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Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court

by DAVID L. FRANKLIN*

Introduction

Consider this statement: Constitutional adjudication is always “as-applied.” In other words: the Court’s job in any case is nothing more and nothing less than to determine, on the facts before it, whether the plaintiff is entitled to the relief she seeks. In a constitutional case, this typically means determining whether the conduct of the party bringing the challenge is protected by a valid claim of constitutional right. If the answer is yes, then the law purporting to regulate that conduct must give way and cannot be applied to the challenger. In this sense, rights serve as shields behind which constitutionally protected activities may continue. A ruling that vindicates a constitutional right, however, does not strike any law—or even any provision of any law—from the statute books. Whether the challenged law may validly be applied to other actual or potential challengers, or in other factual situations, is for future lawyers to argue about and future cases to decide.

Now consider this statement: Constitutional adjudication is always “facial.” In other words: it is emphatically the province and duty of the judicial department to say what the law is.¹ In a constitutional case, this means determining whether the challenger’s conduct is regulated by a constitutionally permissible law. Courts must ascertain whether a challenged law is constitutionally permissible by gathering as much relevant information as they can about the law’s purposes and effects, and then measuring what they find against the applicable doctrinal tests.

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Rights rarely function as shields protecting certain activities; virtually any conduct can be regulated, provided the regulation is duly authorized and validly drafted. Constitutional rulings, at least when they are rendered by appellate courts, always have effects beyond the immediate parties to the case. The precise breadth of a court's holding in a constitutional case, as in any other, is for future lawyers to argue about and future cases to decide.

This Article demonstrates that both of the foregoing statements are true—or, rather, that we have a constitutional jurisprudence in which each of the statements is treated as true some of the time. More strongly put: sometimes the Supreme Court acts as if constitutional adjudication is always as-applied, and sometimes it acts as if constitutional adjudication is always facial. Naturally, this state of affairs has occasioned some frustration and unease among both justices and commentators. Yet, the frustration and unease, I submit, are the result not of the content of either vision of constitutional adjudication but of the absolutism with which each is put forward. Constitutional adjudication is sometimes as-applied and sometimes facial. It is never *always* anything.

The problem, of course, is how to define “sometimes.” When should constitutional adjudication be as-applied and when should it be facial? Scholars have made some headway towards resolving this ambiguity and I will touch upon a few of these contributions in the pages that follow. However, the primary focus of this Article will be Supreme Court jurisprudence over the past half-decade, and particularly the Roberts Court, which has been in place since the elevation of Justice Alito in January 2006. For its part, the Roberts Court has tended to openly throw its weight behind the first statement. That is, on most occasions, the Court speaks and acts as if constitutional adjudication should set its sights narrowly, proceeding on an as-applied basis except in unusual circumstances—and it frequently hints that those circumstances are so unusual as to be practically nonexistent. Yet, on other occasions, though with less fanfare, the Court sets its sights more broadly, acting on a vision of constitutional adjudication that treats facial analysis as a (largely unspoken) norm.

Most intriguing of all, several of the Roberts Court's decisions adopt the language of the as-applied model even as their reasoning pursues the logic of the facial model. These cases embody what I call “facial adjudication in as-applied clothing.” As we will see, this is a versatile technique: it has allowed the Court to reject both facial and as-applied challenges, while ostensibly remaining open to future as-applied

challenges,² and even to signal the future success of all colorable as-applied challenges while purporting not to disturb precedent that rejects just such an outcome.³ Perhaps the most distinctive by-product of this technique has been what I call *facial validation*, where the Court upholds a statute not only against the challenge at bar, but, for all practical purposes, against all future challenges as well.⁴ I will argue that when substantive constitutional doctrine dictates a focus on attributes like legislative purpose that operate at the level of the statute itself rather than at the level of discrete applications, the predictable result is facial adjudication—and that facial adjudication can produce validations as well as invalidations. By the end of our exploration of the Court’s recent cases, we will have discovered that substantive doctrine is what drives the justices to look at constitutional adjudication through both ends of the telescope.

Before proceeding, a note on methods and objectives is in order. I have deliberately framed the choice between the as-applied and facial modes as nothing less than a choice between dramatically opposed visions of constitutional adjudication. Some readers might object that in doing so I have overshot the mark in two related respects. First, it could be objected that by mapping the terrain in such a dichotomous way, I have left out a large patch of habitable middle ground. A judge or scholar might embrace some features of one of the two statements with which this Article began but reject others, or even embrace some features of both. In particular, a commitment to as-applied adjudication need not entail an understanding of rights as shields for privileged conduct, and conversely, the enterprise of facial adjudication need not entail the rejection of such an understanding. To similar effect, the Marshallian injunction to “say what the law is” can be satisfied to a large degree by case-specific, as-applied adjudication, and so on.

Second, some might object that the as-applied versus facial distinction is a much narrower and more technical phenomenon than I have suggested. Indeed, courts and commentators often write as if the distinction turns on a set of fairly modest factors rather than the broad competing visions of adjudication that I emphasize. In some cases, for example, courts appear to equate the question of whether constitutional adjudication is as-applied or

2. See, e.g., *infra* text accompanying notes 21–28 (discussing *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008)); *infra* text accompanying notes 68–78 (discussing *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007)).

3. See *infra* text accompanying notes 87–92 (discussing *FEC v. Wis. Right to Life*, 127 S. Ct. 2652 (2007)).

4. See *infra* text accompanying notes 93–128.

facial with the timing of the litigation relative to the enforcement of the challenged law: pre-enforcement actions are treated as facial challenges, post-enforcement actions as as-applied challenges.⁵ In other cases, courts act as though the choice between as-applied and facial adjudication is simply a matter of the plaintiff's litigating strategy: insofar as our civil adjudication system is a plaintiff-driven one, the story goes, the plaintiff should be the master of the mode in which her constitutional claims will be adjudicated, just as she is the master of what causes of action to bring and what evidence to rely on.⁶ Moreover several prominent scholars have argued that the as-applied versus facial distinction often boils down to nothing grander than an inquiry into the severability of invalid statutory provisions.⁷

As to the first objection, I freely concede that as-applied and facial adjudications do not occupy distinct and mutually inaccessible conceptual universes. Instead, what I mean to suggest is that when Supreme Court justices confront the choice between these two modes of constitutional analysis, they generally gravitate toward one or the other of the two opposed visions of adjudication described at the beginning of this Article. The features of each vision outlined in this Article are by no means strict logical entailments, but are rather clusters of attributes that tend to accompany each mode. So, for instance, I do not insist that the vision of

5. A good example here is *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), in which Judge Frank Easterbrook rejected a facial challenge to an Indiana statute that required women seeking abortions to make two trips to the clinic on the grounds that enforcement of the statute had not yet begun and therefore it was unknown whether it would impose an unconstitutional "undue burden" on women. *Cf. id.* at 715–17 (Wood, J., dissenting) (noting that the undue burden test has a legislative purpose component which can be examined on a pre-enforcement basis).

6. Hence the Court often speaks in terms of whether a facial challenge has been "brought," *see, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1193–94 (2008), or can be "entertained," *see, e.g.*, *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999), rather than whether facial adjudication is appropriate given the substantive constitutional doctrine involved.

7. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 251 (1994) (acknowledging the importance of substantive constitutional principles, but arguing that when they do not come into play, "facial challenge doctrine really boils down to severability doctrine combined with institutional limits on the *Salerno* presumption of severability"); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 876 (2005) ("[T]he debate regarding the availability of facial challenges, in particular facial overbreadth challenges, is really a debate about statutory severability"); *see also generally* Richard J. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (arguing for "separability" as one of two primary factors, along with "specification," that determine when it is appropriate for a court to depart from the normal preference for as-applied adjudication).

rights as shields is uniquely compatible with as-applied adjudication. I do, however, assert that a justice who adopts an understanding of particular rights as shields is more likely to favor as-applied adjudication as the vehicle for vindicating those rights in discrete cases than one who does not.⁸ By the same token, a justice who rejects the paradigm of rights as shields in certain contexts, perhaps in favor of a focus on the government's reasons for acting, is likely to incline toward facial review in those contexts.⁹

Between these two objections, I am more inclined to take issue with the second. There is in my view, for example, no necessary correlation between the timing of a lawsuit and the mode in which it is adjudicated—indeed, we shall see examples from even the Roberts Court of post-enforcement facial review¹⁰ and pre-enforcement as-applied review.¹¹ And, as I have argued before, the as-applied versus facial distinction is not a function of the plaintiff's litigation strategy or the doctrine of severability.¹² What matters most is the Court's understanding of substantive constitutional doctrine and the way in which its understanding is reflected in the breadth of the Court's holdings.

Both objections might have more force if my project were to provide a comprehensive analysis of the precise boundary between as-applied and facial challenges—but it is not. Rather, I am interested in explaining how the Roberts Court has negotiated the choice between as-applied and facial review in its cases, and what those cases tell us about how the justices view the ongoing project of translating constitutional meaning into constitutional doctrine.

Part I of this Article begins with a description of the traditional model of judicial review, which strongly favors as-applied challenges over facial ones, and then canvasses several recent cases in which the Court has reaffirmed its adherence to that model. Part II discusses two categories of cases that have been described as exceptions to the traditional model—overbreadth cases and abortion rights cases—and demonstrates that the Court has not been especially receptive of late to facial challenges even in

8. For a somewhat more extended discussion of this tendency, see David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 77, 81–82 (2006).

9. See *id.* at 80–81.

10. See *infra* text accompanying notes 21–28 (discussing *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008)).

11. See *infra* text accompanying notes 68–78 (discussing *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007)).

12. Franklin, *supra* note 8, at 64–67.

these areas. Part III exposes the intriguing phenomenon on the Roberts Court that I label “facial adjudication in as-applied clothing” and reveals that this phenomenon acts to mask the fact that facial review is not nearly as rare as the traditional model would have us believe. The Article concludes by suggesting some reasons why this phenomenon occurs, focusing on substantive constitutional doctrines that necessitate an inquiry into legislative purpose.

I. The Traditional Model

An apt starting point for our exploration of facial challenges and the Roberts Court is the statement with which this Article began, which embodies what I will call the traditional model of constitutional adjudication. The traditional model finds its most uncompromising expression, and its eternal case citation, in *United States v. Salerno*.¹³ In rejecting a facial challenge to the pretrial detention provisions of the Bail Reform Act, the *Salerno* Court stated that “[a] facial challenge is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”¹⁴ *Salerno* purports to leave a narrow door open for facial adjudication, but in an important sense it really does not: under the “no set of circumstances” rule, even facial invalidation takes on an as-applied cast, since, in theory, a court may resort to it only after it has been convinced that each discrete application of the challenged statute is invalid.¹⁵

Although Chief Justice Rehnquist laid out his “no set of circumstances” test in *Salerno* quite matter-of-factly and with no citations to precedent, the test has since become something of a battleground among the justices. Justice Stevens has repeatedly insisted that *Salerno* does not set out a general rule for adjudicating facial challenges,¹⁶ while Justice Scalia has insisted with equal vigor that it does or at least should.¹⁷ On the Roberts Court, the struggle over *Salerno* has subsided into an uneasy cease-fire for the time being, with the Court repeatedly citing the “no set of circumstances” rule while at the same time acknowledging some

13. *United States v. Salerno*, 481 U.S. 739 (1987).

14. *Id.* at 745.

15. *Salerno* does explicitly leave the door open for one type of facial challenge: First Amendment challenges alleging that a statute is unconstitutionally overbroad. *Id.* For a discussion of overbreadth challenges, see *infra* text accompanying notes 41–44.

16. See, e.g., *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (mem.) (Justice Stevens concurring in denying certiorari).

17. See, e.g., *id.* at 1178 (Justice Scalia dissenting from denial of certiorari).

uncertainty about the domain over which it applies.¹⁸ But regardless of the fate of the *Salerno* test, the Court's recent discussions of the facial versus as-applied controversy have made clear the Court's allegiance to the traditional model.¹⁹ Whenever the Court explicitly discusses the choice between as-applied and facial challenges, it characterizes the former as the norm and the latter as the exception. As the Court recently put it, quoting a prominent scholar, "As-applied challenges are the basic building blocks of constitutional adjudication."²⁰

*Crawford v. Marion County Election Board*²¹ is an instructive example of the Roberts Court's adherence to the traditional preference for as-applied adjudication. In 2005, Indiana enacted a "voter ID" law, requiring anyone who wants to cast a ballot in person to show poll workers a piece of government-issued identification with his or her photo on it. As soon as the voter ID law went into effect, the Indiana Democratic Party and other plaintiffs challenged it on its face in court, raising constitutional objections to the law's purposes and its effects. On the purposes side, the plaintiffs argued that the Indiana legislature enacted the law to advance the interests of the Republican Party²² rather than to meet any realistic threat of in-person voter fraud. On the effects side, they argued that the law would make it harder for people without photo IDs to vote—particularly elderly, homeless, and/or poor people, all of whom are disproportionately likely to vote Democratic (if they are allowed to vote). The plaintiffs likened the logistical burdens imposed by the voter ID law to a state-imposed poll tax of the kind the Court declared facially unconstitutional in a landmark 1966 ruling.²³

The Court was not persuaded—the plaintiffs lost by a vote of 6-3. Justice Stevens wrote the lead opinion for a three-justice plurality consisting of himself, Chief Justice Roberts and Justice Kennedy. The plurality concluded that the state's interests in combating both the reality and the perception of in-person voter fraud were legitimate and important, and that in any event the burden on voters of getting a photo ID was rather small. One could quibble with the plurality's conclusion about legislative

18. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) ("We need not resolve that debate.").

19. See *Wash. State Grange*, 128 S. Ct. at 1190–91; *Carhart*, 127 S. Ct. at 1639; Sabri v. United States, 541 U.S. 600, 608–10 (2004).

20. *Carhart*, 127 S. Ct. at 1639 (quoting Fallon, *supra* note 7, at 1328).

21. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

22. All of the Republican state legislators voted in favor of the law, and all of the Democratic legislators who were present voted against it. *Id.* at 1624 & n.21 (plurality opinion).

23. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

purpose, particularly in light of its own admission that “[t]he record contains no evidence of any such fraud occurring in Indiana at any time in its history,”²⁴ but that conclusion is not central to our project. What is central is the plurality’s statement that the plaintiffs needed to “bear a heavy burden of persuasion” because they were bringing a facial challenge.²⁵

In Justice Stevens’s view, the plaintiffs were asking the Court to balance the interests of the entire state in forestalling fraud against the burdens experienced by a relative few.²⁶ But the record contained no reliable evidence of how many people were burdened, indeed no concrete evidence of any burden at all. “A facial challenge,” the plurality concluded, “must fail where the statute has a plainly legitimate sweep.”²⁷ Moreover, if the plaintiffs prevailed, the proper remedy (since the statute was formally neutral and generally applicable) would be to invalidate the statute as a whole—but such a remedy should be avoided unless absolutely necessary, because it would frustrate the will of the people.²⁸ Implicit in Justice Stevens’s emphasis on the facial nature of the *Crawford* litigation was an invitation to future plaintiffs to bring as-applied challenges, presumably with better evidence in hand.

To the same effect as *Crawford*, and cited prominently in Justice Stevens’s discussion of facial challenges in that case, is *Washington State Grange v. Washington State Republican Party*.²⁹ In *Washington State Grange*, the Court rejected a facial challenge to the state of Washington’s “blanket primary” system, in which candidates identify themselves on the ballot by their own chosen party preference, and the top two vote-getters, regardless of party preference, advance to the general election. The challenge, wrote Justice Thomas for a five-justice majority, rested on “factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge.”³⁰ Facial challenges are generally disfavored, the Court said, because they often rely on speculative factual judgments; because they run counter to the principle of judicial restraint

24. *Crawford*, 128 S. Ct. at 1619 (plurality opinion). The only examples of in-person voter fraud the plurality could cite were stories about Boss Tweed and the New York City elections of 1868, and an investigation of the 2004 Washington state gubernatorial race that revealed a single fraudulent voter. *Id.* at 1619 nn.11–12.

25. *Id.* at 1621.

26. *Id.* at 1622.

27. *Id.* at 1623 (citations and internal quotation marks omitted).

28. *Id.*

29. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008).

30. *Id.* at 1187.

that cautions avoidance of broad or premature constitutional rulings; and because they “short circuit the democratic process.”³¹ The upshot: unless and until a plaintiff can prove that voters wrongly believe the two general election candidates are in fact the nominees of the parties they designate as their favorites, the blanket primary must be upheld.³²

A final piece of evidence for the Court’s adherence to the traditional model is the 2004 case of *Sabri v. United States*.³³ In *Sabri*, a convicted briber contended that the federal bribery statute was facially unconstitutional because it did not contain a “jurisdictional hook”—an element of the offense that would ensure, in every prosecution, proof of a constitutionally sufficient nexus between the bribe in question and some federal spending program.³⁴ The Court, in an opinion by Justice Souter, unanimously rejected this contention, reasoning in view of the fungibility of money that Congress’s power under the Spending and Necessary and Proper Clauses was more than adequate to cover bribes of at least five thousand dollars in connection with programs receiving more than ten thousand dollars in federal funds.³⁵ Justice Souter’s opinion concludes by reprimanding Mr. Sabri for launching a facial attack against the statute:

[F]acial challenges are best when infrequent. Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of premature interpretation of statutes on the basis of factually barebones records.³⁶

In sum, then, the Court in recent years has repeatedly reaffirmed its fidelity to the traditional model with its strong preference for as-applied challenges. It has done so, for the moment at any rate, without taking a position on whether *Salerno*’s “no set of circumstances” formulation announces a broadly applicable rule for the availability of facial challenges. While the Court is not ready to announce the virtual extinction of facial adjudication, it is more than happy to proclaim its rarity.

31. *Id.* at 1191.

32. *Id.* at 1193–94. Justice Scalia, joined by Justice Kennedy, argued in dissent that the only plausible purpose behind the law was the legislature’s desire to rein in non-centrist political parties, which was in his view an illegitimate purpose. *Id.* at 1202 (Scalia, J., dissenting).

33. *Sabri v. United States*, 541 U.S. 600 (2004).

34. *Id.* at 604–05 (citing 18 U.S.C. § 666(a)(2) (2000)).

35. *Id.* at 605–06.

36. *Id.* at 608–09 (citations and internal quotation marks omitted).

It is worth pausing here to note the close kinship between the traditional model and norms of judicial restraint and institutional modesty. As-applied adjudication is the preferred approach, the Court tells us, because the job of the judiciary is to decide concrete cases. The Court's preference for as-applied adjudication, therefore, goes hand-in-hand with its insistence on the jurisdictional requirement of standing, which also aims to limit the judiciary to deciding actual disputes.³⁷ The potent weapon of constitutional invalidation is to be used sparingly; indeed, courts should avoid constitutional issues altogether whenever possible.³⁸ Facial challenges, which invite abstract, hypothetical, and premature constitutional rulings, are an affront to these norms of modesty. Judicial review should operate cautiously, narrowly, one case at a time. Or, as Chief Justice Roberts once put it, "If it is not necessary to decide more to [dispose of a case], then . . . it is necessary not to decide more."³⁹

II. Special Cases: Overbreadth and (Maybe) Abortion Rights

Notwithstanding the dominance of the traditional model, the Court has long recognized exceptions to it—special cases in which facial rather than as-applied challenges are the norm. A recent article by David Gans provides a thoughtful introduction to these special cases. Gans characterizes the Court's ventures into facial review as "strategic," and he does not use that word pejoratively.⁴⁰ On the contrary, Gans maintains that in certain categories of cases the Court makes a judgment that facial adjudication (more specifically, facial invalidation) is the best way of implementing important constitutional norms. To take the most familiar example, in many cases involving regulations on speech the Court has made the judgment that reliance on case-by-case adjudication to sort out valid from invalid applications would lead to a period of uncertainty during which speakers might censor themselves rather than incur the expense of defying or challenging the law. Better in such cases, from the standpoint of First Amendment values, to invalidate the challenged regulation on its face,

37. Accordingly, exceptions to the as-applied model, principally the overbreadth doctrine, are often described as exceptions to the ordinary rules of standing. See, e.g., Fallon, *supra* note 7, at 1359.

38. See generally *Ashwander v. Tenn. Valley Ass'n*, 297 U.S. 288, 341–48 (1935) (Brandeis, J., concurring).

39. *Chief Justice Says His Goal is More Consensus on Court*, N.Y. TIMES, May 22, 2006, A16 available at <http://www.nytimes.com/2006/05/22/washington/22justice.html?fta=y>.

40. David H. Gans, *Strategic Facial Challenges*, 85 B. U. L. REV. 1333 (2005).

even at the cost of leaving some proscribable speech untouched, than to keep it on the books and chill speech.⁴¹

The result is the First Amendment overbreadth doctrine, which even *Salerno* recognized as an exception to the traditional preference for as-applied adjudication.⁴² Gans argues that facial invalidation is “strategically” appropriate not only for statutes that create a chilling effect with respect to speech and other fundamental rights, but also for statutes that confer excessive discretion on government officials and those that send a message of stigma or inferiority.⁴³ For Gans, then, “strategic” means something like “more beneficial than harmful in translating constitutional meaning into constitutional doctrine.”⁴⁴

That, at any rate, is the theory behind overbreadth doctrine. In practice, the Roberts Court’s latest foray into the world of overbreadth was not friendly to facial challenges. In the 2008 case of *United States v. Williams*,⁴⁵ the Court rejected a defendant’s facial challenge to a provision of the ridiculously named Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, or “PROTECT Act.”⁴⁶ The statute made it a federal crime to knowingly pander or solicit material through the interstate communications system in a way that is designed to make the recipient believe he is getting child pornography or that reflects such a belief, even if the belief is untrue, i.e., even if the materials are not child pornography. The Court, in a 7-2 decision written by Justice Scalia, held that the statute was not unconstitutionally overbroad because it did not prohibit a sufficiently large amount of protected expressive activity.⁴⁷ Along the way, Justice Scalia archly commented that the objections of the defendant and his amici “demonstrate nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals.”⁴⁸ Justice Souter, joined in dissent by Justice Ginsburg,

41. See, e.g., *id.* at 1137–38 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611–15 (1973)).

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

43. Gans, *supra* note 40, at 1338. According to Gans, these statutes include ones that are impermissibly vague, that grant government decisionmakers too much discretion to advance religion in violation of the Establishment Clause, and that criminalize private sexual activity. *Id.* at 1364–87.

44. See, e.g., *id.* at 1337.

45. *United States v. Williams*, 128 S. Ct. 1830 (2008).

46. 18 U.S.C. § 2252A(a)(3)(B) (2006).

47. *Williams*, 128 S. Ct. at 1841–45.

48. *Id.* at 1843. The Court also rejected the claim that the statute was facially unconstitutional because of vagueness. *Id.* at 1845–47.

would have found the statute overbroad because in some cases it makes it unlawful for a person to offer to sell lawful material.⁴⁹

Nonetheless, First Amendment overbreadth remains a well-settled (indeed, paradigmatic) exception to the preference for as-applied adjudication. Far less settled is whether cases involving abortion rights constitute a similar exception. The Court as recently as 2004 suggested that they do,⁵⁰ but more recent cases tell a different story.

To tell the full story of abortion rights and facial challenges, we need to take a brief trip back to the 1992 case that gave rise to modern abortion rights jurisprudence: *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵¹ Before that facial challenge to a Pennsylvania abortion law reached the Supreme Court, it reached a panel of the Third Circuit. As luck and irony would have it, one of the judges on that panel was Samuel Alito, who found himself in the position of trying to predict the reactions of the justice he would eventually succeed on the Supreme Court, Sandra Day O'Connor. Writing in partial dissent in *Casey*, Judge Alito made two predictions, one of which was right: he correctly guessed (as did the panel majority) that Justice O'Connor, reinforced by colleagues appointed by Presidents Reagan and George H. W. Bush, would tug a controlling bloc of justices away from the rigid confines of *Roe v. Wade*⁵² and toward the looser "undue burden" framework that she had been outlining in her own separate opinions for the better part of a decade.⁵³ Judge Alito's other prediction was wrong: he thought the Court would uphold Pennsylvania's spousal notification requirement on the grounds that it did not impose an undue burden. After all, the record suggested that 95 percent of married women voluntarily tell their husbands before getting an abortion, and most of the remaining 5 percent wouldn't mind being required to do so, or would

49. *Id.* at 1848–58 (Souter, J., dissenting).

50. *See Sabri v. United States*, 541 U.S. 600, 610 (2004) (citing the abortion rights case of *Stenberg v. Carhart*, 530 U.S. 914 (2000), as an example in which the Court "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)" outside the First Amendment context).

51. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

52. *Roe v. Wade*, 410 U.S. 113 (1973).

53. *See Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 687–98 (3rd Cir. 1991), *rev'd in part*, 505 U.S. 833 (1992) (adopting "undue burden" standard); *id.* at 689–90 (tracing that standard to Justice O'Connor's dissenting and concurring opinions in such cases as *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); and *Hodgson v. Minnesota*, 497 U.S. 417 (1990)); *id.* at 720 (Alito, J., concurring in part and dissenting in part) (agreeing that "undue burden" standard is appropriate standard of review).

qualify for an exception under the statute.⁵⁴ Judge Alito read Justice O'Connor's opinions to mean that "an undue burden may not be established simply by showing that a law will have a heavy impact on a few women,"⁵⁵ and that in a facial challenge to a statutory provision, "proof that the provision would adversely affect an unknown number of women with a particular combination of characteristics could not suffice."⁵⁶

When the case made it to the Supreme Court, Justice O'Connor, writing her section of the controlling joint opinion,⁵⁷ shot down Judge Alito's analysis unceremoniously:

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.⁵⁸

Justice O'Connor cited a First Amendment case by way of analogy—newspapers cannot be forced to adopt a "right of reply" policy for their editorial pages even if most would do so voluntarily⁵⁹—and went on to suggest that the real infirmity of the spousal notification provision was that it embodied an outmoded and repellent view of marriage in which the husband enjoyed dominion over his wife.⁶⁰ The Court held the provision invalid on its face.

Fast-forward fourteen years to January 2006 and the last opinion Justice O'Connor would write for the Court before being replaced by Samuel Alito. Justice O'Connor described the issue presented by *Ayotte v. Planned Parenthood of Northern New England*⁶¹ as solely one of remedy: if a statute requiring a parent or guardian to be notified before a minor gets an abortion is deemed unconstitutional because it lacks an exception for

54. *Id.* at 722–23.

55. *Id.* at 721.

56. *Id.* at 722 n.1.

57. The various sections of the joint opinion in *Casey* were not separately attributed, but researchers using the papers of Justice Blackmun have since confirmed what everybody suspected at the time—that Justice O'Connor wrote the section striking down the spousal notification provision. See, e.g., JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 58–59 (2007).

58. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992).

59. *Id.* (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

60. *Id.* at 896–98.

61. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006).

cases of medical emergency, should the statute be struck down on its face or should narrower relief be ordered? On this remedial question, the Court was unanimous: “Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem.”⁶² Partial rather than facial invalidation is the usual remedy for unconstitutionality, so long as the partial remedy is within judicial competence and does not circumvent the intent of the legislature.⁶³ The Court’s decision in *Stenberg v. Carhart*⁶⁴ facially invalidating Nebraska’s ban on “partial-birth abortion” was not to the contrary because “the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn.”⁶⁵ In short, since “only a few applications” of the parental notification statute were unconstitutional, the lower courts should craft an injunction barring enforcement of the statute in those few instances.⁶⁶

The Court’s approach to the facial challenge issue certainly seems to have shifted between *Casey* and *Ayotte*, but as a technical matter we can reconcile the two cases without too much fancy footwork. The spousal notification provision in the former case was unconstitutional on its face and had to be struck entirely. The parental notification provision in the latter case was, we could say, unconstitutional on its face for want of a health exception, but this time the Court concluded that the infirmity could be cured by judicial surgery. So even in *Ayotte* the facial challenge was in some sense successful: the plaintiffs’ sought-after remedy was narrowed but not denied.⁶⁷

Explaining the Court’s change of tack in the 2007 case of *Gonzales v. Carhart*⁶⁸ is an entirely different matter. In that case, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003 against facial, pre-enforcement attack. Put aside for the moment the implausibility of Justice Kennedy’s attempts to distinguish *Stenberg*, in which the Court invalidated a very similar Nebraska statute—chalk it up to crisper legislative draftsmanship and a healthy dollop of deference to Congress.⁶⁹ What is again most interesting for us is the Court’s treatment of the facial challenge

62. *Id.* at 328.

63. *Id.* at 329–30.

64. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

65. *Ayotte*, 546 U.S. at 331.

66. *Id.*

67. This at any rate seems to be how Justice Ginsburg later interpreted the outcome in *Ayotte*. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1651–52 (2007) (Ginsburg, J., dissenting).

68. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

69. As opposed, say, to a change in personnel on the Court from Justice O’Connor to Justice Alito.

issue. Justice Kennedy begins by acknowledging the tension between the *Salerno* “no set of circumstances” test and the analysis of the spousal notification provision in *Casey*, which focused on those women for whom it presented an obstacle.⁷⁰ But, he says, it is unnecessary to resolve that tension here, because even the *Casey* test requires the plaintiffs to show “that the Act would be unconstitutional in a large fraction of relevant cases,”⁷¹ and these plaintiffs haven’t done that. What of the federal statute’s lack of a health exception, which was a fatal (and facial) defect in *Stenberg*, and even seemingly in *Ayotte*? Justice Kennedy’s response is terse:

We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to potential situations that might develop.⁷²

After all, “[a]s-applied challenges are the basic building blocks of constitutional adjudication,”⁷³ and the Act remains open to as-applied challenges, even on a pre-enforcement basis, in future cases.

This really is impossible to square with *Casey* and *Ayotte*, not to mention *Stenberg*. Under the logic of those earlier cases, as Justice Ginsburg points out in her dissent, if it is the absence of an exception that triggers the undue burden analysis, then the undueness of the burden must be assessed with regard to those women for whom the exception would have been relevant. Justice Kennedy reads *Casey* as mandating a “large fraction” test, but “there is no fraction when the numerator and the denominator are the same: The health exception reaches only those cases where a woman’s health is at risk.”⁷⁴ And even if the Court believed striking down the Act was too extravagant a remedy, why not order the lower courts to enjoin its enforcement where medically necessary, as the Court unanimously suggested in *Ayotte*?⁷⁵ Perhaps most puzzling of all, what exactly did the Court have in mind when it invited a new round of

70. *Stenberg*, 127 S. Ct. at 1639 (citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)).

71. *Id.* (citing *Casey*, 505 U.S. at 895).

72. *Id.*

73. *Id.* (quoting Fallon, *supra* note 7, at 1328).

74. *Id.* at 1651 n.10 (Ginsburg, J., dissenting).

75. *See id.* at 1651.

“preenforcement, as-applied challenges”?⁷⁶ As Justice Ginsburg notes, preenforcement facial challenges had already yielded hundreds of pages of testimony and detailed factual findings from several district courts.⁷⁷ Waiting for plaintiffs to prove that “in discrete and well-defined instances a particular condition has [occurred] or is likely to occur in which the procedure prohibited by the Act must be used”⁷⁸ would mean, at best, incurring a serious medical cost for an uncertain evidentiary benefit.

On the basis of *Gonzales v. Carhart*, it is hard to resist the conclusion that the Court has abandoned Justice O’Connor’s facial approach from *Casey* and has assimilated abortion rights cases to the traditional model in which as-applied challenges hold sway.

III. Facial Adjudication in As-Applied Clothing

When we turn from abortion rights to another contentious constitutional issue—campaign finance reform—it looks at first as though a very similar pattern is repeating itself: the Court rebuffs facial overbreadth-type claims in favor of case-by-case elaboration through as-applied challenges. But, as we shall see, the story does not end the same way. Instead, the campaign finance cases give us an insight into a different trend, one that has accelerated at the Court in recent years—what I call facial adjudication in as-applied clothing.

The campaign finance story has three acts, corresponding to the cases in the Court’s recent triple-header concerning “electioneering communications.” The statute at issue in all three cases is section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), commonly known as McCain-Feingold.⁷⁹ Section 203 prohibits corporations and labor unions from using their general treasury funds to pay for electioneering communications, defined as any communication that refers to a candidate for federal office and is aired within thirty days of a primary election or sixty days of a general election.⁸⁰

In the first act, the 2003 *McConnell* case,⁸¹ the Court confronted a facial challenge alleging that the electioneering provision was unconstitutionally overbroad under the First Amendment because it swept within its reach not only campaign ads (“Vote against Senator Warbucks”)

76. *Id.* at 1638 (majority opinion).

77. *Id.* at 1652 (Ginsburg, J., dissenting).

78. *Id.* at 1638 (majority opinion).

79. 2 U.S.C. § 441b(b)(2) (Supp. IV 2000).

80. *Id.* § 434(f)(3)(A).

81. *McConnell v. FEC*, 540 U.S. 93 (2003).

but also issue ads that just happen to mention a candidate's name ("Call Senator Warbucks and tell him how you feel about the Wall Street bailout"). Justices Stevens and O'Connor, writing for a five-justice majority, were not impressed by the distinction between the two types of ads. Indeed, they held that the First Amendment does not "erect[] a rigid barrier between express advocacy and so-called issue advocacy," and forthrightly admitted that the Court's landmark *Buckley* decision had drawn a "functionally meaningless" line by interpreting existing law to prohibit only the former and not the latter.⁸² Given that the barrier between express advocacy and issue advocacy was too permeable to have any special First Amendment significance—and especially given that corporations were free to pay for electioneering with segregated political action committee ("PAC") funds—the Court held that the overbreadth challenge to section 203 had to fail.⁸³

Next, Wisconsin Right to Life, Inc. ("WRTL"), a corporation that wanted to run issue ads naming federal candidates during the 2004 election, brought an as-applied challenge to section 203. A three-judge district court dismissed the case, relying on a footnote in *McConnell* in which the Court had said it was "uphold[ing] all applications of the primary definition" of electioneering communications.⁸⁴ The Supreme Court vacated and reversed in a brief per curiam opinion issued a few days before Justice O'Connor's retirement.⁸⁵ The lower court had misunderstood the *McConnell* footnote, which had simply meant to say that the statutory definition was facially valid with respect to BCRA's funding and disclosure requirements, not that all as-applied challenges to section 203 were precluded.⁸⁶ One can sympathize with the district court for making this "error"—if the line between campaign ads and issue ads is "functionally meaningless," as *McConnell* had held, then what First Amendment interest could be served by vindicating an as-applied challenge to a provision that regulates both?

When the WRTL litigation made it back to the Court for the third act in *Federal Election Commission v. Wisconsin Right to Life* ("WRTL II"),⁸⁷

82. *Id.* at 193–94 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam)).

83. *Id.* at 190–94. The Court also upheld the provision of BCRA requiring extensive disclosures by those who fund electioneering communications. *Id.* at 194–202.

84. *Wis. Right to Life v. FEC*, 126 S. Ct. 1016, 1017–18 (2006) (per curiam) (quoting *McConnell*, 540 U.S. at 190 n.73).

85. *Id.*

86. *Id.*

87. *FEC v. Wis. Right to Life (WRTL II)*, 127 S. Ct. 2652 (2007).

the Roberts Court was fully assembled, and its tune had changed. Not only did *WRTL*'s as-applied challenge succeed, but the Court strongly suggested that from now on *all* challenges brought by organizations engaged in issue advocacy would succeed. Justices Scalia, Kennedy, and Thomas, who had already voted in *McConnell* to strike down section 203 on its face, stuck to their position.⁸⁸ Meanwhile, the Court's newest member, Justice Alito, joined Chief Justice Roberts's lead opinion, which concluded in light of First Amendment concerns that "a court should find that an ad is the functional equivalent of express advocacy [and therefore covered by section 203] only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."⁸⁹ No competently counseled organization would run a political ad that satisfied this test, as Chief Justice Roberts no doubt understood, so any enforcement of section 203 in a particular case would run up against an impassable constitutional roadblock. Thus *WRTL II* amounts in effect to a facial invalidation of section 203 in as-applied clothing.

In *WRTL II*, Justice Scalia (joined by Justices Kennedy and Thomas) wrote separately to express his view that section 203 should have been struck down on its face "to avoid the chilling of fundamental political discourse."⁹⁰ As-applied challenges, in his view, were an inadequate response to the overbreadth of the electioneering provision.⁹¹ Indeed, Justice Scalia went so far as to accuse his colleagues in the majority—Chief Justice Roberts and Justice Alito—of disingenuousness, noting that "seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the [*WRTL II*] opinion effectively overrules *McConnell* without saying so," and tartly concluding that "[t]his faux judicial restraint is judicial obfuscation."⁹²

88. See *McConnell*, 540 U.S. at 273–75 (Thomas, J., concurring in part and dissenting in part) (arguing for the facial invalidation of § 203); *id.* at 323–30 (Kennedy, J., concurring in part and dissenting in part) (same); *WRTL II*, 127 S. Ct. at 2683–87 (Scalia, J., concurring in part and concurring in the judgment) (arguing that *McConnell* should be overruled and section 203 declared facially unconstitutional).

89. *WRTL II*, 127 S. Ct. at 2667 (majority opinion).

90. *Id.* at 2680 (Scalia, J., concurring in part and concurring in the judgment).

91. *Id.* at 2684.

92. *Id.* at 2683 n.7. Justice Scalia's accusation may have hit home, for the Court was not so oblique about its use of facial analysis in a more recent campaign finance case. In *Davis v. FEC*, 128 S. Ct. 2759 (2008), the Court forthrightly vindicated a facial challenge to BCRA's so-called "Millionaire's Amendment," 2 U.S.C. § 441a-1(a), which increased the otherwise applicable contribution limits for any federal candidate as soon as his or her opponent spent more than \$350,000 in personal money on the campaign. The Court held that the statute in effect penalized wealthy candidates for exercising their First Amendment right to make unlimited personal

Justice Scalia was right. *WRTL II* renders *McConnell* a practical nullity by laying out a test under which every realistically conceivable as-applied challenge to section 203 will succeed, while at the same time purporting not to disturb the holding of *McConnell*, which upheld that provision against facial attack. The Court's reliance on the as-applied mode here can aptly be labeled "strategic," but only if we use the label in a less wholesome sense than David Gans intended. The Court in *WRTL II* borrowed the language of the traditional, as-applied model—the rhetoric of judicial modesty—in an attempt to soften what was both a facial invalidation and a significant overruling. Pretending to take small steps, the Court made a giant leap.

Facial adjudication in as-applied clothing need not always result in invalidation. Sometimes it does quite the opposite, as *Gonzales v. Raich*⁹³ shows. The plaintiffs in *Raich* were seriously ill Californians who used locally grown marijuana for medical purposes as authorized by state law.⁹⁴ Unfortunately for them, their conduct was criminal under the federal Controlled Substances Act ("CSA"), which classifies marijuana as a Schedule I drug, meaning that as far as Congress is concerned the drug has no currently accepted medical use.⁹⁵ The plaintiffs argued successfully in the Ninth Circuit that the CSA was unconstitutional as applied to them because it exceeded Congress's regulatory authority under the Interstate Commerce Clause. In a 6-3 ruling written by Justice Stevens, the Court disagreed.

What is so striking about *Raich* is that the Court acknowledged that it was dealing with an as-applied challenge—a departure from recent Commerce Clause cases, which had involved facial challenges—but treated this fact as a reason to be *less* receptive than usual to the plaintiffs' claim.⁹⁶

expenditures on campaign speech, and was therefore subject to strict scrutiny. *Davis*, 128 S. Ct. at 2772. The statute could not withstand that kind of scrutiny because the interests it pursued—leveling the electoral playing field for non-wealthy candidates and alleviating the restrictive effects of existing regulations—were not only not compelling but "antithetical to the First Amendment." *Id.* at 2773, 2774.

93. *Gonzales v. Raich*, 545 U.S. 1 (2005). Although *Raich* was decided in the waning years of the Rehnquist Court, there is no reason to believe the Roberts Court will take a fundamentally different approach to the Commerce Clause. After all, Chief Justice Rehnquist and Justice O'Connor dissented in *Raich*, so their replacement by Chief Justice Roberts and Justice Alito would not change the outcome in that case. In any event, the Roberts Court has evinced no interest thus far in revisiting the issues that were raised in *Raich*. For my own earlier thoughts about *Raich* and the concept of facial validation, see David L. Franklin, *supra* note 8, at 51–52.

94. *Raich*, 545 U.S. at 6–7.

95. *Id.* at 14.

96. *Id.* at 23 (citing *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000)). *Raich* goes on to conclude that "[t]his distinction [between facial and as-

Justice Stevens reasoned that narrow, single-subject federal statutes, like those criminalizing the possession of guns near schools or providing civil remedies for rape victims, might fall wholly outside Congress's commerce-regulating power and are therefore vulnerable to facial attack.⁹⁷ But when a statute establishes a comprehensive scheme for the regulation of a commodity for which there is an interstate market, then Congress may extend its regulatory authority to cover any subclass of activities that it rationally concludes is "an essential part of the larger regulatory scheme," even if those activities are themselves local and noncommercial in nature.⁹⁸ Justice Scalia, in concurrence, arrived at the same conclusion by relying on the Necessary and Proper Clause, "which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."⁹⁹ *Raich*, in short, *facially validated* the CSA for Commerce Clause purposes.¹⁰⁰ And given that the plaintiffs' activities in *Raich* were about as local and noncommercial as one can get and yet they still lost, it is not too far a stretch to conclude that the Court has in effect outlawed as-applied constitutional challenges under the Commerce Clause.¹⁰¹

In this light, it is interesting to glance back at the brief concurrence filed by Justice Kennedy, joined by Justice Scalia, in *Sabri v. United States*.¹⁰² Recall that *Sabri* was the 2004 case in which the Court unanimously upheld a federal bribery statute against a facial challenge alleging that Congress had exceeded its powers under the Spending Clause. In Justice Kennedy's four-sentence-long concurrence in *Sabri*, he pointedly declines to join the section of the majority opinion throwing cold water on facial challenges and emphasizes that the majority does not call into question the Court's approach in *United States v. Lopez* and *United States v. Morrison*: "In those instances the Court did resolve the basic question

applied challenges] is pivotal for we have often reiterated that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Id.* (citations and internal quotation marks omitted).

97. *Raich*, 545 U.S. at 23–26 (describing the *Lopez* and *Morrison* precedents).

98. *Id.* at 27.

99. *Id.* at 39 (Scalia, J., concurring) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421–22 (1819)).

100. For more on facial validation, see Franklin, *supra* note 8, at 64–65.

101. Lower courts have drawn the same conclusion. See, e.g., *United States v. Nascimento*, 491 F.3d 25, 42 (1st Cir. 2007); *United States v. Stewart*, 451 F.3d 1071, 1076–77 (9th Cir. 2006). It is of course still open for parties to argue as a matter of statutory interpretation that a particular federal statute ought to be construed narrowly not to apply to their conduct in the first place in light of federalism concerns. See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006).

102. *Sabri v. United States*, 541 U.S. 600 (2004).

whether Congress, in enacting the statutes challenged there, had exceeded its legislative power under the Constitution.”¹⁰³ Thus Justices Kennedy and Scalia left themselves room, in cases involving the scope of congressional authority, to engage not only in facial invalidation, as in *Lopez* and *Morrison*, but also in facial validation. For Justices Kennedy and Scalia, when “basic questions” concerning “legislative power” are at issue, the traditional preference for as-applied challenges ought to give way. It is probably no coincidence that they proved to be the only two justices from the Court’s conservative wing to side with the majority in *Raich* in facially validating the CSA.

Once we learn to recognize it, facial validation crops up in some surprising contexts. Take the recent case of *Altria Group, Inc. v. Good*.¹⁰⁴ The question in *Altria* was whether smokers could maintain a state-law fraud action against a tobacco company for falsely claiming that its “light” cigarettes delivered less tar and nicotine than regular cigarettes. The cigarette maker’s defense was that the lawsuit was preempted by the Federal Cigarette Labeling and Advertising Act (“Labeling Act”), which says that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes” covered by the federal statute.¹⁰⁵ Here the challenge to the state law was not one of unconstitutionality per se, but of preemption. One could try to dissolve the distinction by pointing out that enforcement of a preempted state law is unconstitutional under the Supremacy Clause,¹⁰⁶ but for our purposes there is no need: what matters is that a law is invalid and unenforceable insofar as it is preempted, just as it is invalid and unenforceable insofar as it is unconstitutional. The fact that the superior law to which the state law must yield comes from Congress rather than from the Constitution should not have any effect on the dynamic of the facial versus as-applied debate.¹⁰⁷

In *Altria*, the Court held that the state anti-fraud law was not preempted. Picking up where he had left off in a plurality opinion sixteen

103. *Id.* at 610 (Kennedy, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000)).

104. *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

105. 15 U.S.C. § 1334(b) (2006).

106. U.S. CONST. art. VI, cl. 2.

107. The difference, of course, is that Congress could overturn the Court’s ruling in a preemption case but not in a constitutional case. This difference ought to mean that the Court’s preemption decisions have greater *stare decisis* effect than its constitutional decisions, but that factor was not important in *Altria*, where the key precedent was a non-binding plurality opinion, as described in the text.

years earlier,¹⁰⁸ Justice Stevens (writing this time for a five-justice majority) held that “the phrase ‘based on smoking and health’ [in the Labeling Act] modifies the state-law rule at issue rather than a particular application of that rule.”¹⁰⁹ Because the state anti-fraud statute at issue in *Altria* codified a general duty not to deceive, and did not on its face have anything to do with smoking or health, it was not preempted.¹¹⁰ The fact that the smokers in this particular litigation were alleging that the defendant made false statements about smoking and health was immaterial. After all, the Labeling Act “preempts only *requirements and prohibitions—i.e., rules—that are based on smoking and health.*”¹¹¹ *Altria* is a facial validation of state anti-fraud laws as against Labeling Act preemption, just as *Raich* is a facial validation of the CSA as against Commerce Clause attack.¹¹²

The Court will soon have another opportunity to engage in facial validation—or invalidation if it so chooses—in a case that echoes *Raich* but tests the limits of a different source of federal legislative power. The statutory provision at issue in the pending case of *Northwest Austin Municipal Utility District Number One v. Holder* (“*NAMUDNO*”)¹¹³ is section 5 of the Voting Rights Act of 1965 (“VRA”). That provision prohibits political jurisdictions in covered states, mostly southern, from changing their voting regulations without first getting “preclearance” from the Department of Justice or a special three-judge court.¹¹⁴ In 2006, Congress reauthorized section 5 for an additional twenty-five years by an overwhelming bipartisan vote.¹¹⁵ Days later, a wastewater treatment district on the outskirts of Austin, Texas, filed an action challenging the provision’s constitutionality.

108. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

109. *Altria*, 129 S. Ct. at 545 (citing *Cipollone*, 505 U.S. 504 (1992); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)).

110. *Id.*

111. *Id.* at 547.

112. Justice Thomas, dissenting in *Altria*, took an as-applied approach, interpreting the Labeling Act as preempting any claim that, if successful at trial, would require tobacco companies to take corrective action based on the effects of smoking upon health. *Id.* at 554 (Thomas, J., dissenting) (citing *Cipollone*, 505 U.S. at 554, 555 (Scalia, J., concurring in judgment in part and dissenting in part)).

113. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, No. 08-322, 2008 WL 4153806 (S. Ct. Jan. 9, 2009) (noting probable jurisdiction).

114. 42 U.S.C.S. § 1973c (2008).

115. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 228–29 (D.D.C. 2008).

In its initial complaint, the plaintiff in *NAMUDNO* launched both facial and as-applied challenges, but in its amended complaint it tried to repackage its action as exclusively as-applied.¹¹⁶ Here is where the parallel with *Raich* becomes apparent. Even if section 5 is generally valid, the argument goes, it cannot constitutionally be applied to a small wastewater treatment district that was not even established until more than twenty years after the VRA's initial enactment; that has never been denied preclearance or even been subjected to federal scrutiny; and whose proposed voting modifications may be as trivial as "a plan to move a polling place across the street from a church to a school."¹¹⁷

The three-judge district court prudently ignored the labels in the complaint and focused instead on the substance of the arguments offered in the briefs and the nature of the Supreme Court's precedents in this area. As a result, it treated the challenge as a facial one.¹¹⁸ The Court held that section 5 was facially valid under both the lenient rationality test set forth in the Court's cases upholding the constitutionality of the VRA and the more exacting "congruence and proportionality" test announced in more recent cases testing Congress's Fourteenth Amendment enforcement power.¹¹⁹ Its opinion left no more room for as-applied challenges than did the Supreme Court's decision in *Raich*: "[W]here, as here, Congress has compiled a sufficient legislative record to defeat a facial constitutional challenge, . . . an as-applied challenge based on a political subunit's record of nondiscrimination must also fail."¹²⁰ In fact, the district court went so far as to imply that all challenges testing the scope of Congress's enumerated authority must be resolved facially.¹²¹

This last suggestion goes a bit too far, as I have argued before.¹²² Indeed, toward the end of the Rehnquist Court, the justices sparred over just this issue in a case testing the limits of Congress's enforcement power under Section 5 of the Fourteenth Amendment—and the contingent that favored mandatory facial review lost. Writing for a five-justice majority in

116. *Id.* at 235.

117. *Id.* at 281 (quoting First Amended Complaint at 3, *Mukasey*, 573 F. Supp. 2d 221 (No. 1:06-CV-01384)).

118. *Id.*

119. *Id.* at 247–68 (applying the rationality test of *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)); *id.* at 268–79 (applying the "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

120. *Id.* at 280.

121. *Id.* at 281 (stating that the plaintiff's as-applied theory "finds no support in cases addressing claims that Congress exceeded its enumerated powers").

122. See Franklin, *supra* note 8, at 82–83.

Tennessee v. Lane,¹²³ Justice Stevens held that Title II of the Americans with Disabilities Act (“ADA”) was a valid exercise of federal authority insofar as it enforced the constitutional right of access to the courts.¹²⁴ In dissent, Chief Justice Rehnquist expressed “grave doubts about importing an ‘as applied’ approach into the Section 5 context.”¹²⁵ Still, even *Lane* does not adopt a purely as-applied perspective toward the question of congressional power; it is better understood as resting on the plausible idea that legislation crafted to enforce constitutional rights can be evaluated with respect to subclasses of cases involving those rights.¹²⁶ This idea is of no use to the plaintiff in *NAMUDNO* because section 5 of the VRA is designed to protect, in all of its applications, the same double-barreled constitutional right: the right to be free of racial discrimination with respect to the fundamental interest in voting.¹²⁷ Thus, the Supreme Court in *NAMUDNO* is faced with what seems an inescapably facial constitutional question.¹²⁸ In view of the watershed status of the Voting Rights Act in American law and society—a status that some may view as confirmed by the election of the nation’s first African-American president—the stage may be set for yet another facial validation.

The notion of facial validation brings us back to the case with which we started, *Crawford v. Marion County Election Board*.¹²⁹ Recall that in *Crawford*, the facial challenge to Indiana’s voter ID law failed because the plaintiffs had assembled an inadequate factual record, but Justice Stevens’s lead opinion suggested that future as-applied challenges, with better evidence, might succeed.¹³⁰ Law school professors used to hypothesize a maximally credible witness list by asking their students to imagine a “busload of nuns.” In the case of the Indiana voter ID law, we don’t need to imagine it: during the primary election in May 2008, about a dozen nuns from a retirement home at Saint Mary’s Convent near the University of

123. *Tennessee v. Lane*, 541 U.S. 509 (2004).

124. *Id.* at 530 & n.18; *see also* *United States v. Georgia*, 546 U.S. 151 (2006) (holding that Title II of the ADA validly abrogates state sovereign immunity insofar as it prohibits conduct that actually violates the Fourteenth Amendment).

125. *Lane*, 541 U.S. at 551 (Rehnquist, C.J., dissenting).

126. *See* Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 27.

127. *See* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 269 (D.D.C. 2008).

128. Of course, the Court could escape the constitutional question entirely, for instance by holding that the plaintiff is entitled to an exemption from preclearance by way of the statutory “bailout” provision, 42 U.S.C.S. § 1973b(a)(1) (2008).

129. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

130. *Id.* at 1623 (plurality opinion).

Notre Dame were turned away from the polls because they lacked photo IDs.¹³¹

Suppose the nuns were to bring an as-applied challenge; is there any reason to be confident they would succeed? The balancing test announced in *Crawford* would presumably continue to apply, as would the Court's finding that the state's purpose of avoiding fraud was legitimate and important. True, the plurality in *Crawford* was willing to assume that "the burden [of getting a photo ID or casting a provisional ballot] may not be justified as to a few voters,"¹³² but this is one of those assumptions that seems to have been indulged almost solely for the sake of argument. After all, the plurality also notes that for most voters, "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."¹³³ Given Justice Stevens's skepticism on the subject of burdens, not to mention the broad (if grudging) societal acceptance of photo IDs as a requirement of entry everywhere from airports to office buildings, the smart money is not on the nuns.

But there is a more fundamental reason why it is difficult to envision a successful as-applied challenge being mounted in the wake of *Crawford's* failed facial challenge. The alleged constitutional infirmity of the voter ID law was that it violated the Equal Protection Clause, and equal protection jurisprudence in recent decades has not been friendly to as-applied challenges. As Justice Scalia reminds us in his concurrence in *Crawford*, a facially neutral law will not be held to deny equal protection simply because it burdens some people more than others, even if the burdened group is a suspect class.¹³⁴ And when a law *is* held to deny equal protection, the typical result is not an exemption carved out by the Court for the benefit of the plaintiff and others similarly situated; it is facial invalidation.¹³⁵ Because modern equal protection doctrine focuses on

131. Scott Martelle, *Nuns are turned away from Indiana polls under voter ID law*, L.A. TIMES, May 7, 2008, available at <http://articles.latimes.com/2008/may/07/nation/na-voterid7>.

132. *Crawford*, 128 S. Ct. at 1621 (plurality opinion).

133. *Id.* (plurality opinion); see also *id.* at 1621 n.19 (plurality opinion) (suggesting that the only voters facing a significant burden are those with religious scruples about being photographed).

134. *Id.* at 1626 (Scalia, J., concurring) (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)).

135. See Dorf, *supra* note 7, at 260. I say facial invalidation is the typical rather than the inevitable result because it is still theoretically possible for a facially neutral law to violate the Equal Protection Clause by virtue of drastically unequal administration. In such cases, the remedy might be an injunction against continued unequal implementation rather than invalidation

attributes at the level of the statute itself—most notably formal classifications and invidious legislative intent—rather than on effects at the level of individual applications, modern equal protection adjudication is typically an all-or-nothing affair. Laws that are based on suspect classifications or impermissible purposes, like the student assignment policies in the Seattle and Louisville school district cases,¹³⁶ are struck down in their entirety, while laws that are formally neutral and supported by adequate governmental objectives, like the voter ID law in *Crawford*, are for all practical purposes facially validated. Likewise, the requirement of narrow tailoring, which is in essence an unusually exacting prohibition on overbreadth, lends itself to facial review.¹³⁷ Equal protection adjudication is, at least presumptively, facial adjudication, regardless of whether it comes dressed in as-applied clothing.¹³⁸

Conclusion

Our tour of the Roberts Court's constitutional decisions, necessarily incomplete though it has been, yields three important lessons. First, the traditional model of judicial review, which asserts that as-applied adjudication is the norm and facial adjudication a rare and suspicious exception, is alive and well on the Court. Indeed, the Court in recent years

of the law itself. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But see *United States v. Armstrong*, 517 U.S. 456 (1996) (setting high hurdle for selective prosecution claims under the Equal Protection Clause).

136. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

137. See Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 416–21 (1998) (noting affinities between narrow tailoring and overbreadth). The requirement of congruence and proportionality in the exercise of Congress's Fourteenth Amendment enforcement power is also essentially a prohibition on overbreadth.

138. This is not a new feature of equal protection jurisprudence. In the landmark 1966 case relied upon by the *Crawford* plaintiffs, for example, the Court pronounced the poll tax unconstitutional on its face, not merely as applied to those voters who were unable to pay. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666, 668 (1966) (“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. . . . We say the same whether the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all, pays the fee or fails to pay it.”). To be sure, some older cases do appear to stand for the proposition that facially neutral laws can deny equal protection insofar as they have the effect of depriving some people of a fundamental right. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that a state must waive fees for trial transcripts in cases involving indigent defendants if a free transcript is necessary for adequate and effective appellate review). But however one wishes to explain cases like *Griffin*, they do not represent the prevailing trend on the Court today, even with respect to textually enumerated fundamental rights. Cf. *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not mandate exemptions for religious practitioners from neutral rules of general applicability).

has made a point of reaffirming its preference for as-applied review in case after case. Claims involving abortion rights, which appeared to constitute a prominent counter example, have been assimilated to the traditional model, first with respect to remedies in *Ayotte* and then with respect to underlying rights in *Gonzales v. Carhart*. Even the doctrine of overbreadth, the longest-standing and best-established exception to the traditional model, has not fared well on the Court in recent years.

Second, the Court has been alert to what we might call the strategic uses of the traditional model and its accompanying rhetoric. By emphasizing the norms of judicial modesty that lie at the heart of the traditional model, the Court can try to soften the blow of an effective overruling, as in *Carhart*, or to disguise a facial invalidation, as in *WRTL II*. Even Justice Stevens in *Crawford* may have seen some strategic benefit in accentuating the impression that the Court was merely rejecting a facial challenge, leaving a door theoretically open for future plaintiffs even if none is ever able to walk through it. The Roberts Court's strategic deployment of the traditional model has given us a distinctive creation: facial adjudication in as-applied clothing.

Third, and most important, we have seen that despite the Court's repeated declarations of allegiance to the traditional model, facial adjudication is not at all rare. That is because the distinction between as-applied and facial review, far from being a by-product of severability doctrine or the particulars of the plaintiff's plea for relief, is most centrally a function of substantive constitutional doctrine. When the applicable doctrinal tests point the Court toward attributes that operate at the level of the statute—most notably legislative purpose—the resulting adjudication will likely be facial in nature.¹³⁹ Thus, as we have seen, substantive constitutional doctrine presses equal protection cases toward facial review, but the same can be said of cases in areas as diverse as the Commerce Clause,¹⁴⁰ the Establishment Clause,¹⁴¹ and the separation of powers.¹⁴² If,

139. It is possible in theory for a court to investigate the purpose of a challenged statute not only on its face but also as applied. Indeed, something of this sort appears to go on in First Amendment cases such as *Cohen v. California*, 403 U.S. 71 (1971). See, e.g., Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286–1311 (arguing that the Court in *Cohen* and other First Amendment cases has inquired whether a generally applicable, facially neutral law was enforced against a particular speech act because of the content of the speech). But this kind of as-applied purpose review seems far from universal even within First Amendment law—for example, see *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 429–35 (1993)—and virtually unknown outside it.

140. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005).

as I suspect, the justices continue to move away from a vision of rights as shields for privileged conduct and toward a constitutionalism driven by notions of permissible and impermissible reasons for government action, then we can expect to see even more facial adjudication in the years to come.¹⁴³ At all events, it is substantive doctrine, more than any other factor, that dictates which end of the telescope the Court looks through in a given case.

Crucially, when substantive constitutional doctrine points the Court toward facial adjudication, it generally does so for invalidations and validations alike. To be sure, the Court will usually have powerful institutional reasons to avoid announcing that a statute is immune from all future challenges simply because it has survived the present contest, just as it often has good reasons not to strike down a statute for all times and all purposes when it vindicates an as-applied challenge. But if the relevant doctrinal tests mandate a judicial examination of legislative purpose or some other attribute that operates at the level of the statute, there is no reason why the resulting decision should not carry over to other applications. The only way to try to determine whether it does is to gauge, in classic common-law fashion, the breadth of the Court's holding in light of the reasoning offered in its opinion. This brings us back to the one similarity between the two otherwise diametrically opposed visions with which this Article began: the precise scope of the Court's constitutional holdings—and consequently the precise location of the boundary they mark out between the realms of as-applied and facial adjudication—will always be for future lawyers to argue about and for future cases to decide.

141. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

142. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Clinton v. City of N.Y.*, 524 U.S. 417 (1998).

143. For a radical endorsement of the latter brand of constitutionalism, and therefore of pervasive facial review, see Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Law*, 97 MICH. L. REV. 1 (1998).