Salerno v. Chevron: What to Do about Statutory Challenges

*by Stuart Buck**

The *Chevron* standard for judging agency statutory interpretations is ubiquitous in administrative law cases.[1] The prototypical *Chevron* case arises where an agency has promulgated a regulation that takes a particular view of the authorizing statute, and the regulation is then challenged as inconsistent with the statute. At that point, the court is supposed to ask first, whether "Congress has directly spoken to the precise question at issue"[2] and if so, whether the regulation is consistent with the clear meaning of the statute. If the "statute is silent or ambiguous with respect to the specific issue, [then] the question for the court is whether the agency's answer is based on a permissible construction of the statute."[3]

What few, if any, scholars have noticed is that the Supreme Court in 1993 spoke approvingly of a standard that seems to be utterly different from *Chevron*: the *Salerno* standard. In the (in)famous 1987 decision of *United States v. Salerno*,[4] the Court said that no facial challenge to a law can succeed unless the plaintiff demonstrates that there is "*no set of circumstances*" in which the law could be applied constitutionally.[5]

Then came the extension of *Salerno* into the statutory context. In the 1993 decision of *Reno v. Flores*,[6] which involved a facial challenge to an INS regulation, the Court said (quoting *Salerno*) that "respondents 'must establish that no set of circumstances exists under which the [regulation] would be valid.'"[7] This is true, the Court said, "as to both the constitutional challenges *and the statutory challenge*."[8] Surprisingly, *Reno v. Flores* has not been discussed in the scholarly literature of administrative law, despite the confusion it has caused various lower courts.

The D.C. Circuit is, of course, the main venue for challenging administrative rulemakings, and is therefore the main source of law on such challenges.[9] Despite *Reno*, that court has had difficulty coming to a definite conclusion on the very existence of statutory *Salerno*. In one post-*Reno* case,[10] the court said the *Salerno* standard does not apply when a regulation is challenged as facially in violation of a statute: "[W]e hold that the *Salerno* standard does not apply here. The Supreme Court has never adopted a 'no set of circumstances' test to assess the validity of a regulation challenged as facially incompatible with governing statutory law."[11] The court pointed out that the Supreme Court had in one case "upheld a facial challenge under normal *Chevron* standards, despite the existence of clearly valid applications of the regulation."[12] Then the D.C. Circuit Court observed that the Supreme Court had "on several occasions invalidated agency regulations challenged as facially inconsistent with governing statutes despite the presence of easily imaginable valid applications."[13] Based on this analysis, the court concluded that "the normal *Chevron* test is not transformed into an even more lenient 'no valid applications' test just because the attack is facial."[14]

In a later D.C. Circuit opinion,[15] however, the court decided to sidestep the question about whether statutory *Salerno* exists.

> NMA brought the case as a facial challenge to the rules. Yet NMA conceded at oral argument that even by its lights, "the rules" could be constitutionally applied in some cases. Whether that concession should have ended this aspect of the case under the doctrine that a law valid in some of its applications cannot be struck down as invalid on its face is a question we leave to another day.[16]

Soon thereafter, the court was again faced with the question of whether *Salerno* applied in the statutory context.[17] Having noticed the conflicting precedents, the court decided to avoid the question of whether to follow its prior panel decision in the first *National Mining* case, or to follow the Supreme Court's dictum in *Reno v. Flores*.[18] The court thought resolving this question was unnecessary because the petitioners would lose under any of the possible standards.

Thus, the reference to *Salerno* in *Reno v. Flores* has caused great confusion. And no wonder. It is extraordinarily difficult to see how the *Salerno* standard could be consistent with *Chevron*. *Salerno*, at least on its face, is a much more demanding test for a plaintiff to have to meet in order to get an administrative interpretation declared unlawful. While a plaintiff could win under *Chevron* either by showing that the agency had violated a clear directive of Congress, or by showing that the agency interpretation was unreasonable, *Salerno* would seem to dictate that a plaintiff cannot ever win unless he can show that there is "no set of circumstances" in which the regulation would be consistent with the statute. Because it would take an extraordinarily obtuse agency to fail so completely in writing such a regulation, applying *Salerno* in the statutory context would seem to dictate that plaintiffs will always lose. This conception of *Salerno* explains why the D.C. Circuit once held that "the normal *Chevron* test is not transformed into an even more lenient 'no valid applications' test just because the attack is facial."[19]

The problem may, however, lie in the usual view of *Salerno*. Most people think *Salerno* means judges are supposed to count up all possible applications (assuming such a task is possible in the first place), examine the validity of each one, and proceed to facial invalidation only if it turns out that all applications are invalid. One might call this the bottom-up view of *Salerno*, and it seems to be held by legal scholars,[20] circuit courts of appeal,[21]

and Supreme Court Justices.[22] For example, Justice Scalia, the most prominent proponent of *Salerno* as to all contexts, once wrote that a certain statute could not be facially unconstitutional, "since there are apparently some applications of the statute that are perfectly constitutional."[23] In another case, he claimed that the petitioner "can defeat the respondents' facial challenge by conjuring up *a single valid application* of the law."[24]

I argue, relying heavily on the exemplary work of Marc Isserles,[25] that the bottom-up view of *Salerno* is wrong. The main thrust of Isserles's work is that *Salerno* is merely *descriptive*. That is, the "no set of circumstances test" is not a "test" at all, in the normal use of that word. Rather, the phrase "no set of circumstances" merely *describes* what happens when a statute is declared facially invalid. And a ruling of facial invalidity doesn't arise from a process wherein a judge (or his law clerk) laboriously tallies up all the conceivable invalid applications of the statute. Rather, courts rely on various constitutional doctrines that literally look only at the "face" of the statute.

On this top-down theory, facial invalidation comes first, on its own terms, and thereby causes the invalidity of all the statute's applications. The bottom-up theory of *Salerno*, in which the invalidity of all applications causes facial invalidation, gets the causal relationship precisely backwards. As the Court once said, though perhaps unaware of the significance of its phrasing, "There is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face *and therefore* in all its applications falls short of constitutional demands."[26]

Moreover, the bottom-up view makes little sense on its face. Any given statute might have innumerable potential applications, many of which might not be foreseeable by a given court or plaintiff. It would be absurd to demand that a plaintiff come up with an affirmative demonstration of the constitutional invalidity of every application of a statute. If that were the requirement, facial invalidation would be practically impossible.[27]

Consider a few examples: The *Lemon* test[28] provides that the Establishment Clause is violated if a law 1) lacks a secular legislative purpose, 2) has the primary effect of advancing or inhibiting religion, or 3) creates excessive governmental entanglement with religion.[29] In one famous case, *Edwards v. Aguillard*,[30] the Court considered a law providing that public school teachers treat creationism equally with evolution.[31] The Court struck this law down on its face, reasoning that the actual purpose was to endorse religion.[32] Note, however, that the facial invalidity was due solely to a consideration of the law's *purpose*, and not to any consideration of every possible application. And this makes sense—an impermissible purpose would presumably affect (and thus invalidate) every possible application. So once the court has figured out that a statute was passed with an unconstitutional purpose, it can rule that the statute is facially invalid.

Consider as well the First Amendment caselaw on content-discrimination. In *Police Department of Chicago v. Mosley*,[33] for example, the Court considered a statute that prohibited picketing except for that inspired by labor concerns.[34] The Court held that this content discrimination necessitated striking down the law on its face.[35] But note: the facial invalidation arose here not by counting up the number of invalid applications, but by looking for a discriminatory effect. And such a discriminatory effect automatically made all applications invalid, even though an evenhanded law could likely be constitutionally applied to all the non-labor picketers.[36]

In short, after a court holds a statute facially invalid, all applications of the statute are indeed invalid. But it is crucial to get the chain of causation correct here: the invalidity of all applications does not *cause* facial invalidity, but rather *flows from* it. Facial considerations come first, and *Salerno* merely describes the ultimate result: the invalidity of all applications.

So, what precisely are the types of statutory challenges that would by nature result in facial invalidation (and hence satisfy *Salerno*)? Isserles theorizes that a "valid rule facial challenge is a challenge alleging that the statutory terms themselves, and not particular statutory applications, trigger constitutional scrutiny."[37] Translating to the administrative context, a facial challenge should allege that the regulation's terms themselves, not particular applications, violate a statutory command in some way that affects all applications.

If this view of *Salerno* is correct, then the analogue in the statutory context is none other than *Chevron* Step One. Under Step One, if a statute is clear as to a particular issue, and the agency's regulation is contrary to the statute, then the regulation is to that extent facially invalid.[38] As a result, the regulation must be vacated on its face and/or remanded to the agency for further consideration. In any event, a facial challenge under Step One is judged not by imagining all possible applications of the regulation, but by a direct "facial" comparison of the regulation and the authorizing statute. Here, as under the modified view of *Salerno*, facial considerations come first, causing the invalidity of all potential applications, not the other way around.

For example, regulations are often struck down because the agency failed to follow some required procedure. Under the Administrative Procedure Act, an informal rulemaking proceeding must satisfy certain procedures: First, notice must be published in the Federal Register, containing a "statement of the time, place, and nature of public rule making proceedings;" a "reference to the legal authority under which the rule is proposed;" and "either the terms or substance of the proposed rule

or a description of the subjects and issues involved."[39] Second, the agency must give all interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments."[40] Third, the agency "shall incorporate in the rules adopted a concise general statement of their basis and purpose."[41]

Regulations are often challenged on the grounds that the agency failed to meet one or more of these procedural requirements—most often that the notice provided by the agency was insufficient.[42] The court will usually find that the agency's notice was sufficient as long as the ultimate rule is a "logical outgrowth" of the proposed version of the rule.[43] But if the rule is not a logical outgrowth, the court will deem the agency's notice to have been insufficient—and the rule will be facially invalidated, at least as to those provisions affected by the lack of notice.[44]

Note that facial invalidation here does not proceed by asking whether all applications of the regulation are inconsistent with the statute. Indeed, the courts do not even ask whether *any* application is inconsistent with the statute. Rather, the question of validity is decided by the agency's compliance with required procedures— and failure to comply can facially invalidate a regulation even if all applications would otherwise be consistent with the statute. In this respect, administrative cases resemble some constitutional cases. A law passed out of a discriminatory motivation might be facially invalidated even if every application was otherwise constitutional. And there too, the legislature could, at least in theory, constitutionally pass the same law if it had a proper motivation, just as the agency could promulgate the same regulation if it followed the proper procedures. The question of facial invalidity rests not on the validity of any particular applications, but on the agency's compliance with trans-substantive *statutory* norms, or the legislature's compliance with trans-substantive *constitutional* norms.

Another example would be where the regulation outright contradicts the statute on a certain point. Obviously, this is the paradigmatic *Chevron* Step One question. Under *Chevron*, if the statute is clear as to an issue, and the regulation is inconsistent with the statute, then the rule is facially invalid, whether or not particular applications might otherwise be valid if encompassed by a regulation consistent with the statute. As the Court itself said, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[45] One reaches the same result by applying statutory *Salerno*. Where the regulation flatly contradicts the statute, the contradiction affects every possible application, which is why facial invalidation is appropriate.

A dissent by Justice Scalia gives a colorful example of why this is so.[46] Imagine a statute that says, "No premeditated killing," and a regulation that says merely, "No killing." In such a case, the regulation is facially in violation of the statute, even though the regulation *could* lawfully be applied to the subset of killings that *are* premeditated. Scalia's full discussion of this point is as follows:

> It is one thing to say that a facial challenge to a regulation that omits statutory element *x* must be rejected if there is any set of facts on which the statute *does not require x.* It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element *x happens to be present.* On this analysis, the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires.[47]

What Justice Scalia is getting at here, though not in so many words, is that the fault with the hypothetical regulation is its facial inconsistency with the statute, and that this inconsistency automatically makes all applications invalid. This occurs even though the application to a killing that actually was premeditated would otherwise be in accord with the statute. It is crucial to focus on this aspect—if a court started its reasoning from the "bottom up," that is, by imagining all possible applications and judging their validity in accordance with the statute, the court might well conclude, *contra* Scalia, that the application of the regulation to a genuinely premeditated killing was valid. But it is clear from this passage that Justice Scalia was engaged in "top down" reasoning, in which the validity of various applications are determined by first examining whether the regulation is facially consistent with the statute. If a flat inconsistency is found, all applications are thereby made invalid, just as Isserles hypothesized for the constitutional context.

In numerous cases, courts have facially invalidated a regulation or regulatory provision, based not on a sum total of possible applications, but by using a similar Step One inquiry.[48] If the statute and the regulation conflict over a given point, then the regulation is to that extent facially invalid, and hypothesizing about possible applications is irrelevant.

The role of *Chevron* Step One shows up perhaps most strikingly in those cases where a court strikes down

an agency interpretation, not because the interpretation was inconsistent with the statute, but because the agency wrongly assumed that a particular interpretation was *commanded by* the statute, even though the agency actually had discretion on the particular point. In such cases, a court may facially invalidate the agency interpretation under *Chevron* Step One, even while acknowledging that the agency could turn right around and promulgate an *identical* interpretation in the exercise of its discretion. As the D.C. Circuit has said, "an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it 'was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that such [a regulation is] desirable.'"[49] Thus, *Chevron* Step One can lead to facial invalidity even where *every application is otherwise valid*.

In sum, *Salerno* has often been misunderstood, even by distinguished judges and scholars, as an extraneous "test" imposed on constitutional adjudication from the outside. It has been seen as requiring the court to hypothesize about all possible circumstances or applications before venturing to declare a statute unconstitutional.

Such a vision of *Salerno* is in sharp conflict with the *Chevron* model of adjudication, in which a regulation will be upheld as long as it neither contradicts the statute nor is unreasonable. Thus, the Supreme Court's holding that *Salerno* applies equally to statutory challenges has caused great confusion.

This conflict between *Salerno* and *Chevron* can be avoided, however, if *Salerno* is reconceptualized (following Marc Isserles) as purely *descriptive*. As I explain above, that reconceptualization makes eminent sense, and indeed is the only way that a seemingly impossible-to-meet *Salerno* "test" can be reconciled with *Chevron*.

* Mr. Buck is an associate at Kellogg, Huber, Hansen, Todd & Evans. A longer version of this article appears at 55 Admin. L. Rev. 427 (2003). The author would like to thank Stephen Williams and Marc Isserles for their helpful comments. The views and opinions expressed herein are those of the author only and do not necessarily reflect the views of Kellogg, Huber, Hansen, Todd & Evans.

Footnotes

[1] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron*'s importance and counter-intuitiveness are each captured in Cass Sunstein's marvelous aphorism that *Chevron* is the "counter-*Marbury* for the administrative state." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2119 (1990).
[2] *Chevron*, 467 U.S. at 842.
[3] *Id*. at 843.
[4] 481 U.S. 739 (1987).
[5] *Id*. at 745.
[6] 507 U.S. 292 (1993).
[7] *Id*. at 301 (quoting *Salerno*, 481 U.S. at 745) (alteration in original).
[8] *Id*. (citation omitted) (emphasis added).
[9] The Tenth Circuit has followed *Reno v. Flores* in at least one case. *See* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1293-94 (10th Cir. 1999) (adopting the *Reno v. Flores* interpretation of *Salerno* and applying it to *Chevron* in the court's determination of standard of review).
[10] Nat'l Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).
[11] *Id*. at 1407.
[12] *Id*. (citing Sullivan v. Zebley, 493 U.S. 521 (1990)).
[13] *Id.* at 1407-08 (citing Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 418-20 (D.C. Cir. 1994)).
[14] *Id.* at 1407.
[15] Nat'l Mining Ass'n v. United States Dep't of the Interior, 251 F.3d 1007 (D.C. Cir. 2001).
[16] *Id*. at 1010.
[17] Amfac Resorts, L.L.C. v. United States Dep't of the Interior, 282 F.3d 818 (D.C. Cir. 2002).
[18] *Id.* at 828.
[19] *United States Army Corps of Eng'rs*, 145 F.3d at 1407.
[20] *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 239-40 & n.20 (1994)).
[21] *See, e.g.*, Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1077-78 (D.C. Cir. 2003) (holding a provision of the Endangered Species Act facially valid under the Commerce Clause because the EPA had shown one particular scenario in which the Act could be constitutionally applied); Chem. Waste Mgmt., Inc. v. EPA, 56 F.3d 1434, 1437 (D.C. Cir. 1995) (holding an EPA rule facially valid because of a "hypothetical scenario" involving a valid application).
[22] *See, e.g.*, Janklow v. Planned Parenthood 517 U.S. 1174, 1176 (1996) (Stevens, J., concurring in denial of cert.).
[23] Ada v. Guam Soc'y. of Obstetricians & Gynecologists, 506 U.S. 1011, 1013 (1992) (Scalia, J., dissenting from denial of *certiorari*).
[24] City of Chicago v. Morales, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting).
[25] Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359 (1998).
[26] Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984) (emphasis added).
[27] The Fifth Circuit hinted at this possibility in *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634-35 (5th Cir. 2003), where it acknowledged that the Supreme Court's recent Commerce Clause decisions would have come out the other way if the Court had hypothesized about possible valid applications.
[28] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[29] *Id.* at 612-13.
[30] 482 U.S. 578 (1987).
[31] *See id.* at 581 (referring to Louisiana's "Creationism Act").
[32] *See id.* at 586-87 (concluding the Act was not designed to further its stated purpose, which was to protect academic freedom).
[33] 408 U.S. 92 (1972).
[34] *See id.* at 92-93.
[35] *See id.* at 102.
[36] *See id.*
[37] Isserles, *supra* note 25, at 428.
[38] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[39] 5 U.S.C. § 553(b)(1)-(3).
[40] *Id.* § 553(c).
[41] *Id*.
[42] *See, e.g.*, 1 Richard J. Pierce, Jr., Administrative Law Treatise

§ 7.3, 426 (2002) (categorizing challenges to the adequacy of agency notice as two types: first, that parties affected by the final rule could not have known its effect on them because the proposed and final rules were substantially different; and second, that the agency did not make known supporting data it used in its decision to affected parties until it had already taken final action).

[43] *See, e.g.*, Natural Res. Def. Council, Inc. v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988).

[44] *See, e.g.*, Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1274-75 (D.C. Cir. 1994); Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994); Horsehead Res. Dev. Co. v. Browner, 16 F.3d 1246, 1267-68 (D.C. Cir. 1994).

[45] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984).

[46] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting).

[47] *Id*.

[48] *See, e.g.*, Dole v. United Steelworkers of Am., 494 U.S. 26, 42-43 (1990) (invalidating a Department of Labor rule using *Chevron* Step One); Pittston Coal Group v. Sebben, 488 U.S. 105, 113-19 (1988) (invalidating a rule as inconsistent with the statute); INS v. Cardoza-Fonseca, 480 U.S. 421, 430-32, 448-49 (1987) (invalidating an agency interpretation of a rule based on reasoning similar to that of *Chevron* Step One); Conn. Dep't of Income Maint. v. Heckler, 471 U.S. 524, 537-38 (1985) (upholding a rule as consistent with the language of the statute).

[49] Prill v. NLRB, 755 F.2d 941, 948 (D.C. Cir. 1985) (quoting Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650, 666 (1983) (quoting FCC v. RCA Communications, Inc., 346 U.S. 86, 96 (1953))) (alterations in original).