C. Cir. 2014), adhered to on rehearing *en banc*, 800 F.3d 518 (D.C. Cir. 2015).

50. *See, e.g.*, Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) (striking down a Vermont law that restricted sale, disclosure and use of records of prescribing practices of physicians by pharmaceutical and data mining companies without physician consent).

51. *See, e.g.*, Nat'l Ass'n Mfrs. v. Nat'l Labor Relations Bd., 717 F.3d 947 (D.C. Cir. 2013), *overruled in part on other grounds*, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

52. *See, e.g.*, *In re* Tam, 808 F.3d 1321 (Fed. Cir. 2015) (*en banc*) (striking down Lanham Act provision).

53. *See, e.g.*, Citizens United v. Fed. Election Comm., 558 U.S. 310 (2010).

54. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (holding that a municipal ordinance that is content-specific on its face cannot be deemed content-neutral because the Town offered non-speech related justifications to defend it).

55. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

56. Snyder v. Phelps, 562 U.S. 443 (2011).

law, which makes these times relatively good for freedom of speech advocates. Judicial receptiveness to free speech claims is growing. Those who favor a brake on this First Amendment advance thus have real cause for concern, while those who fear robust free speech protection by the Court is eroding have scant recent doctrinal justification for their anxieties.[57]

These advances of free speech and the bipartisan luster of the First Amendment also may lead to greater judicial willingness to act favorably on facial challenges that chill this newly protected speech. More free speech coverage logically will lead to more overbreadth challenges, which in turn could exacerbate the constitutional and analytical tension between free speech overbreadth doctrine and the conventional jurisdiction rules.

Free speech litigants seeking to raise an overbreadth challenge likely will invoke *United States v. Stevens*,[58] which illustrates the pro-speech leanings of the Roberts Court. In *Stevens*, the Court struck down as overbroad a federal statute that criminalized commercial creation, sale, or possession of

57. *See, e.g.*, Leslie Kendrick, *First Amendment Exceptionalism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) (describing "First Amendment expansionism, where the First Amendment's territory pushes outward to encompass ever more areas of law"); Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 51 (2012) (noting that the newer case law threatens "[m]uch of the work of the Federal Trade Commission, the Securities and Exchange Commission, and countless other governmental agencies [that is] is predicated on the government's ability to pursue and punish not only fraud, but also statements which may be misleading or on the government's ability to require various disclosures in order to conduct certain businesses"); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) (observing that "[i]t is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable."); Michael R. Siebecker, *Securities Regulation, Social Responsibility, and a New Institutional First Amendment*, 29 J. L. & POL. 535, 535 (2014) (worrying that "a looming jurisprudential train wreck between the Supreme Court's commercial speech doctrine and its disparate approach to corporate political speech threatens the integrity of the securities regulation regime."); Rebecca Tushnet, *Cool Story: County of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015) (describing the First Amendment as "the new *Lochner*, used by profit-seeking actors to interfere with the regulatory state in a way that substantive due process no longer allows"); Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 2, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation [https://perma.cc/ZU32-Q43U] (casting doubt on free speech arguments that thwart useful regulation).

58. 559 U.S. 460 (2010).

certain depictions of animals.[59] Congress hoped to curb the abuse of animals by destroying the market for images of the abuse. The statute thus reached portrayals of acts, not just the underlying acts themselves, and applied to any visual or auditory depiction in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if the underlying conduct is illegal where the depiction was created, sold, or possessed.[60] The law provided an exemption for depictions that had serious artistic, historical, scientific, religious, political, educational, journalistic, or artistic value.[61]

Stevens ran a business and website that sold videos of pit bulls participating in dogfights and attacking other animals.[62] The footage included dogfights in Japan—where they are legal—older films of dogfights in the United States, and films that depicted use of pit bulls to hunt wild boar that included a scene in which a dog viciously attacked and killed a domestic pig.[63] He was prosecuted under the statute, and challenged this action on free speech grounds.[64]

Stevens did not argue that videos of illegal dogfights that lack serious value cannot be banned. He argued that the statute reached a substantial amount of other constitutionally protected images—such as footage of hunting videos—and that these were "the vast majority of materials subject to the statute."[65] Applying the overbreadth doctrine described above, the Court agreed. It noted that the government "made no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense . . . rests on interpreting the statute as narrowly limited to specific types of 'extreme' material."[66]

The Court concluded the statute was one of "alarming breadth," and was not restricted to depictions of cruelty.[67] It rejected the government's effort to restrict the statute's application to depictions of cruelty, given its unambiguous

59. *Id.* at 464, 482.
60. *Id.* at 465.
61. *Id.*
62. *Id.* at 466.
63. *Id.* at 466.
64. *Id.* at 466–67.
65. *Id.* at 473.
66. *Id.*
67. *Id.* at 474.

language.[68] It also rejected the government's attempt to defend the statute on the grounds that it would prosecute only extreme acts of cruelty under the exceptions clause.[69] The Court stated that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*."[70]

b. Facial Challenges in Non-Speech Cases

Yet in non-speech cases the Court's concerns about *noblesse oblige* fade. It ostensibly imposes a much stricter, "no set of circumstances" test for facial challenges of overbroad laws.[71] As the Court in *Stevens* noted, the typical rule is that facial challenges should prevail only when there is no constitutional application of the statute.[72] For example, if an overbroad law chills privacy or procedural due process rights, it is not properly subject to a facial (versus as-applied) challenge unless no set of circumstances exists in which the law could be lawfully applied to anyone.

Commentators have questioned the harshness of the rule, as well as whether courts consistently apply it.[73] Indeed, the Court itself has struggled with the doctrinal confusion about facial challenges. Three cases suggest the Court is beginning to see the problems with the strict rule against such challenges and may be poised to adjust its practice and rhetoric accordingly.

For example, in *Planned Parenthood v. Casey*, the question arose as to whether a spousal notification requirement constituted an unreasonable burden on married women's right to abortion, where many married women were likely to consult their spouses.[74] The Court stated that a facial challenge may be appropriate where "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial

68. *Id.* at 476.
69. *Id.*
70. *Id.* at 480.
71. United States v. Salerno, 481 U.S. 739, 745 (1987).
72. United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting *Salerno*, 481 U.S. at 745).
73. *See, e.g.*, Dorf, *supra* note 26, at 241; Fallon, *supra* note 7, at 935–48; Isserles, *supra* note 40, at 395–415 (discussing critiques, but disagreeing with their interpretations of *Salerno*).
74. 505 U.S. 833, 888–89 (1992).

obstacle to a woman's choice to undergo an abortion."[75] Controversy followed over whether this passage from *Casey* relaxed the "no set of circumstances" test in abortion cases or could be squared with it.[76]

The Court clarified in *Los Angeles v. Patel*—a Fourth Amendment case—that this passage could be squared with the general rule, noting that "when assessing whether a statute meets this [no set of circumstances] standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct."[77] Thus the "no set of circumstances" rule remains the typical rule for facial challenges, but it may not be as harsh as some fear. In other words, *Casey* did not set forth a new rule applicable only in reproductive rights cases, but expressed a riff on the old one. This riff presumably is not unique to abortion cases and softens the impact of the general rule.

In its most recent reproductive rights case, *Whole Woman's Health v. Hellerstedt*, the Court allowed a facial challenge to a Texas law that placed an undue burden on abortion rights.[78] In fact, the Court made no mention of the "no set of circumstances" rule and stated that "if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper.' . . . Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims."[79]

c. Closing the Gap

These shifts matter. If the "no set of circumstances" rule is not so strict in non-speech cases, and if it need not even be mentioned in a case that involved facial challenges, then the gap between this rule and the overbreadth doctrine of free

75. *Id.* at 895.

76. Isserles, *supra* note 40, at 363 (describing the conflict between *Salerno* and *Casey* as "a false one that rests on a fundamental misconception about the nature of facial challenge adjudication in the federal courts").

77. 135 S. Ct. 2443, 2449 (2015) (facially invalidating a municipal ordinance that compelled hotel operators to obtain information about guests and provide it to police on demand, and noting that facial challenges in Fourth Amendment cases are not "categorically barred or especially disfavored").

78. 136 S. Ct. 2292 (2016).

79. *Id.* at 2307 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 333 (2010) and referring to Fallon's work on facial versus as-applied challenges).

speech cases already has narrowed. The Court therefore may be poised to accept the step advanced here: treat facial overbreadth challenges of all fundamental rights cases the same.

Whole Woman's Health, Patel, and *Casey* add additional cracks in a wall that *should* tumble. Yet the fractured wall still stands. Cases like *Stevens* show that the current Court—if only rhetorically—still views the standard applied in First Amendment overbreadth cases as a gentler one than the "no set of circumstances" standard. Free speech cases therefore remain analytical outliers even if these newer cases on facial challenges suggest that the distance between them and other constitutional cases may be closing.[80] Closing the remaining gap will require making the link between these cases and free speech overbreadth doctrine more explicit, and addressing any remaining reasons against abandoning outlier treatment of free speech overbreadth cases.

Some commentators think the outlier treatment is analytically justifiable. For example, some maintain that the two rules can be distinguished because overbreadth under the First Amendment examines the number of potentially unconstitutional applications of an *otherwise valid* rule.[81] The stricter, "no set of circumstances" test only applies when the challenge is to the *validity of the rule itself*.[82]

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80. The Court also arguably applies a more generous "void for vagueness" test in free speech cases. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (discussing void for vagueness test in free speech cases, but holding none violated by anti-noise ordinance that applied to school zones); Coates v. Cincinnati, 402 U.S. 611, 617, 620 (1971) (White, J., dissenting) (discussing void for vagueness rule that applies in free speech cases, and noting that "[a]lthough a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others"); Smith v. California, 361 U.S. 147, 151 (1959) (noting that the Court may apply a stricter standard of permissible statutory vagueness in free speech cases); *cf.* Holder v. Humanitarian Law Project, 561 U.S. 1, 20 (2010) (noting that the general rule that a void for vagueness challenge cannot be raised by a party on the grounds that a law is vague as to the conduct *of others* "makes no exception for conduct in the form of speech").

81. *See* Isserles, *supra* note 40; Roosevelt, *supra* note 25.

82. The Court has fleetingly seemed to recognize, yet not fully embrace, this "valid rule" feature. It has stated as follows:

> It is not the usual judicial practice . . . to proceed to an overbreadth issue . . . before it is determined that the statute would be invalid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be

Yet nothing in *Stevens* suggests the Court itself embraces this distinction, or that it matters to its analysis. Moreover, overbreadth challenges in free speech cases may be a second type of facial challenge, subject to a more forgiving analysis, under which parties who could have been prosecuted under a narrower statute may prevail. In both kinds of cases, however, the result should be the same: the overbroad law, *as written*, cannot be enforced *against anyone*. Getting there may be easier in free speech cases,[83] but this should not be because two

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> bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than as applied . . . .

Bd. of Trs. v. Fox, 492 U.S. 469, 484 (1989); *see also* New York v. Ferber, 458 U.S. 747, 768 n.21 (1982) (noting in a footnote, with a citation to Monaghan, that "[o]verbreadth challenges are only one type of facial attack").

83. Discussing the values of facial challenges in free speech and other constitutional contexts, David Gans argues as follows:

> From free speech and privacy cases to vagueness doctrine to Establishment Clause cases, the Court's jurisprudence is replete with strategic facial invalidations. What unites these disparate cases is the Court's conclusion that, in each of these areas of the law, facial invalidation is a better means of implementing the Constitution than case-by-case adjudication.
>
> Emerging from this caselaw . . . are two rules that operationalize the conceptual category of strategic facial challenges. First, the challenged statute must infringe constitutional rights in a large or substantial number of cases. It is only in such circumstances that the benefits of facial invalidation outweigh its costs. Second, as-applied adjudication must not suffice to protect constitutional rights for some pragmatic reason. Facial invalidation is justified as a strategic tool to protect constitutional rights and guarantees—and a better means of implementing the Constitution—because as-applied adjudication is not an adequate protector of constitutional rights.

David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1337 (2005). Gans asserts that analysis of facial challenges has focused too narrowly on the chilling effect rationale of free speech cases. *Id.* Instead, he maintains that strategic facial challenges can have several theoretical bases:

> They are: (i) a chilling effect theory, featured not only in First Amendment overbreadth doctrine, but also in privacy, vagueness, voting, and travel cases; (ii) an excessive discretion theory that condemns statutes that confer too much discretion on actors to violate constitutional rights because (a) discriminatory abuse of that discretion might not be detected in case-by-case review and (b) case-by-case review of whether the actor abused that discretion might come too late to protect adequately constitutional rights; and (iii) a stigma theory, which calls for facial invalidation of laws that send a message of inequality because case-by-case review does not promise to eliminate expeditiously the law's stigmatic message.

different *jurisdiction* standards apply.

Third, in speech and non-speech cases, the facial validity of a law depends on speculation about the number of potential unconstitutional applications of the statute. In theory, that number in non-free speech cases arguably needs to be,[84] or nearly approach, zero, versus a very large number. The Court's willingness to interpret the law as ambiguous, and thus susceptible to narrowing constructions or severability, may dip in non-speech cases.[85] Again, however, "the extent to which a ruling is as-applied to particular facts will be a matter of degree."[86]

Finally, actual judicial practice favors one test. In other contexts—Commerce Clause, dormant Commerce Clause, right to travel, Eighth Amendment, commandeering, Article IV Privileges and Immunities, and religion clause cases—the Court has been willing to strike down legislation on facial challenges. Even though these challenges are not treated as overbreadth challenges per se, they demonstrate that the rule against facial challenges is easily overstated, and that the rhetoric about favorable treatment of facial challenges of laws that chill free speech may be overblown and misleading.[87] The basic question is the same: Is the law, as written, crafted to satisfy the applicable constitutional test? One component of this issue is the proper tailoring question captured by the overbreadth doctrine. That component focuses on whether the law is so clumsily drafted that it scoops up too much constitutionally protected conduct to survive the applicable level of judicial scrutiny. No judicial severing or narrowing construction can save it. It simply is not a valid law. As the

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Id. at 1338.

84. Many cases betray judicial willingness to stray from this strict test, and some question it openly. *See* Rosenkranz, *supra* note 5, at 1232–35 (discussing cases and scholarship seeking to clarify the elusive differences between facial and as-applied challenges).

85. *See* Monaghan, *supra* note 24, at 29 (arguing that in the First Amendment context statutes may not be presumed to be severable as they are in other contexts).

86. Fallon, *supra* note 7, at 925.

87. *Id.* at 936. *See also* John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 55, 79–94 (2004) (discussing use of overbreadth in non-speech contexts that involved fundamental rights); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1735, 1756–57 (2006) (noting the Court's preference for as-applied challenges and that this traverses a broad swath of constitutional cases).

Court stated in *Whole Woman's Health*, striking the law down *in toto* is a proper remedy even for a litigant's as-applied claim.[88]

Of course, the Court first must see this link across its speech and non-speech cases and recognize that facial challenges of invalid laws are more common across substantive domains than the Court's rhetoric suggests.[89] Part III addresses both of these issues.

3. "By Whom" and "How Soon?"—Standing and Ripeness

Facial challenges of overbroad laws assert an inherent defect of the law and implicate timing issues. They raise the question of whether the drafters acted unconstitutionally *ab initio*[90] and the question of "by whom" the law can be challenged.

Standing and ripeness doctrines bear on both issues. Standing doctrine asks if there is (yet) an injury-in-fact[91] to the party in question that is sufficiently linked to the conduct being challenged and that also meets the requirements of redressability and causation.[92] A party ordinarily cannot assert the rights of others, but must point to his or her own injury-in-fact. Ripeness doctrine asks whether the issues have matured

88. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2292 (2016).

89. This point is further developed in Part IV.

90. As Rosenkranz puts it, is the measure "rotten to the core?" Rosenkranz, *supra* note 5, at 1232. A recent freedom of speech case that explicitly embraces this notion is *Heffernan v. City of Paterson*. 136 S. Ct. 1412 (2016). In this case, a public employee was demoted when his supervisors mistakenly assumed he had engaged in constitutionally protected speech. Even though he had not done so, the employer's bad motive was enough to trigger free speech protection from the demotion under 42 U.S.C. § 1983. As the Court noted, "the First Amendment begins by focusing *on the activity of the Government*." *Id.* at 1418 (emphasis added). Even though the employee had not actually engaged in protected speech activity, the employer's retaliation "tells the others that they engage in protected activity at their peril." *Id.* at 1419. The Court noted the relationship of this rule to the overbreadth doctrine and stated that "[t]he upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake." *Id.*

91. As the Court has stated, the standing and ripeness questions both derive from Article III and often "boil down to the same question." Med-Immune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007).

92. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (outlining basic requirements).

to the point where a court can address a sufficiently concrete case or controversy.[93]

Standing and ripeness restrictions apply in all First Amendment cases[94] but with a looser grip than in other areas of constitutional law.[95] Again, a First Amendment plaintiff can challenge a law on overbreadth grounds because it may reach protected speech of third parties.[96] This is so even though the plaintiff's own speech could have been regulated under a more narrowly tailored measure, which ordinarily prevents a party from asserting a facial challenge.[97] The "bad actor" plaintiff does not need to have any relationship to the third-party "good actor" whose rights the plaintiff asserts. Finally, the plaintiff may assert the overbreadth claim without showing that the third party herself could not have brought it directly.[98]

But this is strange. If one conceptualizes the overbreadth doctrine as allowing a first party to assert the rights of a third party, it conflicts with the general rule that each party must have standing to assert a claim herself, and the notion that her injury must be non-hypothetical. So characterized, overbreadth doctrine is an exception to this general rule against third-party standing, and all free speech overbreadth cases are, at root, third-party claim cases.

There also is no obvious reason why a party as to whom a law works perfectly should be allowed to challenge that law on behalf of a stranger to the lawsuit, against whom the law could not be applied. Even less clear is why the challenge should be entertained more readily if it involves speech versus other fundamental rights. Lastly, but most fundamentally, the free speech deviation must comply with Article III.

Even if one concludes that the challenge is not, in fact, a third-party challenge but is a first-party challenge, one must

93. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 148–53 (1967) (discussing ripeness doctrine).

94. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2345 (2014) (noting that petitioners plead sufficiently specific statements they intended to make in future election cycles that arguably would violate the Ohio statute, and that the threat of future enforcement of the statute against them was substantial).

95. *See id.* at 2344 (noting that the threatened proceedings were of particular concern because they burdened electoral speech).

96. United States v. Stevens, 559 U.S. 460, 473 (2010).

97. Thornhill v. Alabama, 310 U.S. 88 (1940); Dombrowski v. Pfister, 380 U.S. 479 (1965).

98. *See, e.g.*, *Stevens*, 559 U.S. at 473.

surmount the hurdle of *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.*—a statute cannot be deemed void *in toto* simply because it is void in some cases.[99] Its century-plus old rule is that litigants cannot assert the rights of third parties. That prohibition endures, though with some exceptions.[100] Courts typically address how a measure applies to the litigants before them and will not speculate on how it may be applied to others.[101] This principle affects how courts tend to handle all facial challenges, including overbreadth-based ones. The presumption against facial challenges is broader than the presumption against third-party standing, but it arises from overlapping concerns about judicial efficiency and authority.[102]

Yet there *are* exceptions to this general principle. For example, the *jus tertii* doctrine allows parties who have standing to assert a claim measure to also raise claims of others implicated by the same law, provided they stand in a special relationship to the third party and can fairly assert their interests.[103] Both criteria must be satisfied. For example, a doctor with standing to assert her own rights may be permitted under this principle to assert the constitutional rights of her patient. Or a commercial actor who wishes to sell beer with reduced alcohol content to male minors may be able to assert the rights of his minor patrons.[104]

The overbreadth doctrine of the First Amendment thus works like *jus tertii* in some respects. But it operates quite differently in others. Specifically, the overbreadth doctrine arguably allows a party to invoke others' rights in support of her own. Yet it only allows this insofar as the successful

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99. 226 U.S. 217, 219–20 (1912); *see also* United States v. Raines, 362 U.S. 17, 21 (1960) (noting 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"). *But see* Fallon, *supra* note 7, at 926 (describing *Yazoo* as the "central pillar of conventional understanding that facial challenges are anomalous and disfavored, that the most familiar tests of constitutional validity do not license them, and that a presumption of severability explains how facial challenges can be readily dismissed").

100. *See Yazoo*, 226 U.S. at 217.

101. *Id.* at 219–20.

102. *See* Fallon, *supra* note 7.

103. Some cases added that it mattered if the third parties for some reason could not assert their own rights. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953). But this aspect of *jus tertii* standing "diminished." Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 288 (1984).

104. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

challenge to an overbroad law depends on the existence of many examples of how these "good actors" may be chilled.[105] Unlike *jus tertii* cases, the free speech litigant *need not* stand in a special relationship to the absent third party and there *need not* be a reason why the third party could not assert her own rights.[106] Conventionally understood, "the first amendment was thought to free litigants from the general limitations of as-applied challenges in permitting them to challenge the 'facial' validity of a statute by raising the 'rights' of 'hypothetical' third parties."[107] Any "bad actor" challenge based on their rights thus is inherently a facial challenge, versus an as-applied challenge.

In sum, multiple jurisdictional hurdles may be lowered in free speech cases. Projected versus actual injuries may suffice for standing more readily than in other cases. Facial versus as-applied challenges may be permitted more often than in other realms. Finally, parties may assert the constitutional rights of third parties even when their own rights may not have been violated, and even when they stand in no special relationship to that third party.[108] All of these departures make free speech cases unusual.

Even odder than these departures from jurisdiction conventions is that the fate of the challenged law may differ if the party seeking to overturn it on overbreadth grounds is a "good actor" versus a "bad actor." A successful overbreadth claim by a "bad actor"—one as to whom a properly drafted law could have been written—will result in the law being struck down *in toto*. A successful overbreadth claim by a "good actor"—one against whom even a better drafted law could not apply—may result only in the law being struck down as applied.[109] This last twist may be the strangest one of all.

Yet even the foregoing list of jurisdiction oddities does not exhaust the ones raised in the case law. We turn now to

105. See discussion of overbreadth in Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (noting that the overbreadth must be substantial).

106. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 473 (2010).

107. Monaghan, *supra* note 103, at 282.

108. *See supra* text accompanying note 98.

109. *See* Roosevelt, *supra* note 25, at 1005–06 (discussing this puzzle). This rule, though, is not applied consistently. Courts sometimes allow facial challenges without first determining if the litigant's speech was constitutionally protected. *See, e.g.*, N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13–15 (applying overbreadth doctrine without determining whether litigant's speech was protected).

remaining timing and litigant conduct issues that can affect judicial analysis of overbreadth cases.

4. "How Soon?" Nuances

Courts seeking to confine their work to actual cases or controversies obviously care whether a policy has been applied to anyone yet. Executive decisions as to whether and how to apply acts matter to whether and when the judicial branch thinks it should step in. Also relevant to the jurisdiction inquiry is whether the measure has been applied to the particular party before it.

When a measure has yet to be applied *to anyone*, the question is the most purely legal, remote, and abstract. When the party asserting the claim can point to others as to whom a law has been applied, but not to herself, it is less abstract but still remote. Many of these nuances are captured by the standing and other jurisdiction issues addressed above, yet it is useful to place the cases in categories along an "enactment-to-challenge" time spectrum.

a. Pre-enforcement: Ink Barely Dry

The first category includes the "ink barely dry" cases. These cases are especially hard—though not impossible—to launch, and for good reason. Courts understandably are reluctant to leap in before the executive branches have a chance to determine whether to deploy the measures. A premature intervention may veer too far from the judicial role of resolving an actual case or controversy.[110] Thus such immediate facial challenges should be reserved for really awful drafting contexts, with especially bracing and foreseeable consequences. Correlatively, assertion of a facial challenge on overbreadth grounds as a defense to application of an act should be easier than asserting this defect offensively. In the latter case, the ink may be barely dry, but the government already has invoked the law. The threat of enforcement no longer is hypothetical.

A pre-enforcement, "ink barely dry" challenge of an

110. The ripeness doctrine overlaps here. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (discussing the many concerns raised by premature litigation).

overbroad law occurred in *Clapper v. Amnesty International*.[111] The Court dismissed the challenge on standing grounds.[112] On the day when the challenged law was enacted, respondents filed an action seeking a declaration that the act violated the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles, and sought a permanent injunction against its use.[113] The law expanded federal agencies' authority to monitor telephone, e-mail, and other communications between the United States and other countries, using high-volume, computer-driven techniques.[114] The respondents were U.S. citizens residing in the United States who sought judicial invalidation of an amendment to the Foreign Intelligence Surveillance Act.[115]

The respondents feared that their communications with overseas contacts were being monitored.[116] That is, the law chilled their professional speech and invaded their privacy. The majority held that they lacked standing to challenge the law because their claim was based upon a speculative chain of contingencies that would have to fall into place before their communications might be at risk of eavesdropping.[117] They had not shown that harms to them were "certainly impending."[118] The Court also expressed confidence that the Foreign Intelligence Surveillance Court would protect against abuses of the new surveillance program.[119]

The majority opinion rejected the respondents' argument that they almost certainly would be monitored by the program in the future, and that they were injured because they had adopted new and more expensive methods of reaching their contacts to avoid being monitored.[120] Both claims depended upon events that might never occur, or might not occur in a

111. 133 S. Ct. 1138 (2013).

112. *See also* Laird v. Tatum, 408 U.S. 1, 11–16 (1972) (holding challenge of government surveillance program not justiciable because parties were not subject to regulatory, proscriptive, or compulsory government action).

113. *Clapper*, 133 S. Ct. at 1145.

114. *Id.*

115. *Id.*

116. *Id.* at 1147–50.

117. *Id.*

118. *Id.* at 1147 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 n.2 (1992)).

119. *Id.* at 1149–50.

120. *Id.*

way the parties claimed.[121] Even if some of their electronic exchanges were being monitored, this may not have been linked to the specific statute challenged in the case.[122]

The dissenting opinion by Justice Breyer argued that the standard applied by the majority—that an injury must be "certainly impending"—was an unduly strict standard for probabilistic injuries.[123] The parties' relationship with foreign actors made it likely that their communications would be intercepted under the revised statute.

Clapper is difficult to pigeonhole. It undeniably applied a strict interpretation of probabilistic injury and did so in a free speech case that entailed core-value, political speech. Were this the only case on chilling and standing, the First Amendment

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121. *Id.*

122. *Id.*

123. *Id.* at 1160. As the dissent pointed out, some of the Court's past decisions had referred to a need for "certainly impending" injury, but future injury is seldom "absolutely certain," and the "federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely . . . to take place." *Id.* at 1155, 1160 (Breyer, J., dissenting). The plaintiffs stated that their work as lawyers, scholars, and journalists required them to communicate with people abroad whom the government believed to be affiliated with terrorist groups. *Id.* at 1158. Thus, the likelihood of injury arguably was large enough to permit standing. *See generally* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012) (discussing cases that allow plaintiffs standing for future injuries). The majority recognized that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." Clapper, 133 S. Ct. at 1150 n.5. *Clapper*'s outcome thus likely hinged on the presence of national security concerns: "[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Id.* at 1147.

In *Clapper*, the Court said "none of those [First Amendment] cases [cited by the plaintiffs] involved a 'chilling effect aris[ing] merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to the individual.' Because '[a]llegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm,' . . . [the] respondents here[] lack standing." *Id.* at 1152.

Clapper has inspired substantial commentary, most of it based on its view of probabilistic harms as this relates to standing. *See, e.g.*, Andrew C. Sand, Note, *Standing Uncertainty: An Expected Value Standard for Fear-Based Injury in* Clapper v. Amnesty International USA, 113 MICH. L. REV. 711 (2015) (arguing that the Court should apply an expected value standard from probability theory in fear-based injury cases, under which Court would use a weighted average of the likelihood and magnitude of injury); Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1284–89 (2013) (describing expected value approach to standing).

would not look exceptional at all.

But the case was written over a powerful dissent, and had at least two features that may make it easier to cabin going forward: the ink on the applicable amendment was barely dry, and powerful national security concerns arguably justified giving the government a go of it before a judicial challenge on the merits. Nevertheless, *Clapper* illustrates an important point: timing matters. Minutes after an overbroad measure is passed, litigants seeking to overturn it may rush in. Yet the headwinds to overbreadth challenges will be stiffest at this early stage, and properly so. Arguments about chilling of rights, the probabilities of litigant harm, or the nature of actual enforcement, are quite abstract. Judges may prefer to let enforcement facts unfold before stepping in to resolve even the purely legal questions raised by a facial challenge.

b. Pre-enforcement: Looming

Insight into when the Court thinks pre-enforcement challenges can be launched after the ink is dry may be drawn from a more recent free speech case. The cases are not easily squared, which shows the Court is not likely to hold fast to *Clapper*'s harsh standard in all cases.

In *Susan B. Anthony v. Driehaus*,[124] a party brought a pre-enforcement challenge to a state law that criminalized dissemination of known false statements about political candidates where a statement was designed to promote the election, nomination, or defeat of the candidate.[125] The Susan B. Anthony List (SBA) stated that a former Congressman's vote for the Patient Protection and Affordable Care Act was a vote in favor of "taxpayer funded abortion."[126] The Congressman filed a complaint against the SBA with the state elections commission, which reached a probable cause determination in his favor.[127] Before the Commission hearing, the SBA filed suit in federal district court seeking injunctive and declaratory relief.[128] The court stayed the action pending determination of

124. 134 S. Ct. 2334 (2014).
125. *Id.* at 2338–39.
126. *Id.* at 2339.
127. *Id.*
128. *Id.*

the Commission proceedings.[129] The parties then agreed to postpone the full Commission hearing until after the election, which the Congressman lost.[130] He withdrew his complaint with the Commission, and the district court stay was lifted.[131]

The lower court combined the SBA case with a separate suit making similar claims about the unconstitutionality of the state law.[132] The lower court held neither case was justiciable because there was no concrete injury for standing purposes and the matter was not ripe.[133] The Sixth Circuit affirmed on ripeness grounds.[134]

In a unanimous opinion by Justice Thomas, the United States Supreme Court reversed and remanded.[135] After intoning hornbook law on constitutional standing,[136] the Court noted that a credible threat of enforcement will suffice for purposes of the injury-in-fact requirement of Article III.[137] This was true even if the plaintiffs did not confess that their future speech would violate the law.[138] The threat of future enforcement actions by the Commission for comparable electoral speech was "substantial," and backed by the additional threat of criminal prosecution.[139]

Although the Court relied on cases that involved threats to free speech, nothing in the rationale suggested the case applied only to pre-enforcement challenges in this area of constitutional law. That free speech was chilled may have

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129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 2340.
133. *Id.*
134. *Id.*
135. *Id.* at 2347.
136. *Id.* at 2341.
137. *Id.* at 2342. *See also* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (finding that plaintiffs had alleged a justiciable case or controversy in seeking pre-enforcement review of a criminal statute where they had engaged in conduct covered by the statute and the government did not argue it would not prosecute them if they engaged in such conduct in the future); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (noting that where a plaintiff faces a "credible threat of [criminal] prosecution," a pre-enforcement review of a statute satisfies Article III's case or controversy requirements).
138. *Driehaus*, 134 S. Ct. at 2344. The Court stated that "[n]othing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate the law." *Id.* at 2345.
139. *Id.* at 2346. Given that both threats existed, the Court stated it did not need to decide if the threat of Commission proceedings, standing alone, would suffice for Article III. *Id.*

made it easier to persuade the Court that the threat of future enforcement was substantial,[140] but this was not essential to the Article III injury holding. In other words, all pre-enforcement challenges should be subject to the same pre-enforcement standing and ripeness rules, regardless of subject matter.

Reading the two cases together, Richard Fallon argues as follows:

> When *Susan B. Anthony List* is juxtaposed with *Clapper*, little room for doubt exists that a credible threat of prosecution for violating a federal statute (on which the plaintiff relied for standing in the former) is easier to establish than a credible threat of being subjected to allegedly unconstitutional surveillance related to national security (which the plaintiffs unavailingly claimed to face in the latter).[141]

Fallon thus agrees that *Clapper* is best read as a national security case, not a typical free speech "chilling" case.[142] *Driehaus* better expresses the general rule for pre-enforcement challenges of measures that cast a pall on expressive freedom,[143] and *Driehaus* is relatively generous.

There is little doubt that national security apprehensions affect judicial willingness to second-guess government conduct

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140. This is not guaranteed in all free speech cases. *See Holder*, 561 U.S. at 1; Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).

141. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1079 (2015).

142. *Id.*

143. *Clapper* also may prove to be an outlier in terms of general standing rules regarding "probabilistic standing." *See, e.g.*, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) ("[plaintiff] must demonstrate a *realistic danger* of sustaining a direct injury") (emphasis added); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) ("[I]t is the plaintiff's burden to establish standing by demonstrating that . . . the defendant's allegedly wrongful behavior will likely occur or continue . . . ."). *See generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 503–06, 510–11 (2008); Hessick, *supra* note 123, at 60–70. Insight into *Clapper*'s effect may be drawn from cases in the lower courts that are challenging the same surveillance law but now with substantial evidence of how the government has in fact been monitoring electronic communications. *See, e.g.*, Wikimedia Found. v. Nat'l Sec. Agency, 143 F. Supp. 3d 344, 347–48 (D. Md. 2015); Klayman v. Obama, 957 F. Supp. 2d 1, 26 (D. D.C. 2013) (noting that in *Clapper* the plaintiffs "could only speculate as to whether they had been surveilled at all . . . [whereas] plaintiffs in this case can point to strong evidence").

in ways that can skew case law.[144] But the significant timing issue that surfaced in *Clapper* might cause the Court to hesitate in *any* scenario, not just government efforts to protect national security. The litigants filed the suit immediately after the law was passed rather than allowing any evidence of enforcement to develop.[145] The better view is that both factors in the case mattered here: national security and timing. Yet the Court's respect for the projected—or merely imagined—harm may depend on the nature of that harm. In some free speech cases, chilling is presumed to exist.[146] The more deference given to that presumed effect, the easier it is for a litigant to prove injury-in-fact from the mere existence of a statute that has enforcement measures that may apply to the party. A thick thumb already lies on the scale of any judicial balance (explicit or implicit) of projected fears and potential consequences.

c. *Post-enforcement Against Others*

Beyond the "whether" question raised in the above two Sections are the "who" questions. Even if a measure has been applied against some, it may not mean this plaintiff has standing to mount a challenge. The normal rule, described above, is that a party lacks standing to assert the rights of third parties.[147] This rule is relaxed in overbreadth and *jus tertii* cases.

5. Summing Up

The foregoing discussion identified the conventional jurisdictional obstacles to overbreadth challenges and

144. *See, e.g.*, *Holder*, 561 U.S. at 1; Korematsu v. United States, 323 U.S. 214 (1944) (upholding national origin and ethnic classifications in Japanese internment cases on national security grounds).

145. Contrast *Clapper* with *Wikimedia*, which challenges the same statute in light of the evidence that emerged post-*Clapper* to support the concerns about widespread monitoring and capture of private overseas communications. *Clapper*, 133 S. Ct. 1138; *Wikimedia Found.*, 143 F. Supp. 3d at 347–48 (holding plaintiffs lacked standing).

146. Again, *Stevens* is an excellent example in that there was no evidence that the law had ever been applied to recreational hunters or would be, or that any hunter was deterred by the statute. *See* United States v. Stevens, 559 U.S. 460 (2010).

147. *See supra* text accompanying notes 96–109.

explained how free speech cases may depart from the conventional rules. It noted that the departures may be less sharp than some believe or as the judicial rhetoric implies. Nevertheless the Court has continued to describe the standard for overbreadth challenges in free speech cases as more forgiving than the standard applied in other cases.

The discussion also showed how the enactment-to-challenge time spectrum affects judicial receptiveness to facial challenges in both free speech and non-speech cases. Overbreadth challenges are allowed more readily when events, harms, and enforcement realities have become manifest.

Yet nothing with respect to these practical nuances supports a categorically different approach to an overbroad law that chills speech and one that chills *other* constitutionally protected behavior. Nor would a uniform approach to both kinds of cases prevent a court from considering these case-specific nuances. Thus the jurisdictional oddities of the free speech overbreadth doctrine are not only mystifying; they lack any obvious practical or normative basis.

These problems have not gone unnoticed. The following Section discusses significant scholarly objections to the Court's approach to overbreadth challenges. It then addresses how the analytical and constitutional conflicts these scholars identify might be eliminated.

II. CONFLICTS AND RESPONSES

The preceding Section showed how the jurisdiction conventions may be eased in some free speech cases and questioned whether this is justifiable.

Other commentators have puzzled over these peculiarities.[148] Are free speech rights superior to other

148. *See, e.g.*, Dorf, *supra* note 26, at 261–79 (discussing the complexities of overbreadth doctrine); Fallon, *supra* note 13, at 853 (building on earlier work that understood overbreadth doctrine as a form of valid rule challenges); Monaghan, *supra* note 24, at 1 (justifying the overbreadth doctrine on grounds that these are "valid rule" challenges); Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749 (2010) (justifying the overbreadth doctrine on grounds of marketplace of ideas and protecting listener's rights to receive information). *But see* Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063, 1082–86 (critiquing Monaghan's thesis). *Cf.* Rosenkranz, *supra* note 5, at 1251–57 (justifying overbreadth doctrine on textual grounds, insofar as the First Amendment is written in an active voice that suggests the very writing of such laws is unconstitutional). For a recent case that comes close to embracing the

constitutional claims in ways that justify their distinctive jurisdiction treatment? If so, the jurisdiction rules applied in free speech cases must be squared with Article III. How might that be done? If not, should the cases instead be aligned under one uniform test?

This Section outlines the academic commentary on these questions. It embraces and builds upon works that conclude a dual approach to speech versus non-speech cases is not warranted. Finally, it explains why substantive due process lends further support to a unitary approach to the jurisdiction puzzle.

A. The Article III Conflict

The overbreadth doctrine as applied in free speech cases is uncommonly generous in its standing and ripeness respects.[149] This exceptionalism is indefensible.

First, *any* law that reaches farther than constitutionally permitted may "chill" legally permissible behavior; overbroad laws that chill free expression are no worse in this respect.[150] Moreover, federal courts operate under a presumption of severability, under which they assume the potential unconstitutional segments of a statute are severed absent legislative intent against severability.[151] Courts are reluctant to toss out statutes wholesale or strike them down in advance of application. They proceed more sure-footedly when laws have been applied, or imminently are likely to be applied, to the parties before them. And they will strike only the unconstitutional provisions of the laws, as possible, while working hard to preserve the constitutional remainder.[152]

Rosenkranz view by declaring that the First Amendment focuses on the activity of the government, not the rights of the people, see Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016), discussed *supra* note 90.

149. *See* Schauer, *supra* note 12, at 705 ("The chilling effect doctrine reflects the view that the harm caused by the chilling of free speech . . . is comparatively greater than the harm resulting from the chilling of other activities involved.").

150. Fallon, *supra* note 13, at 861 n.48. *See also* John F. Decker, *Overbreadth Outside the First Amendment*, 34 N. M. L. REV. 53 (2014) (discussing the Supreme Court's use—implicit and occasionally explicit—of overbreadth reasoning in analyzing facial challenges in constitutional contexts other than freedom of speech, and urging the Court to adopt more uniform rules).

151. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) ("Partial invalidation would be improper if it were contrary to legislative intent . . . .").

152. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012)

Courts are expected to perform essential and precise surgery on statutes, not purely prophylactic and crude disembowelments of them.

Facial challenges to statutes on the ground that a law is fatally overbroad (versus other defects that may be apparent on the face of a measure) should be denied in most cases. At a minimum, the law should be unconstitutional in "a large fraction of the cases in which [the law] is relevant."[153] The common, and ostensibly stricter, statement of the facial challenge rule requires that there be "no set of circumstances" under which the statute would be valid.[154] First Amendment overbreadth cases depart from this stricter approach.[155]

Second, and most crucially as a matter of Article III limits, is that access to federal courts always requires that the litigant satisfy three constitutional standing criteria: (1) injury in fact—which must be "concrete and particularized" and "actual or imminent;"[156] (2) a "causal connection between the injury and the conduct complained of" that is "fairly traceable"[157] to the action being challenged; and (3) redressability, in the sense that the injury "will be redressed by a favorable decision"[158] in whole or in part. The burden of proof on all three criteria rests with the litigant asserting the claim.[159] Overbreadth-based facial challenges of statutes implicate all three of these criteria.

Of course, the constitutional criteria are vague and highly

(severing the unconstitutional portion of the Affordable Care Act and preserving the balance over strenuous objection by the dissent).

153. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992). This does not mean successful facial challenges do not occur. *See, e.g.*, City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015) (holding city ordinance violated Fourth Amendment on facial challenge). *See also* Fallon, *supra* note 13, at 918 (noting that the Court has in some terms "adjudicated more facial challenges on the merits than . . . as-applied challenges" and seeking to clarify what the Court has actually done in terms of facial challenges versus the rhetoric it has used to describe these challenges and that commentators have sometimes blindly adopted).

154. United States v. Salerno, 481 U.S. 739, 745 (1987). *See also* United States v. Stevens, 559 U.S. 460, 473 (2010) ("[T]o succeed in a typical facial attack, a [party] would have to establish 'that no set of circumstances exists under which the [measure] would be valid . . . .") (quoting *Salerno*, 481 U.S. 739, 745). *See generally* Dorf, *supra* note 26, at 272–77 (1994) (discussing tension between the two approaches).

155. *See supra* text accompanying notes 95–108.

156. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

157. *Id.* at 560–61.

158. *Id.*

159. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006).

manipulable.[160] Some critics have argued they are applied in a manner driven less by threshold jurisdictional concerns than by judges' views of the merits of the dispute[161] or by pure ideology.[162] Others argue the standing law is seriously fragmented[163] or even incoherent.[164] Many focus on the injury prong in particular and the difficulty in determining what counts as a constitutionally sufficient harm under the Court's test.[165] But nobody denies that the current doctrine has identified a constitutional baseline that must be satisfied. This means that the free speech overbreadth cases either satisfy the constitutional test or must be rejected as violations of Article III. There is no other option. It also means that the relaxed third-party standing implications of the free speech overbreadth doctrine are especially puzzling.

The ordinary standing principle is that one cannot invoke third parties' injuries "absent a relationship that makes actual enjoyment of rights by a third party dependent on the challenger's capacity to assert those rights."[166] The question is whether this is a matter of judicial grace or an Article III imperative. If it is merely discretionary and not constitutionally required, then the free speech cases simply are ones in which the Court has exercised its discretion to permit these claims.

But a reading of this as discretionary is almost impossible to square with other jurisdiction doctrine. For example, federal courts may not exercise supplemental subject matter jurisdiction over transaction-related claims that fail to satisfy Article III case or controversy requirements, such as standing or mootness.[167] Also, a party is required to have standing to

160. *See generally supra* note 11. *See also* Linda Greenhouse, *Judges Standing Upside Down*, N.Y. TIMES (Sept. 3, 2015) (critiquing recent cases as ideologically driven insofar as justices who have been particularly skeptical of broad notions of standing on constitutional grounds arguably have departed from these strict rules in some cases).

161. *See, e.g.*, Fletcher, *Who Can Sue*, *supra* note 11.

162. *See supra* note 11.

163. *See, e.g.*, Fletcher, *Structure of Standing*, *supra* note 11.

164. *See, e.g.*, Nichol, *supra* note 11.

165. *See, e.g.*, Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 928 ("[T]he task of defining what interests matter is a subjective one—perhaps hopelessly so."); Richard Re, *Relative Standing*, 102 GEO. L.J. 1191, 1194 (2014) ("[A]dequate factual injury is the touchstone of the Court's standing analysis—except when it isn't . . . ."); Sunstein, *supra* note 34.

166. *See* Fallon, *supra* note 13, at 859.

167. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). The Court

assert all forms of relief requested for her alleged injuries.[168] Standing to seek compensatory damages for past injuries also does not mean the party has standing to seek injunctive relief for similar future harms by the same defendant.[169] In multiple ways, the Court has insisted that Article III requires standing for every claim, by each party. Moreover, the Court never has declared that federal jurisdiction rules vary with constitutional subject matter in other arenas.

Assume, for example, that a party has engaged in speech that could have been regulated by a more narrowly drawn policy. The party is punished under the policy and seeks to defend on the ground that the policy is fatally overbroad. A "bad actor" ordinarily cannot raise the interests of third-party "good actors," as to whom application of a policy would be unconstitutional. Nor can a bad actor ordinarily escape punishment on the ground that the policy reaches too much good conduct to survive a facial challenge. Recall that the usual rule is that there must be no circumstances under which the policy can be constitutionally applied. Yet the overbreadth doctrine in free speech cases allows bad actors to invoke the rights of good actors and allows bad actors to escape punishment when a more narrowly drawn measure could have captured their conduct. These outcomes sound wrong if one thinks of the bad actor arguments as assertions of third-party claims or as an exception to the injury requirements under Article III. In short, the free speech overbreadth doctrine simply cannot be squared with Article III unless Article III is interpreted to permit overbreadth claims in all constitutional cases, not just free speech cases, on these same terms. There is no prudential exception to constitutional baselines.

Yet the Court seems impervious to these constitutional criticisms.[170] The obvious and difficult question is why it would

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also has implied the prohibition on third-party standing has constitutional roots. *See* New York v. Ferber, 458 U.S. 747, 767 n.20 (1982); *infra* note 189.

168. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

169. *Id.*

170. One example of this was its granting of certiorari—again—in *Fisher v. University of Texas*, 136 S. Ct. 533 (2015). The earlier case was *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) (reversing and remanding case on ground that lower court did not properly apply strict scrutiny). The vehicle problem with this lingering challenge of the University of Texas's admissions policies case was profound, given that it was not brought as a class action and the named plaintiff, Abigail Fisher, enrolled in another school and has since graduated. The constitutional injuries for her seemed to be her $100 application

refuse to consider them, given its general insistence that these jurisdiction ceilings cannot be vaulted. Perhaps this is because the current free speech overbreadth test—despite its analytical infirmities—serves a substantive goal that appeals to a wide and bipartisan swath of its members. The Court may be more offended by laws that chill speech than laws that chill reproductive rights or other fundamental liberties.

Or perhaps analytical fissures within standing law more generally are tolerable to the Court, given the wide range of factors across the vast set of contexts in which standing principles must operate. Standing doctrine limits all claims brought in federal court. Doctrinal coherence here is inherently elusive, and the perennial ivory tower calls for clearer or cleaner Article III standards may ignore this on-the-ground complexity. In any event, the Court shows no signs of abandoning the generic three-part Article III test or the overbreadth doctrine of free speech.

But as Part III shows, the cases are on an analytical collision course that no longer can be ignored. The Court has pruned the prudential, non-constitutional factors that federal courts may invoke to deny standing.[171] The distinction between prudential and constitutional limits is a crucial one because a non-constitutional limit on standing is discretionary—thus the term "prudential"—whereas the constitutional minima cannot

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fee, her alleged lost earnings due to graduation from a lesser institution, and harms that allegedly flowed from being subject to a race-conscious policy—though there was a substantial dispute as to whether she would have been admitted despite the policy. The Court overlooked these vehicle problems and ruled against Ms. Fisher on the merits. Fisher v. Univ. of Texas, 136 S. Ct. 2198 (2016).

Whether a process harm alone is enough when forward-looking relief is not sought is unclear. *See* Texas v. Lesage, 528 U.S. 18, 21 (1999) (*per curiam*) (noting that there is no cognizable injury warranting relief under Section 1983 if the government can show it would have made the same decision absent the use of the impermissible criterion); Ashutosh Bhagwat, *Injury Without Harm:* Texas v. Lesage *and the Strange World of Article III Injuries*, 28 HASTINGS CONST. L.Q. 445 (2001) (discussing the case and its anomalies). Also, it is not clear that the injuries Fisher alleges are redressable, even if she can establish that she would have been admitted "but for" the race-conscious policy. Despite these problems, the Court will hear the case for the third time during the 2015 Term and is likely to reach the merits. The Court likely will rely on its earlier statement that the "injury in fact" in such an equal protection case is "the denial of equal treatment resulting from the imposition of [a barrier that makes it more difficult for the members of a group to obtain a benefit], not the ultimate inability to obtain the benefit." Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

171. *See infra* text accompanying notes 204–217.

be ignored. These prudential limits also are controversial, and in growing disfavor with the Court.

Third-party standing rules straddle constitutional and prudential limits on standing. As the latter shrink, fewer judicial third-party standing rulings can be defended as discretionary.

For example, the Court has imposed limits on "generalized grievances"—which it defines as suits "claiming only harm to [the plaintiff's] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large."[172] In earlier cases, it stated that the prohibition on generalized grievances was driven by "counsels of prudence."[173] As the Court stated, "even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Article III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branch."[174] That a grievance is widely shared does not make it a "generalized grievance" for standing purposes, as long as the harm is sufficiently concrete.[175] Rather, the key is a combination of abstractness and wide public significance, along with undifferentiated harm. The "common concern for obedience to law" is an example of a generalized grievance under this test.[176]

The prohibition on hearing these generalized grievances, however, is no longer a matter of prudence. The Court stated in 2013 that the bar of generalized grievances exists "for constitutional reasons, not 'prudential ones.'"[177] The work of defining generalized grievances now is more urgent because they are *constitutionally* off limits, not just disfavored as a matter of judicial prudence. A facial challenge to a law that chills everyone's rights therefore cannot be asserted in federal

172. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).

173. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 474–75 (1982).

174. *Id.*

175. *See, e.g.*, Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998); Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007).

176. *Akins*, 524 U.S. at 24.

177. Lexmark Int'l, Inc. v. State Control Components, Inc., 134 S. Ct. 1377, 1386 (2014).

court when the alleged harm is so undifferentiated that it amounts to a common concern that the government must obey the law, rather than a concrete grievance.

Part III expands on how the law is catching up to these problems in ways that bear on how to handle overbreadth cases. The following Sections lay the groundwork for that discussion by first outlining scholarship that engages these conflicts directly and then incorporating the best of these insights into a theoretical structure that supports the unitary proposal set forth in Part IV.

B. First-Party Approaches

Monaghan long ago rejected the conventional view of the overbreadth doctrine and questioned the conventional understanding of many *jus tertii* cases as well. In his view, overbreadth cases and some *jus tertii* cases are better understood as *first-party* challenges of invalid laws.[178]

First Amendment law requires a "high degree of means-end congruence"[179] that enables the "bad actor" to assert *her own right* not to be subject to an overbroad law, regardless of whether she might have been properly punished under a narrower one. Moreover, "[a]ny litigant has the right to make a facial challenge to the constitutional sufficiency of the rule actually invoked against him, without regard to whether his own conduct could validly have been regulated by a differently formulated rule."[180] In other words, if free speech overbreadth claims have special bite, it is because of free speech law requirements, not special standing rules.[181]

Nor, said Monaghan, are free speech cases unique in this respect. Overbreadth challenges should be more successful "whenever significant means-ends congruence is required by the applicable substantive law."[182] If there is free speech favoritism here, this is best understood as a form of *substantive* constitutional distortion—i.e. a matter of the merits of the dispute—not *jurisdictional* distortion.[183] Article III is not bent,

178. Monaghan, *supra* note 103, at 283; Roosevelt, *supra* note 25, at 990.
179. Monaghan, *supra* note 103, at 283.
180. *Id.*
181. *Id.*
182. *Id.* at 285.
183. *See* Monaghan, *supra* note 24, at 37.

it is *satisfied.* Whether third-party standing restrictions are constitutionally or prudentially dictated is irrelevant.

Richard Fallon and Michael Dorf agree with Monaghan, but with their own twists on his thesis. Fallon has described the overbreadth doctrine as "procedural or prophylactic"[184] yet with "a constitutionally mandated core, involving the personal right of defendants not to be sanctioned except under a constitutionally valid rule of law."[185]

Dorf would advance the ball farther. In his view, *all* facial challenges to statutes must be reconciled under common principles, given that no one may be judged by an unconstitutional rule of law.[186] He also explores the federalism implications of this approach.[187] After all, if facial challenges are about constitutionally valid rules, then judicial treatment should not depend on whether the case is filed in state or federal court.[188] Finally, Dorf is among those who view the oft-intoned distinction between as-applied and facial challenges as more confusing than illuminating.[189]

All concur that the Court must place the free speech overbreadth doctrine firmly under the Article III umbrella. Construing the overbreadth question as a matter of substantive law, rather than jurisdiction per se, achieves this goal. Overbroad statutes violate rights of all parties as to whom those laws might be applied, and should not hinge on awkward contortions of third-party rights, or on discredited distinctions between prudential and constitutional limits on federal court jurisdiction. They are first-party rights to be judged by a valid rule of law in ways that should support a unitary approach to overbreadth challenges across substantive domains.

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184. Fallon, *supra* note 13, at 867. *See* Roosevelt, *supra* note 25, at 1009 (noting this feature of the Fallon approach and taking issue with it).

185. Fallon, *supra* note 13, at 856.

186. Dorf, *supra* note 26, at 238. *See also* Isserles, *supra* note 40, at 364 (arguing that the *Salerno* "no set of circumstances" rule is actually "a descriptive claim about a statute whose terms state an invalid rule of law").

187. Dorf, *supra* note 26, at 255–56.

188. *Id.* at 283–93.

189. *Id.* at 294. *Cf.* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law,* 97 MICH. L. REV. 1, 3 (1998) (arguing that the notion of an as-applied challenge is flawed because the Constitution protects individuals from particular rules, "it does not protect a particular action of hers from all the rules under which the action falls").

C. The Substantive Due Process Baseline

In an important extension of prior works that apply "valid rule" demands to overbreadth and third-party standing, Kermit Roosevelt argues first that First Amendment overbreadth is "best understood as a substantive First Amendment rule that such laws cannot be enforced against *anyone*, regardless of whether their speech is protected."[190] He agrees that the overbreadth doctrine is "also an example of the due process valid rule challenge."[191] That is, a party raising such a challenge is arguing not only that the law is unconstitutional as applied to someone, but that there is no valid rule as to anyone.[192] Second, he states that this is part of a general substantive due process principle that protects individuals from "government coercion that is not backed by a valid law."[193]

Roosevelt concedes that this is not how the Court ordinarily refers to its due process work, but argues that "[t]he due process prohibition of compulsion without law is the invisible thread that connects doctrinal areas often thought of as quite distinct: *Erie, Lochner*-era substantive due process, overbreadth, and modern federalism decisions . . . ."[194] In other words, overbreadth challenges are merits challenges in *two* respects, neither of which is unique to the First Amendment. First, they are not constitutional third-party standing puzzles after all: rather, they are first-party challenges based directly on the merits of the applicable fundamental right at stake.

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190. Roosevelt, *supra* note 25, at 1009 (emphasis added).

191. *Id.* at 1009 n.108.

192. *Id.*

193. *Id.* at 989. *Cf.* Jane Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281 (2015) (discussing why substantive due process protects against arbitrary laws even absent an enumerated or unenumerated fundamental right). *See also* Adler, *supra* note 189, at 3 ("Constitutional rights are rights against rules."). Rosenkranz offers another take, derived from the language of the First Amendment that "Congress shall make no law." He states that the amendment binds Congress directly and thus it violates the Constitution by adopting the offending statute. The Fourth Amendment, in contrast, makes the execution of a law a violation, not the act of Congress. *See* Rosenkranz, *supra* note 5, at 1237–41. In his view, "*a constitutional claim under the first clause of the Fourth Amendment is never a 'facial' challenge, because it is always and inherently a challenge to executive action.*" *Id.* at 1241 (emphasis in original). This argument is inconsistent with the Court's recent holding in *Patel*. *See supra* text accompanying note 77.

194. Roosevelt, *supra* note 25, at 990.

Second, they raise substantive due process concerns that apply across constitutional contexts, not only to First Amendment cases.

This is correct. Due process principles provide substantive undergirding for the "valid rule" arguments advanced by others. The next step is to integrate these substantive clarifications into a new path forward.[195]

D. Integration

The unitary approach proposed here synthesizes the best of the foregoing literature and steps beyond it. Under the proposal, facial challenges of constitutionally overbroad measures are matters of substantive due process: all parties, regardless of the constitutional right at stake, have a due process right to be judged by a valid rule of law. When the law is substantially overbroad—the standard currently applied in free speech cases—the valid rule of law principle has been violated. The party thus can, assuming normal standing and other timing and litigant conduct rules are satisfied, challenge the law directly or defend against its enforcement. There should be no constitutional "exception" for free speech cases.

The remaining gap between the "no set of circumstances" rule invoked in non-speech cases and the "substantial overbreadth" standard applied to speech cases should be formally closed. There should be one, unified test. As Part IV explains, this would not cause a cascade of successful facial challenges or erosion of the general principle in favor of as-applied challenges or severability, when feasible. It would forge greater analytical and constitutional coherence in future cases that involve overbreadth challenges of facially unconstitutional laws.

The next Section further explains why the Court may be amenable to adopting the unified approach proposed here.

III. TOWARD HARMONY: RECENT CASES

Two recent cases on standing complement the foregoing discussion of *Casey*, *Patel*, and *Whole Woman's Health*[196] and

195. *See* Bambauer & Massaro, *supra* note 193.
196. *See supra* text accompanying notes 74–79.

support a harmonized approach to all facial challenges of laws that chill fundamental rights. In the first case, the Court moved a prudential limit on standing to a merits inquiry.[197] The Court also suggested—though it did not hold—that it may be willing to move third-party standing to a merits inquiry.[198]

In the second recent case, *Spokeo, Inc. v. Robins*, the Court underscored that constitutional limits on standing may not be elided, even with congressional approval.[199] This is a recent and forceful reminder that Article III must be obeyed. All of the superficially disparate pieces described above[200] must fit together; there cannot be separate, constitutionally dictated jurisdiction rules for free speech cases and not others.

If the Court does change course on third-party standing, it then would face several analytical choices. In free speech cases it would need to decide whether to overrule the cases that allow a party to assert the interests of third parties as inconsistent with free speech law, or uphold them on the basis that these involve first-party, not third-party standing. This would conclusively end the debate about whether Article III is violated by overbreadth challenges in which litigants challenge laws that have been applied to others, but not to themselves.

The Court is unlikely to pitch the overbreadth doctrine of free speech cases altogether for at least two reasons. First, too much recent case law stands in the way, and the Roberts Court has considerable respect for robust free speech protection.[201] This would place pressure on the Court to reconsider its general prohibition against overbreadth challenges in non-speech cases, insofar as it often has justified this practice as derived from a prohibition on third-party standing.[202] Second, constitutional coherence requires one rule, not several. Correlatively, the Court would need to revisit the general assumption that a party as to whom application of a law is unconstitutional cannot raise both an as-applied and a facial challenge to the law.[203]

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197. Lexmark Int'l, Inc. v. State Control Components, Inc., 134 S. Ct. 1377, 1387 (2014).

198. *Id.* at 1387 n.3.

199. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

200. *See supra* Part I.

201. *See supra* text accompanying notes 58–70.

202. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 767 (1982) (setting forth the general rule).

203. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985)

If the Court does choose to preserve the free speech overbreadth case law outcomes, it can and should revise the analytical and constitutional justifications used in defense of these outcomes in the manner proposed in Part II. This would open the door to the step proposed in Part IV: apply the revised justification for the overbreadth doctrine in free speech cases to all cases that involve facial challenges of overbroad measures that chill constitutional rights.

At first blush, the cases may seem orthogonal to facial challenges and overbreadth in free speech cases because neither case dealt directly with a free speech overbreadth claim and neither dealt with due process. But they relate directly to the general principles at stake here, because the multiple jurisdiction and judicial husbandry rules that surface in facial challenge cases—including standing—are intertwined.

Seeing the relationship among all of these pieces and among the superficially disparate cases, though, is very difficult. The territory is vast, the cases are legion, and the relationships among the jurisdiction and due process principles are not easily seen or widely understood. This may explain why the Court has been so slow to qualify or reconcile the four misleading bromides explored here: they are, again, (1) that as-applied challenges are favored over facial challenges, (2) that statutes should only be struck down when there is no set of circumstances under which they are constitutional, (3) that parties must assert their own rights, not others', and (4) that the overbreadth doctrine of the First Amendment is more generous to facial challenges than is true in other cases in order to prevent chilling of speech rights. As we have seen, *none* of these conventional phrases is entirely accurate, either descriptively or as a matter of sound constitutional law.

As we also have seen, scholars have been complaining about this for decades, and many have offered remedies to the problem with woeful little impact. Yet the time is approaching when the Court must listen, because the need to do so is becoming more urgent. The cracks in the doctrinal walls portend a tumble. This Section shows why that showdown may come sooner rather than later.

(refusing to apply overbreadth doctrine to plaintiff whose conduct was constitutionally protected).

A. Lexmark*'s the Spot?*

The first and more significant recent case is *Lexmark International, Inc. v. Static Control Components*[204] in which the Court directly confronted and clarified the distinction between jurisdiction and merits inquiries. The Court in *Lexmark* eliminated one ostensibly "prudential" limit on standing—the "zone of interests" or "statutory standing" rule—by redefining it as a merits question in statutory cases, not a jurisdictional question.[205] To bring a claim under a statute, one must by definition be a party whose claim falls within the zone of interests that the law in question protects, and must have constitutional standing to assert that claim; there is no independent prudential rule to satisfy.

The so-called "zone of interests" test was part of the analysis of litigant standing in cases that involved statutory rights. It asked whether a party was within the zone of interests that a statute sought to protect, as a condition on whether the party could bring a statutory claim.[206] By defining this as a merits inquiry only, *Lexmark* restated the question as whether the statute applies to the party as a matter of statutory interpretation, full stop.[207]

Generalized grievances, the Court continued, are barred by constitutional standing rules, not by prudential limitations.[208] Of course, constitutional limits cannot be avoided in the way discretionary limits can be.

Most crucially, the Court in *Lexmark* indicated in a footnote that limitations on third-party standing are "harder to classify"[209] but also may be ripe for reclassification. The following language from the footnote may loom large in future standing cases:

> [W]e have observed that third-party standing is "closely related to the question whether a person in the litigant's position will have a right of action on the claim,". . . but most of our cases have not framed the inquiry that way.

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204. 134 S. Ct. 1377 (2014).
205. *Id.* at 1387–88.
206. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).
207. 134 S. Ct. at 1387–88.
208. *Id.*
209. *Id.* at 1387 n.3.

> See, e.g., Kowlaski v. Tesmer, 543 U.S. 125, 128-29 (2004) (suggesting it is an element of "prudential standing"). This case does not present any issue of third-party standing, and consideration of that doctrine's place in the standing firmament can await another day.[210]

This Article argues that third-party standing *should* be viewed as a merits question. The question of whether third-party standing is a merits question versus a standing question may be particularly *visible* in overbreadth cases under the First Amendment, but *it is not restricted to these cases.* If third-party standing really is a merits question, which is the better view, then the constitutional standing question is an independent inquiry. Also, the standing issues currently addressed under the third-party standing prohibition should be treated as purely constitutional, not also prudential.[211] Parties first would have to show they are covered by the statute. This is the merits question. They *then* would need to establish that they meet the Article III requirements of injury, causation, and redressability. This is the jurisdiction question. If they satisfy both criteria, then the federal court can hear the controversy absent some other reason not to.

Several of the Justices view all prudential limits on standing (as well as ripeness) as potentially inconsistent with their "recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'"[212] This could portend the

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210. *Id.*

211. *See* Richard M. Re, *Another Type of Standing That Isn't?*, RE'S JUDICATA (Oct. 1, 2014), https://richardresjudicata.wordpress.com/2014/10/01/another-type-of-standing-that-isnt/ [https://perma.cc/6MJB-YCDH]. *Cf.* Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL OF RTS. J. 277, 281 (2015) (noting the language from *Lexmark* and offering a merits-based theory of third-party standing that conforms, in part, with the Monaghan, Fallon, Fletcher, and Dorf-inspired arguments presented here, but that departs from this proposal insofar as Lea would overrule the overbreadth doctrine in the First Amendment context and rely on *jus tertii* inseverability doctrine to pick up the rights protective or "chilling" slack). *See also* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 130–32 (2014) (arguing for abandonment of prudential limits on standing).

212. Lexmark Int'l, Inc. v. State Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (*quoting* Sprint Communications, Inc. v. Jacobs, 134. S. Ct. 584, 591 (2013) (some internal quotation marks omitted). *But see* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (discussing judicial reliance on prudential considerations with approval).

death of third-party *prudential* standing doctrine, though there is opposition to jettisoning the prudential limits on the Roberts Court.[213] Thus even if the Court were to see all overbreadth claims as falling within Article III, but view the stricter limits imposed on non-speech cases as *discretionary* refusals to hear those cases, some Justices would reject that justification for a dual approach. In their view, all claims that satisfy Article III could and should be heard.

How the Court resolves these questions will be particularly important to future analysis of the overbreadth doctrine in free speech cases. The connection may not yet be fully apparent to the Court, but the connection both exists and is of profound constitutional significance. The Court's resolution also will matter to the vitality of facial challenges of overbroad measures in general, and to answering the specific question of who can challenge facially overbroad statutes in other areas of constitutional law.

Again, the Court's general hint is that third-party standing doctrine in all cases—not just statutory cases—should be viewed as a merits question, from which the Article III analysis follows. If so, then the question of whether a party may assert an overbreadth claim is a first-party analysis—i.e., whether the relevant cause of action embraces the claim of constitutional injury asserted. The relevant question is whether the chilling effect of a substantially overbroad measure is enough of an injury to permit the claim to be asserted even by a party as to whom it has not been applied, as yet. What once was viewed as

213. At least for now, a majority of the Court likely is not ready to jettison all prudential limits on standing. *See* United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (discussing prudential versus constitutional limits on standing, and deciding neither prevented the Court from ruling on the constitutionality of the Defense of Marriage Act in the case before it). *Cf. Hollingsworth*, 133 S. Ct. at 2667-68 (holding litigants lacked standing to assert a third-party challenge to state law prohibiting same-sex marriage, and declaring this was a "generalized grievance"). *See* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L. Q. 95, 128–33 (2014) (questioning Article III justification for prudential standing doctrine); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990) (critiquing the Court's distinctions between prudential and constitutional elements of standing as a matter of judicial say-so rather than principle); Scalia, *supra* note 6, at 885 (questioning the existence of prudential limits of standing). *See generally*, Bradford C. Mank, *Is Prudential Standing Jurisdictional?* 64 CASE W. L. REV. 413, 422–23, 428 (2013) (discussing the debate regarding whether prudential standing rules should be recast as constitutionally required). And of course the death of Justice Scalia further muddies the waters.

a prudential limit on third-party standing would be properly seen as a federal law compulsion to hear the case if the constitutional criteria are satisfied. The first party would have a substantive due process right to challenge the law, whether in federal or state court.[214]

One attractive feature of this shift would be that "a principled theory that reflects current substantive legal concepts is to be preferred over the unreasoned 'discretion' that now dominates *jus tertii* standing."[215] But there are obstacles as well: the Court could read *Lexmark* narrowly or simply avoid confronting its analytical implications. A majority of the Court may be reluctant to cede judicial discretion to manage third-party claims differently even if that different treatment looks curious or arbitrary. A one-size-fits-all approach would compel the Court to justify the ways in which it has allowed First Amendment third-party claims, and other constitutional claims,[216] in ways that depart from standing business as usual. *Lexmark* thus could loom large theoretically but, like many analytically confounding cases in the jurisdiction arena, might be ignored.

More likely, however, is that the Court will need to address the implications of the doctrinal internal chaos directly. In any event, refusing to confront the internal chaos has become more difficult for the Court, post-*Lexmark*.[217] Moreover, the

214. *Cf.* Monaghan, *supra* note 103, at 297–301 (discussing why courts should not be allowed to disregard federal law where it is premised on a broad reading of a federal right and thus becomes a matter of first-party standing instead of *jus tertii* standing).

215. *Id.* at 304. Such a move leaves uncertain when "close relationship" third-party standing would survive—that is, when a party with standing to assert his own primary claim also would have standing to raise the claim of a third party, where they have a relationship that makes the two claims sufficiently interactive. For example, a physician subject to an abortion statute currently is allowed to raise the constitutional rights of his or her patients, in addition to his or her own rights. *See, e.g.*, Doe v. Bolton, 410 U.S. 178, 188 (1973); Singleton v. Wulff, 428 U.S. 106, 118 (1976). Under my approach, this would depend on a merits inquiry that assessed whether the relationship could sustain a first-party challenge that embraced the patient's rights.

216. *See Singleton*, 428 U.S. 106 (1976); *see also* Craig v. Boren, 429 U.S. 190, 192–97 (1976) (allowing saloon owner to assert equal protection rights of underage male patrons); Barrows v. Jackson, 346 U.S. 249, 257–60 (1953) (allowing white property holder to assert rights of third-party African-American buyers).

217. *See* Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?*, 18 U. PA. J. CONST. L. 213 (2016) (discussing ways in which the Court may seek to cabin *Lexmark*).

underlying stakes are constitutional, not just a matter of jurisdictional etiquette. If the predicted rise in free speech-based overbreadth challenges occurs, then this constitutional muddle will become harder to justify, and the analytical confusion harder to deny or disregard.

B. Spokeo v. Robins

The recent United States Supreme Court case of *Spokeo v. Robins* could have a similarly indirect—albeit as yet unseen—impact on overbreadth doctrine. This case involved a statutory challenge to a private website's disclosure of false factual assertions about Robins.[218] The Fair Credit Reporting Act (FCRA) creates a private cause of action for damages when a party commits a willful violation of its terms.[219] The issue in the case was whether Robins suffered a concrete injury for Article III purposes due to the violation of the statutory right alone.[220] The false information posted about him—that he was married, had advanced education, and was currently employed—was not linked to direct evidence that this misinformation in fact reached or affected any potential employer.[221]

There is no doubt that this claim was in the "zone of interests" that the FRCA seeks to protect. Thus, it was a merits inquiry, post-*Lexmark*. Moreover, the claim of injury was particularized: the false information was about *him*. What was arguably missing was an actual harm beyond violation of the statute. Not clear was whether Robins had to allege and prove that the inaccurate information caused him economic or other losses. The case also raised two important matters involving congressional power to create statutory rights. First, could Congress consider the difficulty of proof of economic harm in such cases and provide a statutory right to damages without

218. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016). *See* Maxwell L. Stearns, Spokeo, Inc. v. Robins *and the Constitutional Foundations of Statutory Standing*, 68 VAND. L. REV. EN BANC 221 (2015) (discussing the pending case and its separation of powers implications). Once again, the February 2016 death of Justice Scalia, which occurred after oral arguments in *Spokeo*, makes firm predictions even more difficult.

219. Fair Credit Reporting Act, Pub. L. No. 91–508, 84 Stat. 1128 (1970) (codified at 15 U.S.C. § 1681 *et seq.*).

220. 136 S. Ct. at 1543.

221. *Id.*

it?[222] More fundamentally, could Congress establish statutory standing even if there were no factual injury to the protected party? That is, can it define the "zone of interests" in a way that expands constitutional limits on injury-in-fact?

The Court's answer was that Congress cannot expand statutory standing beyond Article III. In an opinion by Justice Alito, the Court held that the lower court had conducted an incomplete analysis of the injury-in-fact requirement.[223] Injury-in-fact is a constitutional requirement that Congress "cannot erase."[224] Nor is it enough that an injury be particularized; it must also be "concrete." This is an independent requirement that means the injury "must actually exist."[225] Although Congress may identify and elevate harms that satisfy Article III by granting a statutory right,[226] this "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize a person to sue to vindicate that right."[227]

Spokeo is relevant to the overbreadth inquiry because the more weight placed on the "constitutional, not prudential" side of the standing balance, the harder it becomes to justify the existence of additional prudential limits, or to justify any exceptions to Article III. The cumulative effect of insisting that standing doctrine is about Article III ceilings, not floors, could be to eliminate judicial discretion to relax standing requirements. This in turn means that more potentially was at stake in *Spokeo* than whether Congress has limited power to define judicially enforceable statutory injuries. Specifically it means that if all standing decisions are constitutionally driven—so much so that Congress must heel to this imperative—then there may be *no* outlier cases where these rules are excused. Accordingly, the First Amendment overbreadth cases *must* lie within the constitutional fold, though perhaps at its outer perimeters. Any plausible defense of the cases must put them within Article III limits. The most persuasive approach is to see free speech overbreadth

222. The practical implications of an affirmative answer would be profound given that this was filed as a class action suit.

223. 136 S. Ct. at 1545.

224. *Id.* at 1548.

225. *Id.*

226. *Id.* at 1549.

227. *Id.*

questions as merits inquiries.

C. Implications

Relocating prudential third-party standing and overbreadth into a merits inquiry would have many fundamental implications. One is that state courts, no less than federal, would be obliged to respect the right of the first party to assert the ostensibly "third-party" claims. If the question is a matter of merits, then any differences between federal and state court jurisdiction rules would be irrelevant to this threshold concern.

This shift also would eliminate judicial discretion not to hear an overbreadth challenge; the parameters of a cognizable claim would be defined by substantive law, not by prudential jurisdictional principles. Again, this would no longer provide shelter for doctrinal outlier cases justified as a matter of prudence rather than constitutional imperative.

Finally, and most importantly for this Article, the shift would resolve the potential tension between overbreadth doctrine and Article III, as well as the sense of overbreadth doctrine as a First Amendment anomaly. Concerns might remain about free speech favoritism,[228] but they now would have a non-jurisdictional cast.

This shift must occur, and sooner rather than later. Although the trajectory of standing law in general is less clear without Justice Scalia leading the charge toward erecting higher standing barriers and giving them all constitutional struts, *Lexmark* implies that a majority of the Court thinks there is no such thing as a "third-party doctrine" that *ever* allows litigants to assert rights of others.[229] It is a first-party merits inquiry, which might best be justified by the due process principle that *nobody* may be subject to a constitutionally invalid rule.[230] The Court thus seemed ready in *Lexmark* for revamping of its case law. In any event, canny litigants now can invoke doctrinal support for such a reading rather than plucking it solely from academic commentary.

This does not mean the whole house falls. A party bringing

228. *See supra* text accompanying notes 199–201.

229. *See supra* text accompanying notes 204–217.

230. Canes-Wrone & Dorf, *supra* note 21, at 250; Fallon, *supra* note 13, at 862; Isserles, *supra* note 40, at 386–88; Monaghan, *supra* note 24, at 7.

a facial challenge of a statute or policy on overbreadth grounds still would be required to demonstrate the baseline requirements of standing—injury-in-fact, causation, and redressability[231]—but the underlying claim would be seen as *hers*, not derivative of others'. Again, the constitutional root of the overbreadth claim might best be defined as a due process right[232] derived from basic substantive due process principles,[233] which apply regardless of whether a fundamental right is at stake but gain urgency when fundamental rights are in play.[234] Under due process, constitutionally valid rules are a predicate of any effort to enforce them,[235] though laws that also implicate fundamental rights may be subject to closer judicial scrutiny.[236] Facial challenges of overbroad laws should be seen as a sub-set of these more general rules about constitutionally valid laws. It is a merits inquiry, *all the way down.*

This last point may encounter opposition from justices who are profoundly skeptical of substantive due process in any of its forms.[237] The number of such justices, though, is dwindling. On

231. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (discussing constitutional elements of standing).

232. *See* Roosevelt, *supra* note 25.

233. E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 130–66 (2013).

234. Bambauer & Massaro, *supra* note 193, at 311–16.

235. *See* Roosevelt, *supra* note 25. The due process void for vagueness doctrine is a close cousin of overbreadth, and is trans-substantive. It also may be viewed as a form of substantive, not merely procedural due process. *See generally* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L REV. 551, 618–20 (1997); Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 496–98 (1994); Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051 (2015).

236. The general rule is that direct and substantial burdens on fundamental rights trigger strict scrutiny, though elevated scrutiny may be more accurate. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1973) (applying strict scrutiny to restrictions on access to contraception); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (applying undue burden test to restrictions on pre-viability abortion).

237. The most skeptical in recent years include Justice Thomas and the late Justice Scalia. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting); Nat'l Aeronautics and Space Admin. v. Nelson, 562 U.S. 134, 160–61 (2011) (Scalia, J., concurring); BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting); Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring); United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring); McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas may now stand alone in his adamant rejection of the historical validity of substantive due process.

the current Court only Justice Thomas is categorically opposed to substantive due process,[238] and most not only are enthusiastic about free speech,[239] but also about insisting that standing rules be seen as constitutional demands rather than as prudential rules that can be tweaked to accommodate context-specific concerns.[240] This could ease the resistance to declaring a new, trans-substantive approach to facial challenges—provided that approach allows for ample judicial discretion to avoid striking down statutes wholesale or jumping into controversies prematurely, and works as well or better than the familiar rules. Part IV makes explicit how the Court should proceed to harmonize the various approaches to overbreadth challenges of laws on constitutional grounds.

IV. A UNIFIED APPROACH

The Court should hold that a substantially overbroad statute violates substantive due process. Yet even if it is unwilling to take this final and logical step, it still could—and should—relocate the overbreadth issue to a merits inquiry. This would eliminate the constitutional and analytical tensions identified above and would not place an undue burden on the courts.

Several things would follow in all cases that involve pre-enforcement challenges of allegedly unconstitutional measures. First, some relational standing arguments would fail. For example, doctors no longer would be allowed to assert the constitutional rights of their patients, unless courts defined the doctors' *own* substantive rights to embrace the patients' constitutional interests.[241] The merits inquiry would determine the scope of a first-party right, though it could be read to

238. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that state prohibitions on same-sex marriage violate substantive due process over strong dissents by Chief Justice Roberts, and Justices Alito, Scalia, and Thomas).

239. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (opinion written by Justice Thomas); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (opinion written by Justice Scalia); Snyder v. Phelps, 562 U.S. 443 (2011) (opinion written by Chief Justice Roberts); Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) (opinion written by Justice Kennedy); Republican Party of Minn. v. White, 536 U.S. 765 (2002) (opinion written by Justice Scalia).

240. *See* Allen v. Wright, 468 U.S. 737 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (discussing separation of powers implications). *See also* Roberts, *supra* note 6; Scalia, *supra* note 6.

241. *See* Singleton v. Wulff, 428 U.S. 106 (1976).

include a *jus tertii* claim or even recast as a narrow form of pendent party standing.[242] The standing inquiry would proceed from that first-party merits baseline. Past cases consistent with that way of reading the law would still stand, but only insofar as the results could be squared with the requirement that the doctors' rights must be violated, that their rights must be so intertwined with the rights of patients that they can be treated as first-party rights for Article III purposes, and that the doctors must be asserting a concrete injury rather than a generalized grievance.

The second effect would be that the "chilling" effect of a substantially overbroad law could be a sufficient injury-in-fact for litigant standing to raise all constitutional claims, not just freedom of speech claims. For example, a woman could assert a facial challenge to a measure that effectively chilled her reproductive rights by criminalizing or making it substantially more difficult to secure the health care providers' provision of reproductive rights-related medical services. Article III standing to assert constitutional claims—versus the scope of the legal right itself—would follow the same approach across contexts. Any constitutional doubts about a special rule in undue burden cases would be resolved, and the rule no longer would be even arguably unique to reproductive rights cases.

Third, freedom of speech cases, now described as entailing a "'second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep,'"[243] would express the general rule. They no longer would state a free-standing exception to general, stricter rules about facial challenges. Rather, the free speech cases would provide the basic principle. The principle may apply with special force in free speech cases and any others that implicate fundamental rights because they demand especially narrow tailoring of laws that burden those rights. But First Amendment overbreadth law would be seen as the proper and typical way to analyze all cases where a party

242. *See* Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. UNIV. L. REV. 285 (2015) (arguing that current practice of the United States Supreme Court implicitly grants "supplemental standing" to plaintiffs who bring facial challenges to statutes). *But see* Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 352–53 (2006) (refusing to permit supplemental standing).

243. United States v. Stevens, 559 U.S. 460, 473 (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

asserts a facial challenge of an arguably overbroad measure to which strict judicial scrutiny applies. As a matter of internal doctrinal coherence, the rule also would apply throughout the entire First Amendment zone where the speech is fully protected.[244]

Relatedly, severability rules would be the same in all constitutional overbreadth cases. Facial challenges still would not succeed where courts could preserve significant parts of the law that should survive constitutional review. Yet when the number of cases in which application of the law would produce unconstitutional results is too high, then the entire law would tumble. Courts would retain significant discretion to perform this task, with a thumb firmly on the scale of severability rather than facial invalidity. Judicial husbandry still would be allowed.

Finally, parties as to whom a narrower statute could not have been written would be free to raise a facial challenge to an overbroad statute, not merely an as-applied challenge. This would eliminate the current anomaly within overbreadth doctrine that allows the free speech "bad actor" greater rights than the free speech "good actor." Both could challenge the overbroad statute facially, though only the latter also could challenge the statute as applied to her. And both would face brisk headwinds in making a facial challenge. This also would ease some of the tension identified by scholars about the often illusory difference between as-applied and facial challenges.

All of this would bring much needed coherence to Article III standing doctrine. It would clarify the constitutional status of limits on third-party standing, and place free speech overbreadth doctrine within the constitutional fold. It also would liberalize—though only marginally—the law regarding facial challenges on overbreadth grounds by tossing the "no set of circumstances" rule in favor of a unitary "substantial overbreadth" principle in all cases that implicate fundamental constitutional rights. The latter is a more accurate description of how the Court has analyzed these facial challenges and is still a very difficult standard to meet. The general judicial reluctance to pull a statute up by its roots should not change with a shift to this marginally more generous (indeed, more

244. For example, when an overbroad measure is facially content-specific, it should trigger strict scrutiny automatically absent a categorical exception or other justification. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

accurate) statement of the rule.

Of course, internal coherence is hardly the hallmark of the Article III standing doctrine we currently have. As Professor Fallon recently observed, the law of standing is deeply fragmented.[245] Moreover, this fragmentation has gotten worse under the Roberts Court.[246] Its "now-we-see-it, now-we-don't" approach to standing deficiencies[247] makes it difficult for some to take the Article III injury, causation, and redressability criteria seriously. These criteria still may be interpreted in ways that seem to be driven factors that are not constitutionally driven—including, but not limited to, judicial ideology. The Court also could apply *Lexmark* narrowly and conclude that it merely tightens up the law of prudential standing in statutory cases, with no wider doctrinal implications. Finally, the Court could continue to ignore scholarly critiques of overbreadth and third-party standing law or how *Lexmark* vindicates these critiques in ways that should have doctrine-wide implications.

But internal incoherence is hardly a doctrinal virtue. Once aware of such serious doctrinal flaws, the Court likely would welcome a sensible way to address them. The vastly more plausible reading of *Lexmark* thus is the broader one outlined above, with the described ripple and doctrine coherence positive effects.[248] Overbreadth doctrine no longer would be a curious case of free speech favoritism within standing law that teeters on unconstitutionality, but a sensible merits-based approach that comports fully with Article III limits.[249] Facial challenges on overbreadth grounds would be governed by one set of rules, as would severability decisions. Third-party

245. Fallon, *supra* note 141.

246. *Id.* at 1068–92.

247. *See, e.g.*, Fisher v. University of Texas, 133 S. Ct. 2411 (2013) (overlooking weak support of standing in equal protection challenge of University of Texas affirmative action policy); Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (rejecting notion that official sponsors of ballot initiative had standing to defend it on appeal, despite state supreme court ruling indicating approval of standing); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (rejecting probabilistic standing of challengers of surveillance law, where they alleged chilling effect on their constitutional rights).

248. *See supra* text accompanying notes 209–217.

249. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (arguing that overbreadth challenges are not unique to the First Amendment). *See also* Adler, *supra* note 189, at 157; Canes-Wrone & Dorf, *supra* note 21; Isserles, *supra* note 40, at 421–56.

standing principles would be redefined as merits inquiries in ways that conform to rules that apply in free speech cases. The crucial question in all cases would be whether a statute is so substantially overbroad that it violates the constitutional baseline requirement that laws must be facially valid and rational, in order to be applied against anyone.

This result would unravel much of the doctrinal tangle. Tough questions would remain about the contours of first-party rights in constitutional cases and about how judicial severability decisions should be made. Courts also would still be able to exercise discretion to deny facial challenges when an as-applied argument would work. Judicial concerns about sticking to cases and controversies, not stepping on legislative toes, and reserving ample discretion to protect favored rights would remain.[250] Thus the standards would be uniform, but their applications could still vary with the constitutional context.

As for free speech law in particular, the litigant favoritism that inspired the overbreadth rule may persist, though under a merits rather than a unique jurisdictional umbrella. Thus it is worth revisiting the justifications for that favoritism briefly, before closing.

One explanation often given for this additional layer of judicial protection is that chilling speech is a particularly serious constitutional harm.[251] By stripping free speech of special jurisdictional protection, do we weaken it? The answer is no.

First, as others have noted, the overbreadth doctrine often is "far weaker than either its champions or its critics have appreciated."[252] That is, the "case or controversy" limits on First Amendment cases already have considerable bite, even in free speech contexts. Again, the overbreadth still must be "substantial," especially when the law at issue is aimed

250. Thus, the concern recently raised by Judge Fletcher that the United States Supreme Court should reserve some discretion to determine who may assert a right would be met. *See* William A. Fletcher, *Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 282–87 (2013).

251. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). *See generally* Schauer, *supra* note 12, at 685. *Cf.* Note, *Overbreadth and Listener's Rights*, 123 HARV. L. REV. 1 (2010) (arguing that the special solicitude reflects an interest individuals have in a right to receive ideas).

252. Fallon, *supra* note 13, at 853.

primarily at conduct, not just speech.[253]

Second, as the reach of the First Amendment has expanded to cover new territory—such as commercial speech[254]—the United States Supreme Court already has refused to extend the overbreadth doctrine to some of that territory.[255] The argument here would make such exceptions impermissible, and thus would actually strengthen free speech rights.

Still another limit on the overbreadth doctrine is that a party whose own speech is constitutionally protected may only advance an as-applied challenge,[256] or must first unsuccessfully assert the as-applied challenge before she can prevail on a facial challenge.[257] The approach advanced would drop that restriction and again make speech rights stronger, not weaker.

The Roberts Court has given quite robust protection to free speech. Its free speech protectionism surfaces both in its substantive rulings about free speech,[258] and in its procedural

253. *Broadrick*, 413 U.S. at 615 (noting overbreadth must be real and substantial).

254. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (extending coverage of First Amendment to commercial speech).

255. *See, e.g.*, Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982) (stating that overbreadth doctrine does not apply to commercial speech); S.F. Arts & Athletics, Inc., v. U.S. Olympic Comm., 483 U.S. 522, 536 n.15 (1987) (stating that it is "highly questionable" whether overbreadth doctrine applies to commercial speech).

256. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985). *See* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 31, 71–73 (2003) (critiquing this aspect of the rule as evidence of drift away from the central premises of the overbreadth doctrine).

257. Fallon, *supra* note 249, at 1350 n.150.

258. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (striking down a sign ordinance and indicating that all content-based regulations trigger strict scrutiny); United States v. Alvarez, 132 S. Ct. 2537 (2012) (striking down regulations of false speech where not narrowly tailored and linked to specific harms); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (striking down law that limited minors' access to violent interactive video games without parental consent); Snyder v. Phelps, 562 U.S. 443 (2011) (upholding right of funeral protesters to picket on public street where no evidence of disruption of the funeral); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (striking down limits on corporate campaign expenditures); United States v. Stevens, 559 U.S. 460 (2010) (striking down congressional measure aimed at preventing animal cruelty and distribution of materials that depicted such abuse on overbreadth grounds). The Court has lapsed in its robust free speech protection in limited, though important, contexts. *See* Walker v. Sons of Confederate Veterans, 135 S. Ct. 2239 (2015) (basing the decision on the government speech exception);

rulings. Some of these cases give a quite liberal construction of the Article III "injury in fact" requirement even when the cases involve a pre-enforcement challenge of a state law.[259] Nothing in this proposal limits the lower courts' ability to follow the Court's speech-protective lead.

Indeed, the Roberts Court has shown remarkable willingness to strike down state and federal speech regulations on facial challenges[260] even when United States government argued it had no intention of giving a challenged measure the feared overbroad effect. In *Stevens,* for example, the overbroad effect was arguably "fanciful."[261] The President who signed the measure added a signing statement expressing his specific concerns about the facial overbreadth, which lent force to the government's insistence that it had no intention of applying the statute in the exotic and unconstitutional way the Court feared.[262] The Court nevertheless struck the measure down on overbreadth grounds.[263]

None of this concern about the chilling effect of laws that implicate speech needs to change, even after a *Lexmark*-inspired retooling of overbreadth and third-party standing. Rather, it would simply be available in non-speech, fundamental rights cases as well. First Amendment fans thus have little to fear.

Finally, the change might bode well for other fundamental

Williams-Yulee v. Fla. Bar, 135 S. Ct. 44 (2014); Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (upholding limits on speech related to fundraising in context of a judicial campaign); Summum v. Pleasant Grove City, 555 U.S. 460 (2009) (basing its decision on the government speech exception); Morse v. Frederick, 551 U.S. 393 (2007) (limiting student expression at a school-sponsored extra-curricular event); Garcetti v. Ceballos, 547 U.S. 410 (2006) (limiting free speech rights of public employees where the speech is part of the employee's duties). For a critique of several aspects of the Roberts Court approach to free speech, *see* Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365 (2014). *See also supra* text accompanying notes 58–70.

259. *Compare* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014), *with* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).

260. *See, e.g., Brown,* 564 U.S. 786 (striking down California law that prohibited minors from purchasing violent videos without parental permission); *Stevens,* 559 U.S. 460 (striking down congressional measure aimed at preventing animal cruelty by punishing distribution of images that depicted, inter alia, killing of animals).

261. *Stevens,* 559 U.S. at 482, 485 (Alito, J., dissenting) (describing the overbreadth claim as based on "fanciful hypotheticals").

262. *Id.* at 480 (noting that "[t]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*").

263. *Id.*

rights litigants where overbroad laws impinge on them, a normative end this Article implicitly favors. The importance of free speech will not pale simply because equal protection, Fourth Amendment, freedom of religion, and other fundamental rights earn comparably close judicial scrutiny. Moreover, the Court can still keep that thumb on the scale against facial challenges, and in favor of severability and as-applied rulings.

Last but not least, these decisions will be seen for what they really are: decisions on the merits of the implicated constitutional claims, with trans-substantive due process implications. If the pattern of the cases under the proposed approach betrays a continuing embrace of free speech exceptionalism, this pattern can be analyzed directly, and the normative implications of striking down measures that chill speech versus other constitutional rights can get a fresh airing. The overbreadth doctrine of the First Amendment no longer would be an Article III enigma embedded in an arcane, nearly impenetrable jurisdiction-insiders-only thicket.

CONCLUSION

It is time for the Court to articulate and apply more consistently the limits on a litigant's right to assert a facial challenge of a statute or policy on overbreadth grounds. Recent cases have raised an important question about third-party standing that cannot be resolved without unraveling many doctrinal snarls. If the Court does decide that third-party standing is a matter of the merits, not jurisdiction, this answer inevitably will implicate the theoretical struts of the overbreadth doctrine. It likewise will raise new questions about facial challenges of overbroad statutes in other contexts. This Article anticipates and welcomes that reexamination and offers a straightforward and normatively grounded path that would bring greater coherence to the doctrine that governs all of these interlocking concerns.