Fact and Fiction About Facial Challenges

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Fact and Fiction About Facial Challenges

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The Justices of the U.S. Supreme Court have frequently insisted that "facial challenges" to the validity of statutes are and ought to be rare. Based partly on an empirical survey of all cases decided by the Court during six selected Terms, this Article reveals that assumption to be empirically false and normatively mistaken. Error on this point reflects broader confusions and misunderstandings. For example, it is not true that only a few especially stringent constitutional tests frame facial challenges. Even the rational basis test sometimes yields the conclusion that statutes are invalid in toto. *The conventional wisdom also errs in positing that the Supreme Court can cure a statute's facial defects merely by invoking a general "presumption of severability" under which, in a future case, any of a statute's invalid applications can be separated from valid ones.*

Besides revising the conventional wisdom about facial challenges, this Article locates the root of misunderstanding in the rhetoric of a relatively small number of much-cited cases. It also begins the reconstructive task of explaining when facial challenges do and do not succeed. That explanation has three parts. First, there is a crucial linkage between rulings of facial invalidity and the breadth of the reasons that the Supreme Court gives in upholding constitutional challenges. Second, the Court is often inattentive to severability issues, and its practice must be understood accordingly.

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Although this Article advances important rationalizing generalizations, it explains why the Court's approach to severability cannot be captured in rigid rules. Third, many Supreme Court decisions rejecting facial challenges are best understood as finding facial challenges to be unripe, rather than categorically unavailable.

INTRODUCTION

The question of when statutes should be subject to "facial" rather than to "as-applied" challenges is currently a subject of hot debate, both in the Supreme Court and among commentators.[1] Especially in the years since John Roberts became Chief Justice, High Court opinions have often displayed an acute self-consciousness about the distinction between facial and as-applied challenges.[2] The Justices have lectured not only the lower courts, but also each other, about when facial challenges are and are not appropriate.[3] Without exception, the lectures rest on the assumption that facial challenges are and ought to be rare.

That assumption is false as an empirical matter and highly dubious as a normative proposition. What is more, misunderstanding on this point reflects more general myopia and confusion with respect to facial challenges in the Supreme Court, perhaps most especially, but by no means exclusively, among the Justices themselves. Nearly across the board, the conventional wisdom regarding facial challenges—some of which I have myself endorsed in prior writing[4]—is more wrong than right. It errs with respect to at least four important points.

First, as I have asserted already, facial challenges to statutes are common, not anomalous.[5] To provide one measure of the frequency of facial challenges, my research assistants and I examined every case decided by the Supreme

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1. For recent scholarly discussions, see, for example, Luke Meier, *Facial Challenges and the Separation of Powers*, 85 IND. L.J. 1557 (2010); Gillian Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 798 (2009); Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1273–79 (2010); Symposium, *The Roberts Court: Distinguishing As-Applied Versus Facial Challenges*, 30 HASTINGS CONST. L.Q. 563 (2009); Kevin C. Walsh, *Partial Unconstitutionality,* 85 N.Y.U. L. REV. 738 (2010).

2. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 892–96 (2010); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008); Gonzales v. Carhart, 550 U.S. 124, 156–68 (2007); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–31 (2006).

3. *Compare Citizens United*, 130 S. Ct. at 892–96 (asserting the appropriateness of entertaining a facial challenge to a statute regulating political speech) (majority opinion) *with id.* at 932–38 (maintaining that challengers had only presented, and the Court should only address, an as-applied challenge) (Stevens, J., dissenting).

4. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

5. *But see Wash. State Grange*, 552 U.S. at 450 ("[F]acial challenges are disfavored."); Sabri v. United States, 541 U.S. 600, 608 (2004) ("recalling that facial challenges are best when infrequent"); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 163 (6th ed. 2009) (referring to "the Court's characteristic refusal to adjudicate facial challenges") [hereinafter HART & WECHSLER]; Persily & Rosenberg, *supra* note 1, at 1644 (noting the Supreme Court's "strong preference for as-applied challenges" in various contexts).

Court in the 2009, 2004, 1999, 1994, 1989, and 1984 Terms.[6] In all of those Terms, the Court adjudicated more facial challenges on the merits than it did as-applied challenges. Another, equally convincing measure of the frequency of facial challenges emerges from an informal survey of leading Supreme Court cases establishing and applying doctrinal tests,[7] many if not most of which direct attention to a statute on its face, not as applied. Consider, for example, the test applied to invalidate an affirmative action program in *City of Richmond v. J.A. Croson Co.*[8] By the Court's own analysis, the City of Richmond could have awarded preferences to identified victims of past racial discrimination.[9] Yet the Court's test assessed the constitutionality of the program on its face, not as-applied, and produced the conclusion that the program was invalid.[10]

Similar determinations of facial invalidity have occurred, frequently without comment, in cases from *Brown v. Board of Education*[11] under the Equal Protection Clause to *Brandenburg v. Ohio*[12] under the First Amendment to *United States v. Lopez*[13] under the Commerce Clause. Although some commentators have correctly noted that facial challenges succeed more often than the Justices appear to grasp,[14] even critical writers have mostly failed to gauge the extent to which facial challenges predominate over as-applied challenges on the Court's docket. Facial challenges also succeed much more frequently than either Supreme Court Justices or most scholarly commentators have recognized.[15] In the Terms that my research assistants and I surveyed, we found a 44 percent success rate for facial challenges, compared with 38 percent for as-applied challenges.

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6. *See infra* Part III.B.

7. *See infra* Part III.A.

8. 488 U.S. 469 (1989).

9. *See id.* at 509 (noting the City's capacity to provide remedies for identified discrimination); *id.* at 526 (Scalia, J., concurring) (affirming that the Constitution permits remedial action to give victims of past discrimination what was wrongfully denied to them).

10. *See id.* at 511.

11. 347 U.S. 483, 492 (1954).

12. 395 U.S. 444, 448–49 (1969).

13. 514 U.S. 549, 551–52 (1995).

14. *See, e.g.*, Marc Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 439 (1998) (reporting that "the doctrinal tests that constitute the main part of constitutional adjudication" make facial challenges "more readily available than the Court, when invoking the indispensability of facts, might otherwise admit"); Michael Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238 (1994) (asserting that the principle laid out by the Supreme Court in *Salerno* as a limit on facial challenges "is wrong" because "[i]t neither accurately reflects the Court's practice" nor is "consistent with a wide array of legal practices").

15. *See infra* Part III.A. To say that facial challenges frequently succeed is not, however, to say, as Professor Adler does, that "[t]here is no such thing as a true as-applied constitutional challenge" or that "every constitutional challenge involves the validity of rules." Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998) (emphasis omitted). *See* Fallon, *supra* note 4, at 1328–36, 1264–68 (responding to Adler's claims).

Second, again contrary to the conventional wisdom, the Supreme Court does not routinely insist on ruling on as-applied challenges before deciding whether to hold a statute invalid on its face, nor should it almost always do so.[16]

Third, contrary to the conventional wisdom once more, it is not the case that only a few stringent and anomalous constitutional tests frame facial challenges, nor that most constitutional tests measure the validity of statutes only as applied to particular cases.[17] To cite just one example, the rational basis test, generally thought to be lax in the extreme,[18] sometimes yields the conclusion that statutes are invalid *in toto* because, on their faces, they are not rationally related to any legitimate state interest.[19] It is undoubtedly difficult to show that a statute is irrational. Nevertheless, applications of the rational basis test typically focus on whether statutes, rather than applications of statutes, are rational or irrational.

Fourth, and yet again in the teeth of conventional wisdom, the Supreme Court cannot cure a statute's asserted irrationality or rectify any other defect identified by a test of constitutional validity by merely invoking a so-called "presumption of severability," generically positing that, when the time comes, invalid applications can be separated from valid ones.[20] Instead, a court confronted with the argument that a statute is invalid under a doctrinal test of statutory validity—regardless of whether the test demands a rational relationship to a legitimate state interest, requires narrow tailoring to a compelling interest, or states other validity conditions—generally will and

16. *See infra* Part III.C.2. *But see* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) ("[T]he 'normal rule' is . . . that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'") (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)) (second omission in original).

17. *See infra* Part III.C.3. *But see* HART & WECHSLER, *supra* note 5, at 181 (summarizing the view that apart from the distinctive attributes of "some doctrinal tests, including the First Amendment overbreadth doctrine and tests that inquire whether statutes are narrowly tailored to promote compelling governmental interests"—which limit statutory severability—"[t]he ordinarily applicable presumption that statutes are 'severable'" renders them immune from facial invalidation on the ground that they have some invalid applications); Metzger, *supra* note 1, at 791 n.77 (linking the success or failure of facial challenges to "substantive constitutional law" and asserting that "instances in which measures are unconstitutional in their entirety, and their unconstitutionality is not curable through severance, are relatively (and appropriately) rare"). Much closer to the truth is Isserles, *supra* note 14, at 439 (recognizing that many doctrinal tests invite facial challenges).

18. *See, e.g.*, FCC v. Beach Commc'n, Inc., 508 U.S. 307, 314 (1993) ("This standard of review is a paradigm of judicial restraint.").

19. *See, e.g.*, Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612 (1985) (finding that a New Mexico statute affording tax exemptions to some veterans but not others failed rational basis scrutiny).

20. *See infra* Part III.B.4. *But see* Hart & Wechsler, *supra* note 5, at 162 (characterizing "the premise that statutes are typically 'separable' or 'severable' and that invalid applications can somehow be severed from valid applications" as "deeply rooted in American constitutional law"); Dorf, *supra* note 14, at 250–51 (discussing "the presumption of severability"); Metzger, *supra* note 1, at 791–92 & n.77 (emphasizing the importance of severability in defeating most facial challenges).

always should anticipate more specifically *how* the statute could be severed in order to satisfy that test.

The truth regarding all of these matters has been hiding in plain sight, visible for all to see in the pages of the United States Reports. Yet, remarkably, the Supreme Court recurrently recites the contrary with respect to all of them, and even the revisionist articles that have got matters most nearly right in some respects have either failed to challenge conventional fallacies or gone badly astray in others. Mea culpa.[21] Among my goals in this Article is to explain how error could have spread so widely.

In seeking to dispel some of the myriad confusions that have grown up around the topic of facial challenges, this Article proceeds as follows. Part I addresses some preliminary definitional matters. The terms "as-applied challenge" and "facial challenge" are both potentially ambiguous; the contrast between them cannot be as sharp as is often imagined. Nonetheless, the debate about the propriety of facial challenges generally assumes such challenges to be ones that, if accepted, would establish that a statute has no valid applications whatsoever. Under this definition, which Part I accepts, all other challenges—including those the acceptance of which would imply a statute's partial invalidity—constitute as-applied challenges.

Part II sketches the foundations of the conventional views that facial challenges are rarely permitted and that they succeed even more infrequently. Part II.A examines the central, frequently cited, and much-quoted cases that courts and many commentators point to as establishing the conventional wisdom. Part II.B discusses a few recent Supreme Court decisions that reaffirm this view.

Part III demonstrates that the conventional wisdom, despite being supported by the cases discussed in Part II, errs in nearly all of its particulars. To establish this conclusion, Part III.A offers a partial catalogue of successful facial challenges in the Supreme Court. That catalogue is lengthy, encompassing cases arising under myriad constitutional provisions and numerous tests of constitutional validity. It suggests that facial challenges constitute the norm, not the anomaly, in constitutional litigation before the Supreme Court in which the validity of statutes and their applications is at issue. Part III.B corroborates that conclusion by presenting the results of a survey of all Supreme Court cases decided during six Terms spaced at five-year intervals from the most recent Term back to 1984. Although categorization of cases presenting facial challenges, as-applied challenges, or neither is a judgment-laden exercise—for reasons laid out in an Appendix—my tally

21. I have written about facial challenges before without challenging the tenets of the conventional wisdom described in the text, in Fallon, *supra* note 4, and in Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991). Apart from this confessed error, I otherwise stand by the main elements of my earlier analyses. I shall not, however, attempt a systematic synthesis in this Article.

indicates that the Court not only adjudicated more facial challenges than as-applied challenges during all six Terms, but also that facial challenges had a higher overall success rate. Part III.C completes the demolition of the conventional wisdom by explaining how particular cases and doctrines specifically refute the conventional wisdom's central, defining premises.

Part IV takes up the reconstructive task of making sense of the Supreme Court's pattern of responses to facial challenges. There is a close link, Part IV argues, between the breadth of the Supreme Court's articulated rationales for decision in constitutional cases—including the rationales furnished by well-known tests of constitutional validity—and holdings or implications of facial invalidity. Sometimes the Court shrinks from rationales that would imply that statutes are invalid on their faces. When it does so, it tends to condemn facial challenges in general terms. But sometimes the Court, appropriately, utters broad holdings that reflect determinations of facial invalidity. To take just the most familiar and uncontroversial examples, when the Supreme Court says that racially separate educational facilities are inherently unequal,[22] it not only holds that the challenged statutes mandating segregation in the case before it are facially unconstitutional, but also provides a basis for future holdings that all statutes that mandate racial separation are unconstitutional on their faces. When the Court says that a statute regulating speech cannot be enforced because it discriminates on the basis of content or point of view when doing so is not necessary to promote a compelling interest, it achieves a similar effect.[23] In articulating and applying rules such as these, the Court frequently upholds facial challenges without even pausing to observe that it is doing so. The crucial first step to understanding facial challenges is to go beyond explicit judicial references to facial and as-applied litigation and to grasp the significance of the Court's articulated reasons for upholding constitutional claims.

As noted above, courts and commentators have often assumed that, absent express declarations of facial invalidity, a so-called "presumption of severability" normally permits the separation of a statute's invalid applications from its valid ones and thus blocks judgments of total statutory invalidity.[24] As

22. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

23. *See, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992).

24. On severability, *see, e.g.*, David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997). Severability doctrine can be understood as having two components. One applies to separately denominated statutory provisions or linguistically distinctive bits of statutory text; it addresses the feasibility and propriety of enforcing the remaining portions of a statute after other textually identifiable portions have been deemed constitutionally invalid. *See* Hart & Wechsler, *supra* note 5, at 163. A second component of severability doctrine involves the severing of invalid applications of a single, otherwise undifferentiated textual provision. *See id.* "[C]ourts and commentators have for the most part treated severance of invalid statutory provisions and severance of invalid

Part IV shows, however, it is a mistake to believe that there is a single, generally applicable presumption of severability. To say this is not to say—as a few commentators have suggested—that severability analysis is relatively unimportant in determining when facial challenges can succeed.[25] The problem, instead, is that the Court's practices in treating severability as a bar to declarations of facial invalidity fail to conform to consistent rules. At best, one can offer generalizations about when the Court tends to treat statutes as severable and when it does not.

Humble though it is, this conclusion provides the foundation for a broad rethinking and recharacterization of the Court's approach to severability issues. Without claiming to have adduced invariant rules of practice, Part IV advances five generalizations concerning Supreme Court propensities to presume statutes severable or inseverable. Taken in conjunction, these generalizations help to explain both why the Court rejected facial challenges in the cases that are recurrently cited as establishing the conventional wisdom and why it very frequently, albeit typically less self-consciously, upholds facial challenges in other cases. Part IV also demonstrates that ripeness doctrine, rather than invariable rules barring facial challenges, provides the best explanation for prominent cases in which the Court has rebuffed facial challenges on the ground that they call for "premature" determinations of statutes' meaning and validity.

Part V, which surveys some familiar normative arguments for barring facial challenges, serves as a brief conclusion. It demonstrates that arguments attempting to prove the categorical undesirability of facial challenges mistake what is true in some cases for what is true in most or even all cases.

I.
DEFINING AS-APPLIED AND FACIAL CHALLENGES: AMBIGUITIES AT THE THRESHOLD

Confusion about facial and as-applied challenges begins with the terminology itself. Although facial and as-applied challenges are invariably contrasted with one another, the meaning of both terms is elusive. Moreover, even insofar as reasonable precision of definition can be achieved, the contrast is not nearly so stark as is often supposed.

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applications of a particular statutory provision as governed by similar principles." Vermeule, *supra*, at 1950 n.26. *See* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 886 (2005) (noting that severability of statutory applications is governed by the same principles as the separation of invalid statutory provisions). I have previously conceptualized the severance of applications as the functional equivalent of hypothesized statutory "sub-rules" that an actual statutory text may be imagined as subsuming. For discussion, see *infra* note 49 and associated text.

25. *See, e.g.*, Meier, *supra* note 1, at 1579 (pointing to "[t]he mistake by modern scholars in placing so much emphasis on severability").

As I have explained previously,[26] the root of the confusion lies in the American style of judicial review, which locates the determination of constitutional claims in concrete disputes between parties with adverse interests.[27] Within this framework, all constitutional challenges to a rule of law—whether denominated as as-applied or as facial—begin with a challenger who maintains that the Constitution forbids the enforcement of that rule against her.[28] In this sense, all challenges are as-applied challenges.

To make sense of the nearly ubiquitous assumption that all challenges to the validity or enforceability of statutes are either facial or as-applied, and that these categories are mutually exclusive of one another, we therefore need to attend to the senses in which the terms are more commonly understood. For the most part, both courts and commentators have tended to adopt a definition of facial challenges as ones seeking to have a statute declared unconstitutional in all possible applications.[29] As-applied challenges are then treated as the residual, although ostensibly preferred and larger, category. Though other definitions would be possible,[30] the currently prevailing ones are sufficiently clear and well accepted that I see no reason to resist them with respect to cases decided by the Supreme Court.[31]

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26. *See* Fallon, *supra* note 4, at 1324.

27. *See* HART & WECHSLER, *supra* note 5, at 58–80 (surveying the history and rationale of American practice and contrasting it with a "European model" in which "constitutional courts" decide abstract questions framed by political authorities to determine the constitutionality of a law before it goes into effect).

28. *See* Dorf, *supra* note 14, at 239, 294; Fallon, *supra* note 4, at 1326, 1339.

29. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 609 (2004); United States v. Salerno, 481 U.S. 739, 745 (1987); Steffel v. Thompson, 415 U.S. 452, 474 (1974); Metzger, *supra* note 24, at 882 ("The net effect of the current *Salerno* approach is that facial challenges now operate solely at the wholesale level, encompassing only across-the-board claims of unconstitutionality."); Kevin C. Walsh, *Frames of Reference and the "Turn to Remedy" in Facial Challenge Doctrine*, 36 HASTINGS CONST. L.Q. 667, 667 (2009).

30. In the past, both the Court and commentators applied the label "facial" when the party challenging a statute "put[] into issue an explicit rule of law, as formulated by the legislature or [a lower] court, and" based her claim of unconstitutionality on the facts of her own case "only insofar as it is necessary to establish that the rule served as a basis for decision." PAUL M. BATOR, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 662 (3d ed. 1988). Some recent commentators have also endorsed this definition. *See, e.g.*, Metzger, *supra* note 24, at 881–82; Isserles, *supra* note 14, at 423.

31. When a court pronounces a statute facially invalid, the force of its holding inheres entirely in the doctrines of claim preclusion, issue preclusion, and precedent as well as in the scope of any injunction that the court issues to enforce its judgment. *See* Fallon, *supra* note 4, at 1339–40. In the case of the Supreme Court, the doctrine of precedent is especially important, because the Court's precedents on issues of federal law bind all inferior courts. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). By contrast, imagine that Congress enacts a statute forbidding a particular abortion technique and that Dr. Spock, a resident of Cambridge, Massachusetts, successfully sues in federal district court in Massachusetts for a declaratory judgment that the statute is invalid "on its face." Imagine further that the First Circuit affirms and that the Supreme Court denies certiorari. Under the doctrine of issue preclusion, Spock cannot be prosecuted for violating the statute. *See* RESTATEMENT

In following common practice, however, I should point out a cost. When the term "as-applied challenge" is treated as a residual category, encompassing every challenge to a statute or its applications that does not seek a holding of total, facial invalidity, terminological imprecision inevitably follows. It does so because when a challenger asks a court to hold a statute invalid in fewer than all applications, there can be a considerable range of choice about just how broadly a ruling of partial invalidity might sweep. To see why, it will be useful to distinguish among the kinds of reasons that a challenger might assert in support of her claim that a statute cannot be applied to her. At one end of the spectrum, she might advance reasons so specifically tied to the facts of her case as to be unique, or nearly unique, to her circumstances. For example, imagine a criminal defendant who challenges a statute prescribing life in prison without parole as the mandatory penalty for possessing an ounce or more of marijuana and who asserts that the statute violates the Eighth Amendment as applied to her because she: (1) was only one day over the age of sixteen at the time of the crime, (2) otherwise had no criminal record, (3) was an honor student, (4) had been abused by her parents as a child, and (5) purchased the marijuana at the request of and for her father, who gave her the money to do so.[32] A judicial ruling holding the mandatory sentencing statute unconstitutional as applied to these facts would be a nearly purely as-applied ruling.

(SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). Under the doctrine of precedent, district courts in the First Circuit would also need to dismiss prosecutions against other doctors. But doctors in other circuits would remain subject to prosecution. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs."). Doctors who had not been parties to the case could not invoke the doctrines of claim or issue preclusion, and although the First Circuit's ruling might have persuasive authority, it would not bind other circuits. *See* Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH L. REV. 1453, 1463 (2010) (reviewing "the standard model of precedent," under which "the bindingness of a prior decision turns most clearly on whether that prior decision was issued by a court with the power of appellate (or discretionary) review over the court deciding a subsequent case."); Fallon, *supra* note 4, at 1340. In short, although the First Circuit might have pronounced the federal statute "facially invalid," the binding force of that judgment would not extend into other jurisdictions. If the federal judgment of facial invalidity occurred in a class action on behalf of all doctors practicing medicine in the state, it could, of course, bar all prosecutions under the statute. But this result would depend, once again, on the sweep and force of the federal injunction and on the doctrine of issue preclusion, not on any talismanic force inhering in the terms "facial challenge" or "facial invalidity." Because the term "facial challenge" tends to obscure issues involving the precedential and preclusive effects of lower court judgments and the appropriate scope of judicial injunctions, we would do better to drop the term "facial challenge" entirely when talking about lower court rulings. It would much enhance the clarity of the analysis to speak instead about broad and narrow judicial rulings, about the claim and issue preclusive effects of lower court judgments, and about the certification and noncertification of class actions in cases challenging statutes or their applications.

32. *Cf.* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (holding that offenders under eighteen may not be sentenced to life in prison without parole for nonhomicide crimes).

Typically, however, the extent to which a ruling is as-applied to particular facts will be a matter of degree. Above I imagined a criminal defendant contesting the application of a mandatory sentencing statute against her based on a bevy of considerations. Appraising the arguments, a court might agree that the Constitution bars enforcement of the statute against the defendant, but based on one factor alone. It might hold, for example, that a statute mandating sentences of life in prison is unconstitutional as applied to defendants of less than eighteen years of age.[33] This holding would be less purely as-applied than one that made more facts pertinent, but more nearly purely as-applied than one holding the statute invalid in all its applications.

From time to time the Supreme Court notices that some as-applied challenges seek relatively broad statutory invalidations and puzzles about how to categorize them.[34] But I shall not, here, embark on a discussion of how the Court might make its terminology more precise. Without wishing to overstate the Court's consistency on this point, I shall, unless otherwise indicated, follow the Court's more usual pattern of employing the as-applied label to refer to any challenge that does not seek to establish that a statute is totally invalid.

A final definitional word may also be in order about what rules of law, exactly, are subject to as-applied or facial challenges. The terms apply most straightforwardly to attacks on statutes and administrative regulations, but can also extend to other written policies and to clearly delineated common law rules.[35] In cases involving statutes and rules, it is important to recognize, too, that the Supreme Court routinely speaks of facial attacks on particular provisions or sections of legislative acts, even when the success of those attacks could leave other aspects of multipart enactments intact.[36] Unless otherwise specifically indicated, I shall use the term in the same way, as comprising challenges to all applications of any linguistically distinguishable part or subpart of a more comprehensive statute or rule. In other words, attacks on the validity of subparts of a statute count as facial attacks on those subparts.

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33. *See id.*

34. *See, e.g.*, Doe v. Reed, 130 S. Ct. 2811, 2816–18 (2010).

35. For slightly fuller specification of the scheme of categorization that I employed in counting facial and as-applied challenges from a selection of Supreme Court Terms, *see infra* notes 321–334 and accompanying text.

36. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 892–96 (2010) (sustaining a "facial challenge" to Section 203 of the Bipartisan Campaign Reform Act of 2002 but not questioning the validity of other parts of the Act); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (finding a single provision of the Pennsylvania Abortion Control Act that required married women to notify their husbands before obtaining abortions unless specified exceptions applied to be facially invalid); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 53 n.55 (2006) (observing that a facial challenge can be directed at only one provision of a statute).

II.
FOUNDATIONS OF THE CONVENTIONAL BUT FALLACIOUS UNDERSTANDING

In the Introduction, I maintained that the conventional wisdom about the availability of facial challenges errs seriously. But the conventional wisdom could not have achieved conventional status if it had nothing to support it. Supreme Court holdings or dicta in a number of much-cited cases undergird the widely held beliefs that facial challenges are rarely entertained and almost never succeed, that courts typically rule on as-applied challenges before addressing facial challenges, that only a few constitutional tests license facial challenges, and that a "presumption of severability" almost always precludes facial challenges. As I shall demonstrate in Part III, the error lies in believing that the much-quoted but highly over-generalized rhetoric of a relatively few cases accurately depicts the Court's ordinary practice.

This Part—which serves as a prelude both to that demonstration and to Part IV's attempt to give a more accurate account of when facial challenges succeed and fail—first describes four important cases supporting the conventional wisdom. It then discusses some prominent, recent cases in which the Supreme Court has appeared to embrace the conventional wisdom's normative prescriptions. Although much of the rhetoric in the cases discussed in this Part is deeply misleading, almost all of the holdings can be fit into a pattern, to be sketched in Part IV, in which facial challenges can almost always be brought and in which they succeed with remarkably little-noticed frequency.

A. Foundations of the Conventional Wisdom

Four Supreme Court cases either lay the foundations for or otherwise illustrate the conventional wisdom about facial challenges.[37]

1. Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.

The central pillar of the conventional understanding that facial challenges are anomalous and disfavored, that most familiar tests of constitutional validity do not license them, and that a presumption of severability explains how facial challenges can be readily dismissed is *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co*.[38] The *Yazoo* case, which has served as the Hart & Wechsler Federal Courts casebook's principal case on facial and as-applied challenges since the book's first edition in 1953,[39] arose under a Mississippi statute that required common carriers doing business in the state to "settle all claims" of less than $200 for "freight which has been lost or damaged between

37. United States v. Salerno, 481 U.S. 739 (1987); Brockett v. Spokane Arcades, 472 U.S. 491 (1985); United States v. Raines, 362 U.S. 17 (1960); Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912).

38. 226 U.S. 217 (1912).

39. *See* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 176 (1953).

two given points on the same line or system" within a period of sixty days or "be liable to the consignee for twenty-five dollars damages . . . in addition to actual damages, all of which may be recovered in the same suit."[40] The Yazoo and Mississippi Valley Railroad lost or damaged freight belonging to the Jackson Vinegar Co., which notified the railroad of damages in the amount of $4.76.[41] When the railroad failed to settle the claim within sixty days, a Mississippi state court awarded the vinegar company $4.76 in actual damages, plus the statutorily prescribed $25 penalty.[42] On appeal to the U.S. Supreme Court, the railroad appears to have conceded its liability for $4.76, but argued that the statute penalizing it for failing to settle the claim violated the Due Process and Equal Protection Clauses, because, the railroad maintained, it would unfairly penalize the litigation of doubtful or excessive claims in other cases.[43]

The Supreme Court rebuffed the railroad's argument that the statute was facially invalid. Because the statute was constitutional as applied to the case before it involving a valid claim, the Court reasoned that it need not, and should not, say any more:

> Of course, the argument [that the Court must determine whether the statute would be valid as applied to other cases] is that, if [it] embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far other parts of it may be sustained if others fail are matters upon which we need not speculate now.[44]

Although commentators have overwhelmingly applauded the result in *Yazoo*, and embraced it as characteristic of a judicial practice of generally refusing even to consider facial challenges that depend on a statute's application to other cases, they have not approved the Court's stated reasoning.[45] The point of discomfiture has involved the Court's dismissal of the argument that a statute that is void as to some cases should therefore be considered void *in toto*. Under what Henry Monaghan has dubbed "the valid rule requirement,"[46] the Yazoo

40. 226 U.S. at 218.
41. *Id.* at 219.
42. *Id.*
43. *Id.*
44. *Id.* at 219–20.
45. *See, e.g.*, RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 181–82 (5th ed. 2003) (querying whether the Supreme Court should have inquired into the separability of the challenged statute before rejecting a facial challenge) [hereinafter HART & WECHSLER'S 5TH EDITION]; Dorf, *supra* note 14, at 243.
46. *See* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 [hereinafter Monaghan, *Overbreadth*]; *see also* Henry Paul Monaghan, *Harmless Error and the Valid Rule Requirement,* 1989 SUP. CT. REV. 195 (considering whether harmless error practice violates the valid rule requirement). Adler, *supra* note 15, at 160, denies the existence of a valid rule

and Mississippi Valley Railroad could not lawfully be held liable to the Jackson Vinegar Co. unless some constitutionally valid rule of law made it liable. If so, however, it would seem to follow that the Supreme Court should have felt obliged to address the argument that the statute before it failed the "valid rule" test by being "void" as to some cases and therefore void *in toto*.

Although agreeing that this argument requires a response, commentators have joined nearly unanimously in positing one, typically characterized as a "presumption of severability,"[47] under which any invalid statutory applications could presumptively have been severed from the valid ones, with the latter reflecting the constitutionally requisite valid rule.[48] In order to account for how the severing of invalid applications could accord with the valid rule requirement, I have previously suggested that statutory rules might be thought of as comprising a number of "subrules," the severing of one or more of which would leave other, valid subrules intact.[49] *Yazoo* illustrates the proposed analytical framework:

> [T]he Court assumes that the statutory requirement that the railroad settle "all claims" should be viewed as potentially encompassing multiple sub-rules, including the sub-rule "(i) settle all valid and non-exorbitant claims," as well as possible further sub-rules such as "(ii) settle all frivolous and excessive claims." If the statute is viewed as comprising a number of sub-rules, it becomes comprehensible that sub-rule (i) could survive even if sub-rule (ii) were constitutionally invalid and had to be severed.[50]

2. United States v. Raines

The Supreme Court came a step closer to expressing reliance on the presumption of severability in a second much-cited case that also dismissed a facial challenge, *United States v. Raines*.[51] *Raines* was a civil rights action, brought by the government to enjoin the defendant state election registrars from discriminating against African Americans.[52] The central issue involved the validity of the statute that authorized the government to sue.[53] Congress had

requirement, but in my view unpersuasively so. *See* Fallon, *supra* note 4, at 1331–33.

47. Dorf, *supra* note 14, at 249–51; *see* HART & WECHSLER, *supra* note 5, at 162–63.

48. The presumption of severability can apply both to linguistically distinguishable bits of statutory text and to invalid applications of an otherwise undifferentiated statutory provision. *See supra* note 24. In a thoughtful and provocative dissent from the conventional wisdom regarding separability, Walsh, *supra* note 1, argues that the modern doctrine displaced an older, preferable approach under which courts simply declined to enforce statutory provisions insofar as they were "repugnant" to the Constitution, but felt no need to frame the further "severability" question of whether Congress would have intended a partially unconstitutional statute to be enforced following judicial excisions of invalid portions or applications.

49. *See* Fallon, *supra* note 4, at 1331–33.

50. HART & WECHSLER, *supra* note 5, at 163.

51. 362 U.S. 17 (1960).

52. *See id.* at 19.

53. *See id.* at 19–20.

enacted that authorization pursuant to Section 2 of the Fifteenth Amendment. Although there was no question that Congress could validly forbid state officials such as the defendants from interfering with voting rights,[54] and could authorize suit against state officials to enforce their obligations, the defendants maintained that the statute also purported to regulate private conduct and to authorize suits against private actors.[55] By doing so, the defendants argued, the statute overreached Congress's Fifteenth Amendment authority and was therefore facially invalid.

In an opinion by Justice Brennan, the Court began by quoting an earlier decision insisting that the Court, when exercising judicial review follows "two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of law broader than is required by the precise facts to which it is to be applied."[56] From these rules, Justice Brennan suggested, it followed that "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases,"[57] such as those to which the defendants necessarily referred in presenting their facial challenge. If a case presenting constitutional difficulties should arise in the future, Justice Brennan noted, the Court had previously recognized that "a limiting construction" that would avoid the prospect of unconstitutionality "could be given to the statute."[58]

Among the reasons that *Raines* is significant is that it was a decision of the Warren Court, rendered after the Court had begun to relax the traditional rule forbidding third-party standing[59] and after it had developed the First Amendment overbreadth doctrine,[60] under which a statute may be declared void on its face if it also purports to prohibit too much constitutionally protected speech. *Raines* helped to promote the view that First Amendment overbreadth doctrine, which indisputably licenses facial attacks, is an anomalous outlier.

54. *See id.* at 25.

55. *See id.* at 20.

56. *Id.* at 21 (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

57. *Id.* at 22.

58. *Id.*

59. *See id.* at 22–23. On third-party standing, see generally HART & WECHSLER, *supra* note 5, at 153–61.

60. For a sympathetic account of the overbreadth doctrine as it had developed under the Warren Court, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

3. Brockett v. Spokane Arcades, Inc.

The First Amendment overbreadth exception was expressly at issue in *Brockett v. Spokane Arcades*.[61] By the time of the *Brockett* decision, the Burger Court had already made clear that the doctrine, which had flowered under the Warren Court, would authorize facial invalidations only when a statute is "substantially overbroad"[62] and a narrowing construction that would moot constitutional objections is not readily available.[63] In *Brockett*, the Court stated the further qualification that the Court would not entertain an overbreadth claim "where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish."[64] In such cases, the Court reasoned, "[t]he statute may forthwith be declared invalid to the extent it reaches too far, but otherwise left intact."[65] In other words, *Brockett* held that a challenger who could prevail on an as-applied challenge should not be permitted to make a facial challenge, and that courts should rely on the presumption of severability to solve any problems that might arise under the valid rule requirement, even in First Amendment overbreadth cases. *Brockett* thus strongly affirms the propositions that facial challenges are and ought to be rare and points toward severability as the device through which statutes' constitutional problems should ordinarily be cured.

4. United States v. Salerno

A final case that helps to illuminate the conventional reasoning with respect to facial challenges is *United States v. Salerno*.[66] In *Salerno*, the Court rejected arguments that the Bail Reform Act of 1984, which mandates pretrial detention without bail for some people accused of federal crimes, violates the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.[67] Chief Justice Rehnquist's opinion for the Court explained why the facial challenge must fail in language that has framed much of the subsequent debate about the availability of facial challenges:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid*. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it

61. 472 U.S. 491 (1985).
62. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); New York v. Ferber, 458 U.S. 747, 771 (1982).
63. *See, e.g.*, *Ferber*, 458 U.S. at 769 n.24.
64. 472 U.S. at 504.
65. *Id.*
66. 481 U.S. 739 (1987).
67. *See id.* at 745–51.

> wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.[68]

Post-*Salerno* commentary has emphasized that even the *Salerno* standard for facial challenges is not always impossible to satisfy in cases outside the First Amendment overbreadth doctrine.[69] Clearly, some tests of constitutional validity—such as those that inquire whether the legislature that enacted a statute had a constitutionally forbidden purpose—can generate the conclusion that some statutes have no valid applications.[70] In an important intervention in the scholarly debate, Marc Isserles thus distinguished between what he called "valid rule facial challenges,"[71] which arise under judicially formulated tests that sometimes mark statutes as invalid based on reasons applicable to all possible applications,[72] and "overbreadth facial challenges,"[73] which seek to hold a statute invalid *in toto* because it has *too many* invalid applications. The conventional wisdom, which now largely incorporates this distinction,[74] holds that only a relatively few tests of constitutional validity authorize "valid rule facial challenges"[75] and that "overbreadth facial challenges" are rare, even if not wholly nonexistent, outside the First Amendment.[76]

B. Recent Cases

A brief review of four relatively recent cases in which Supreme Court majorities have endorsed the conventional wisdom as I have described it will not only reinforce the sense that this is indeed the conventional wisdom, but also set the stage for a more accurate depiction of the Court's actual practice in later Parts of this Article.

1. Sabri v. United States

In *Sabri v. United States*,[77] the government indicted a real estate developer under a federal statute that criminalized bribing any official of an organization, government, or agency that receives federal funds. Sabri argued that the statute was invalid on its face because it failed to require proof of a connection

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68. *Id.* at 745 (emphasis added).

69. *See, e.g.*, Isserles, *supra* note 14, at 371–451.

70. *See* Dorf, *supra* note 14, at 279–81.

71. *See* Isserles, *supra* note 14, at 363–64 (defining a "valid rule facial challenge" as one "which predicates facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute's application to particular cases").

72. *See id.* at 386–87.

73. *Id.* at 363 (asserting that "an 'overbreadth facial challenge' . . . predicates facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law").

74. *See, e.g.*, Franklin, *supra* note 36, at 58–62 (accepting and applying the distinction).

75. *See id.* at 421–51.

76. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 609–10 (2004) (listing "relatively few settings" in which "we have recognized the validity of facial attacks alleging overbreadth").

77. 541 U.S. 600 (2004).

between federal funds and alleged bribes and because Congress had no authority under Article I to criminalize bribes unconnected with federal programs.[78] Writing for the Court, Justice Souter dismissed the argument that Congress had no power to enact the statute as written; the Spending and Necessary and Proper Clauses furnished ample authority.[79]

Although the opinion could have terminated at this point, Justice Souter went on to "add an afterword on Sabri's technique for challenging his indictment by facial attack on the underlying statute."[80] That afterword began "by recalling that facial challenges are best when infrequent."[81] Quoting *Raines*, Justice Souter maintained that "[f]acial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually barebones records"[82] and added that challenges such as that asserted by Sabri—who argued that "the statute could not be enforced against him, because it could not be enforced against someone else"[83]—"are especially to be discouraged."[84] Justice Souter acknowledged a "relatively few settings" in which the Court had "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)."[85] To illustrate his point, he cited cases involving freedom of speech, the right to travel, abortion, and legislation enacted under Section 5 of the Fourteenth Amendment.[86] But "[o]utside of these limited settings," he wrote, "we do not extend an invitation to bring overbreadth claims."[87]

2. United States v. Georgia

United States v. Georgia[88] arose from a paraplegic prison inmate's suit against the state of Georgia for alleged violations of the Americans with Disabilities Act (ADA) and the Fourteenth Amendment.[89] The constitutional issue before the Court was whether Congress, via a provision of the ADA, had validly abrogated Georgia's sovereign immunity.[90] In earlier cases, the Court had held that federal statutory provisions purporting to strip states' immunity came within Congress's power to enforce the Fourteenth Amendment only if they were "congruen[t] and proportional[]" to an identified pattern of

78. *Id.* at 604–05.
79. *Id.* at 605–08.
80. *Id.* at 608.
81. *Id.*
82. *Id.* at 609 (quoting United States v. Raines, 362 U.S. 17, 22 (1960)).
83. *Id.* at 609.
84. *Id.*
85. *Id.* at 609–10.
86. *See id.* at 610.
87. *Id.*
88. 546 U.S. 151 (2006).
89. *Id.* at 157.
90. *Id.* at 156. On state sovereign immunity, see generally HART & WECHLSER, *supra* note 5, at 869–941.

constitutional violations.[91] Applying that test, the Court appeared to hold several statutes facially unconstitutional.[92]

In *United States v. Georgia*, the Court declined to determine whether Title II of the ADA satisfied the "congruence and proportionality" test on its face. In an opinion for a unanimous Court, Justice Scalia noted that the prisoner's "claims for money damages against the State under Title II were evidently based, at least in large part, on conduct that independently violated . . . the Fourteenth Amendment."[93] Averring that "no one doubts that Section 5 grants Congress the power to . . . creat[e] private remedies against the States for *actual* violations" of the Fourteenth Amendment,[94] Justice Scalia held that Title II of the ADA "validly abrogates state sovereign immunity" as applied to such violations.[95] By holding the statute valid as applied, the Court effectively dismissed the state's facial challenge and thereby affirmed the conventional wisdom that facial challenges should rarely succeed, apparently because the presumption of severability promises to solve constitutional difficulties that might materialize in future cases.

3. Ayotte v. Planned Parenthood of Northern New England

In *Ayotte v. Planned Parenthood of Northern New England*,[96] the Court reviewed a lower court decision that held that a state statute requiring minors to notify their parents before obtaining an abortion was facially unconstitutional because it failed to provide an exception for cases of medical emergency. In an opinion by Justice O'Connor, the Court unanimously agreed that the statute was invalid under its precedents insofar as it failed to provide an emergency exception.[97] The Court also observed that the court of appeals' decision holding the statute facially unconstitutional and thus unenforceable in all cases was "understandable, for we, too, have previously invalidated an abortion statute in its entirety because of the same constitutional flaw."[98] But it was error, Justice O'Connor wrote, not to "contemplate relief more finely drawn."[99] Quoting *Brockett v. Spokane Arcades*, the Court affirmed that "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a

91. *See, e.g.*, Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000).

92. *See, e.g.*, *Coll. Sav. Bank*, 527 U.S. at 638–48 (Patent Remedy Act); *Kimel*, 528 U.S. at 67 (provision of the Age Discrimination in Employment Act purporting to abrogate state sovereign immunity); *see also* Metzger, supra note 24, at 876 ("[M]any of the Court's recent Section 5 decisions appear (at least at first glance) to invalidate the statutes there challenged on facial grounds.").

93. 546 U.S. at 157.

94. *Id.* at 158.

95. *Id.* at 159.

96. 546 U.S. 320 (2006).

97. *Id.* at 327–28.

98. *Id.* at 330–31.

99. *Id.* at 331.

'statute may be declared invalid to the extent it reaches too far, but otherwise left intact.'"[100] In this case, "background constitutional rules"[101] made it plain that the statute could survive constitutional scrutiny if invalidated as applied to emergency cases. Accordingly, the Court held that partial invalidation, not total invalidation, was the appropriate "remedy,"[102] as long as "New Hampshire's legislature intended the statute to be susceptible to such a remedy,"[103] presumably under the normally applicable presumption of separability.

4. Gonzales v. Carhart

The unanimity displayed in *Ayotte* fractured the following year in *Gonzales v. Carhart*,[104] but an adamant five-Justice majority restated the conventional wisdom even more forcefully than *Ayotte* had. *Carhart* presented a challenge to a federal statute that banned an abortion technique dubbed "partial-birth abortion," but did not prohibit other methods.[105] The challengers alleged that the statute was unconstitutional on its face because it included no exception for cases in which the forbidden technique would be necessary to protect the health of the mother.[106] Reversing the lower court, Justice Kennedy's majority opinion assumed that the statute would be unconstitutional as applied to any cases in which it confronted women with actual health risks,[107] but found medical uncertainty about whether any such cases existed and ruled that a facial challenge necessarily failed in light of the uncertainty.[108] Having so ruled, Justice Kennedy went on to render the "further determination that these facial attacks should not have been entertained in the first instance."[109] It would not be "within our traditional institutional role" to try to anticipate when the challenged ban might possibly constitute an undue burden on abortion rights, he wrote.[110] Instead, the challengers should be remitted to the "as-applied challenges [that] are the basic building blocks of constitutional adjudication."[111]

100. *Id.* at 329.
101. *Id.*
102. *Id.* at 330–31.
103. *Id.* at 331.
104. 550 U.S. 124 (2007).
105. *Id.* at 140–42, 150.
106. *Id.* at 161.
107. *See id.* at 167–68.
108. *Id.* at 163–67.
109. *Id.* at 167.
110. *Id.* at 168.
111. *Id.* (quoting Fallon, *supra* note 4, at 1328).

III.
CONSTITUTIONAL DOCTRINE AND THE NEAR UBIQUITY OF FACIAL CHALLENGES

As should now be clear, the Justices of the Supreme Court sometimes say, and undoubtedly believe, that facial challenges, and especially successful facial challenges, are and should be rare; that the Court almost invariably rules on as-applied challenges before considering facial challenges; that only a few stringent and anomalous tests such as the First Amendment overbreadth test frame facial challenges; and that a presumption of severability typically defeats facial challenges by allowing a court simply to assume that any possibly invalid statutory applications could be severed from valid ones in future cases. The Justices also believe that it is possible, in cases such as *Salerno*, to state generally applicable, transsubstantive rules specifying when facial challenges can and cannot succeed, without regard to the constitutional provision under which a challenge occurs or the character of the law whose enforcement is being challenged.

On all of these points, the conventional wisdom is false. To establish this claim, this Part begins by identifying some of the astonishingly large number of constitutional provisions under which the Supreme Court has upheld facial challenges. It then presents the results of a more systematic study of all Supreme Court cases decided on the merits during each of six Terms over a twenty-six-year period. That survey strongly corroborates the conclusion that facial challenges are at least as common as as-applied challenges in the Supreme Court and that facial challenges frequently prevail. A final subsection discusses how these two types of evidence, either singly or in conjunction, specifically refute one or another tenet of the conventional wisdom.

A. Facial Challenges Hiding in Plain Sight

Powerful evidence that the Supreme Court routinely entertains, and not infrequently upholds, facial challenges emerges from examination of the leading cases under a broad range of constitutional provisions, as reflected in a single Constitutional Law[112] and a single Federal Courts casebook.[113] A survey of leading cases unmistakably demonstrates that the Court has held statutes wholly invalid under nearly every provision of the Constitution under which it has adjudicated challenges to statutes.

In cases involving challenges to Congress's authority to enact legislation under Article I, the Court has held statutes wholly invalid under the Qualifications Clause,[114] the Presentment Clause,[115] and the Suspension

112. *See* JESSE H. CHOPER, ET AL., CONSTITUTIONAL LAW: CASES–COMMENTS–QUESTIONS (10th ed. 2006).

113. *See* HART & WECHSLER, *supra* note 5.

114. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 828–36 (1995).

115. *See* Clinton v. City of New York, 524 U.S. 417, 447–49 (1998); INS v. Chadha, 462

Clause.[116] Within the past two decades, it has twice ruled that statutes exceeded Congress's power under the Commerce Clause.[117] Indeed, a subsequent decision, in *Gonzales v. Raich,*[118] can be read as rejecting the possibility of successful as-applied challenges to assertions of legislative power under the Commerce Clause and thus as establishing that all attacks must be facial if they are to have any chance at success.[119] The Court has struck down state legislation under the Contracts Clause[120] and the Import-Export Clause.[121] It frequently invalidates state statutes under the dormant Commerce Clause.[122]

In other decisions enforcing the Constitution's structural provisions, the Court has ruled statutory provisions invalid, apparently in all applications, because they trenched on powers reserved to the President by Article II[123] or conflicted with Article III.[124] *Printz v. United States*[125] found that a statutory provision requiring state and local law enforcement officials to enforce federal law violated assumptions of dual sovereignty implicit in the Constitution's structure. The Court has repeatedly held statutes that discriminate against out-of-staters unconstitutional under the Privileges and Immunities Clause of Article IV.[126] It often finds state statutes and regulations to be preempted by federal law and thus wholly unenforceable under the Supremacy Clause of Article VI.[127]

Myriad Supreme Court decisions have pronounced statutes invalid under the Free Speech Clause of the First Amendment.[128] Many of these rulings have

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U.S. 919, 952–59 (1983).

116. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

117. *See* United States v. Morrison, 529 U.S. 598, 627 (2001); United States v. Lopez, 514 U.S.549, 559–68 (1995).

118. 545 U.S. 1 (2005).

119. *See* Franklin, *supra* note 36, at 62–68; Meier, *supra* note 1, at 1563.

120. *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 32 (1977).

121. *See* Polar Tankers, Inc. v. City of Valdez, 129 S. Ct. 2277 (2009).

122. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 389–94 (1994); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 894 (1988); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 275–80 (1988); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 576 (1986); Sporhase v. Nebraska, 458 U.S. 941, 958 (1982); Hughes v. Oklahoma, 441 U.S. 322, 336–38 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978); Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951); Baldwin v. Seelig, 294 U.S. 511, 527–28 (1935).

123. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010); Bowsher v. Synar, 478 U.S. 714, 736 (1986); Buckley v. Valeo, 414 U.S. 1 (1976).

124. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 238–40 (1995); United States v. Klein, 80 U.S. 128 (1871).

125. 521 U.S. 898, 933 (1997).

126. *See, e.g.*, Lunding v. N.Y. State Appeals Tribunal, 522 U.S. 287, 315 (1998); Hicklin v. Orbeck, 437 U.S. 518, 534 (1978).

127. *See, e.g.*, Haywood v. Drown, 129 S. Ct. 2108 (2009); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540–53 (2001).

128. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577 (2010); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010); Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002); Watchtower Bible & Tract Soc'y v. Stratton, 536 U.S. 150 (2005); Lorillard Tobacco Co.

laid down or reaffirmed tests of constitutional validity that can be, and often have been, employed to hold other statutes invalid *in toto*. These include tests that inquire whether statutes regulating speech or expression are substantially overbroad,[129] whether they are narrowly tailored to further compelling governmental interests,[130] and whether restrictions on commercial speech directly advance substantial government interests and are no more extensive than necessary.[131]

A formidably large number of decisions have found statutes unconstitutional under the religion clauses of the First Amendment. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Court held a statute facially invalid under the Free Exercise Clause.[132] More frequently, the Court has declared statutes invalid under the Establishment Clause,[133] often because of their failure to satisfy one or another prong of the much criticized but frequently applied three-part test of *Lemon v. Kurtzman*.[134] Pursuant to the *Lemon* test, laws and regulations will fall to constitutional challenge if they lack a secular purpose, have the principal or primary effect of advancing or inhibiting religion, or promote an excessive government entanglement with religion.[135]

Several cases have pronounced statutes facially invalid because they interfere with a constitutionally protected right to travel.[136] The Court found support for the underlying right in the First Amendment in *Aptheker v. Secretary of State*[137] and in the Fourteenth Amendment Privileges or Immunities Clause in *Saenz v. Roe.*[138] A number of decisions under the Eighth Amendment have held statutes unconstitutional for failing to impose proper safeguards against

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v. Reilly, 533 U.S. 525, 533–36 (2001); United States v. Playboy Entm't Group, 529 U.S. 803, 827 (2000); Reno v. ACLU, 521 U.S. 844, 883 (1997); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–53 (1995); R.A.V. v. City of St. Paul, 502 U.S. 105, 123 (1991); Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988); Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 573 (1987); Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 750, 773 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Miami Herald v. Tornillo, 418 U.S. 241, 259 (1974); Chi. Police Dep't v. Mosley, 408 U.S. 92, 102 (1972); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969); Staub v. Baxley, 355 U.S. 313 (1958); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444, 451 (1938).

129. *See, e.g.*, *Stevens*, 130 S. Ct. 1577.

130. *See, e.g.*, *Citizens United*, 130 S. Ct. at 913.

131. *See, e.g.*, *Lorillard Tobacco*, 533 U.S. at 533–36.

132. 508 U.S. 520, 542, 545 (1993).

133. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000); Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 705 (1994); Edwards v. Aguillard, 482 U.S. 578, 597 (1987); Thornton v. Caldor, 472 U.S. 703, 710–11 (1985); Wallace v. Jaffree, 472 U.S. 38, 61 (1985); Larkin v. Grendel's Den, 459 U.S. 116 (1982); Stone v. Graham, 449 U.S. 39, 42–43 (1980); Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

134. 403 U.S. 602, 607 (1971).

135. *See id.*

136. This line of cases starts with *Crandall v. Nevada*, 73 U.S. 35 (1867).

137. 378 U.S. 500 (1964).

138. 526 U.S. 489, 505–07 (1999).

arbitrary imposition of the death penalty.[139] Indeed, the precedent-shattering decision in *Furman v. Georgia*[140] either held or established that the death penalty statutes in thirty-nine states were unconstitutional.[141]

The Supreme Court has quite frequently held legislation unconstitutional under the Due Process Clauses of the Fifth and Fourteenth Amendments, sometimes based on procedural[142] and sometimes based on substantive defects.[143] In doing so, the Court, depending on the nature of the case, has faulted legislation for failing to be rationally related to a legitimate state interest,[144] for not meeting the demands of strict judicial scrutiny,[145] and for imposing an undue burden on abortion rights.[146] *City of Chicago v. Morales*[147] held that an ordinance making it a crime to loiter in a public place after having been asked to disperse by a police officer who reasonably believed one of the persons present to be a gang member was facially invalid on vagueness grounds because it failed to cabin police discretion adequately.

Under the Equal Protection Clause, the Court has invalidated statutes because they discriminated against racial minorities, in a line of cases including *Brown v. Board of Education*,[148] and because they awarded race-based affirmative action preferences not narrowly tailored to further a compelling governmental interest, as in *City of Richmond v. J.A. Croson Co*.[149] The Court has also applied strict scrutiny to strike down state laws disadvantaging aliens.[150] In the domain of gender, the Court held a statutory provision discriminating against women not to be rationally related to a legitimate state interest in *Reed v. Reed.*[151] Since *Craig v. Boren*[152] in 1976, the Court has most often

139. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 335, 335–36 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 285–305 (1976) (plurality opinion).

140. 408 U.S. 238, 239–49 (1972).

141. CHOPER ET AL., *supra* note 112, at 527.

142. *See, e.g.*, Sniadach v. Family Fin. Corp., 308 U.S. 47 (1969).

143. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Stenberg v. Carhart, 530 U.S. 914, 922 (2000); City of Chi. v. Morales, 527 U.S. 41, 60–64 (1999); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992); Moore v. E. Cleveland, 431 U.S. 494 (1977); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 543 (1973); Roe v. Wade, 410 U.S. 113, 166 (1973).

144. *See Lawrence*, 539 U.S. 558; Hooper v. Bernallilo Cnty. Assessor, 472 U.S. 612, 622–24 (1985); *Moreno*, 413 U.S. at 543.

145. *See, e.g.*, Roe v. Wade, 410 U.S. 113.

146. *See, e.g.*, *Stenberg*, 530 U.S. at 922; *Planned Parenthood of Se. Pa*., 505 U.S. at 887–98.

147. 527 U.S. at 60–64.

148. 347 U.S. 483, 495 (1954); *see also* Hunter v. Erickson, 393 U.S. 385, 392–93 (1969); Loving v. Virginia, 388 U.S. 1 (1967).

149. 488 U.S. 469, 507–08 (1989); *see* Gratz v. Bollinger, 539 U.S. 244, 270–76 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (invalidating voluntarily adopted public school student assignment plans that relied on race to promote integration).

150. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 646 (1973); Graham v. Richardson, 403 U.S. 365, 376–77 (1971).

151. 404 U.S. 71, 76 (1971).

152. 429 U.S. 190, 210 (1976).

applied a test inquiring whether the government's reliance on gender serves important state interests to which the statutory discrimination is "substantially related."[153] In other equal protection cases, the Court has sometimes found statutory classifications to be irrational, and thus invalid, in their discrimination against illegitimate children,[154] single persons,[155] and homosexuals.[156]

The Supreme Court has also relied on the Equal Protection Clause in invalidating statutes that failed to conform to one-person, one-vote norms[157] and in striking down statutory provisions establishing voting districts when racial considerations were the predominant factor leading to those provisions' enactment.[158] *Harper v. Virginia State Board of Elections*[159] held that a statute making payment of a poll tax "a prerequisite of voting" violated the Equal Protection Clause because voting was a fundamental right and "[w]ealth, like race, creed, or color is not germane to one's ability to participate intelligently in the electoral process."[160] In a line of cases beginning with *Shapiro v. Thompson*,[161] the Supreme Court has relied on the Equal Protection Clause to strike down a number of state statutes imposing duration-of-residency requirements as a precondition to the receipt of important benefits or the exercise of fundamental rights.[162]

The Supreme Court has relied on facial invalidations not only to enforce the substantive guarantees of the Fourteenth Amendment, but also to thwart what a majority has viewed as attempted overstepping of Congress's constitutionally conferred enforcement powers under Section 5. Several decisions have thus ruled that statutory provisions purporting to abrogate the states' sovereign immunity from suit were invalid, apparently *in toto*, because

153. In *United States v. Virginia*, 518 U.S. 515, 539–46 (1996), which invalidated an admissions policy that categorically excluded women from attendance at a state military college, the Court emphasized the further requirement that gender-based discriminations require an "exceedingly persuasive justification."

154. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 465 (1988); Trimble v. Gordon, 430 U.S. 762, 766–76 (1977).

155. *See* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

156. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996).

157. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (affirming a lower court decision that held a state districting statute unconstitutional on its face); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 734–35 (1964); Wesberry v. Sanders, 376 U.S. 1, 7 (1964).

158. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900, 920–28 (1995).

159. 383 U.S. 663, 668 (1966).

160. *Id.; see also* Kramer v. Union Sch. Dist., 395 U.S. 621, 628–29 (1969) (holding that a statute limiting voting in school district elections mostly to parents of school children and to those who owned or leased real property in the district or were married to someone who did could not survive the "exacting judicial scrutiny" applicable to "statutes distributing the franchise").

161. 394 U.S. 618, 638 (1969).

162. *See, e.g.*, Memorial Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974) (involving emergency medical care); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (involving voting rights).

they were not "congruent and proportional" to an identified pattern of constitutional violations by states.[163]

B. An Empirical Survey of All Cases in Six Supreme Court Terms

In order further to test the conventional wisdom concerning facial challenges in the Supreme Court, and in particular the propositions that facial challenges are anomalous and rarely succeed, I conducted—with very substantial reliance on the work of research assistants—an empirical examination of all Supreme Court decisions during the October 2009, 2004, 1999, 1994, 1989, and 1984 Terms. The results of this survey, which will be presented in a table below and summarized more fully in an Appendix, provide strong evidence that facial challenges in the Supreme Court are more normal than aberrant and that they quite frequently prevail. In every one of the Terms that we surveyed, the Court adjudicated more facial challenges on the merits than it did as-applied challenges. The overall success rate for facial challenges was also higher than that for as-applied challenges.[164] Perhaps most striking, in only four cases in the sample did a majority of the Court express a preference for as-applied over facial adjudication based on a role-based reluctance to hold statutes invalid *in toto*.[165]

Although the survey results corroborate my thesis about the frequency with which the Supreme Court entertains and upholds facial challenges, the overall picture that emerged is in some ways less clear-cut than I would have hoped. As the Appendix explains, it is sometimes difficult to differentiate facial from as-applied challenges, partly but not exclusively because the Court is often inattentive to the distinction. In addition, the coding of cases in which the Court noted that the parties had presented either facial or as-applied challenges but did not rule squarely on their merits required a number of methodological decisions that others might make differently. Although readers should thus take the numbers presented here with a grain of salt, at least until they have read the Appendix, I would expect the findings of others who examined the Supreme Court's decisions during the same six Terms to align with my conclusions in their general thrust.[166]

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163. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67, 91–92 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637–48 (1999).

164. The respective numbers were 44 percent and 38 percent.

165. *See* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 37–41 (1999); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 477–79 (1995); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502–07 (1985); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447 (1985).

166. For anyone who might wish to check or challenge the categorizations that our tallies reflect, Section C of the Appendix lists every case that we recorded as presenting either a facial or an as-applied challenge, denotes whether we characterized the challenge as successful or unsuccessful, and explains the exercise of judgment that underlie our coding in many of the cases that proved hardest to categorize.

1. Empirical Findings

The following table summarizes our findings regarding facial and as-applied challenges in the Supreme Court during the 2009, 2004, 1999, 1994, 1989, and 1984 Terms:

Table 1: Count and Success of Facial and As-Applied Challenges in the Supreme Court, 1984–2009

		Term						
		1984	**1989**	**1994**	**1999**	**2004**	**2009**	**TOTAL**
Cases Adjudicated	**Total**	151	139	86	77	79	87	619
	Facial	18	17	10	20	5	6	76
	As-Applied	9	14	6	7	3	4	43
	Both Facial and As-Applied	4	5	1	0	3	0	13
Success Rate	**Facial**	11/22 (50%)	4/22 (18%)	7/11 (64%)	12/20 (60%)	2/8 (25%)	3/6 (50%)	39/89 (44%)
	As-Applied	4/13 (31%)	5/19 (26%)	4/7 (57%)	5/7 (71%)	2/6 (33%)	1/4 (25%)	21/56 (38%)

2. Preliminary Discussion

Prior to further discussion of how the results of my empirical survey support this Article's general claims about the relative frequency and success rates of facial and as-applied challenges, I offer four comments about change—or its relative absence—in the Court's pattern of decisions over a twenty-six-year period.

First, the number of cases presenting *either* facial or as-applied challenges to statutes constitutes a smaller proportion of the Court's docket than I might have guessed. Many of the Court's cases involve statutory questions only. As explained in the Appendix, many more involve the constitutionality of actions by lower court judges or government officials that may be authorized, but are not mandated, by statutes and that the parties do not frame as involving a challenge to a statute. Examples include many challenges to lower court judges' rulings on evidentiary motions and to the constitutionality of searches and seizures.

Second, although there is surprising year-to-year variation in the numbers of facial and as-applied challenges that the Court entertained, there is no clear trend line indicating either increasing or diminishing receptivity to facial challenges. The Court decided significantly fewer cases presenting constitutional challenges to statutes in the 2009 and 2004 Terms than it had in previous terms, but review of as-applied challenges declined nearly as markedly as review of facial challenges. There is no obvious pattern to the rates at which facial challenges succeed.

Third, although the survey included only one Term of the Roberts Court (compared with four for the Rehnquist Court and one for the Burger Court), the results for the 2009 Term do not demonstrate any sharp break with past Court practice in either adjudicating or sustaining facial or as-applied challenges.[167]

Fourth, the evidence I examined provides no support for the hypothesis that the Court's 1987 decision in *United States v. Salerno*,[168] which framed the test that facial challenges must meet in especially stringent terms, marked a significant turning point. Although the percentage of successful facial challenges declined from 50 percent in the 1984 Term to 18 percent in the 1989 Term, there was little change in the number of facial challenges that the Court addressed on the merits. Probably more significantly, by the 1999 Term, the total number of facial challenges adjudicated approached the 1984 level—even though the total number of cases on the Court's merits docket had declined by more than half—and the success rate for facial challenges was actually higher (60 percent as compared with 50 percent).

C. The Conventional Wisdom Reappraised

The evidence emerging from an informal review of leading Supreme Court cases and a more systematic examination of the cases decided during six of the Court's Terms reveals the conventional wisdom about facial challenges as astonishingly wide of nearly every relevant mark.

1. Facial Challenges Are Not Rare or Categorically Suspect

Without need for further explanation, the evidence adduced above should dispose of the fallacy that facial challenges, or even successful facial challenges, are anomalous. As noted above, some commentators have correctly pointed out that facial challenges succeed substantially more often than the Supreme Court acknowledges,[169] but none, so far as I am aware, has adequately described or documented the breadth of the range of cases in which the Court has upheld facial challenges,[170] frequently without even denominating them as such.

In an important article referred to earlier, Marc Isserles simultaneously attacked the conventional wisdom that facial challenges are rare and disfavored and, by introducing a conceptual distinction among facial challenges, largely reaffirmed the conventional wisdom regarding what he called "overbreadth facial challenges."[171] According to Isserles, both the Supreme Court and

167. It is possible, of course, that examination of more Roberts Court Terms would support the judgment of some that the Roberts Court tends to prefer as-applied to facial adjudication—and perhaps especially as-applied to facial invalidation—more frequently than its predecessors.

168. 481 U.S. 739 (1987).

169. *See, e.g.*, Isserles, *supra* note 14, at 439; Dorf, *supra* note 14, at 248–49.

170. *Cf.* Adler, *supra* note 15 (purporting to establish on analytical grounds, rather than on the basis of an empirical survey, that all challenges to statutes are facial challenges).

171. *See* Isserles, *supra* note 14, at 363–64.

scholarly commentators have erred by conflating overbreadth facial challenges, which are indeed disfavored, with what he calls valid rule facial challenges, which succeed much more frequently. When tested against Part III.A's long list of successful facial challenges, however, Isserles's effort to revise the conventional wisdom looks shaky. Although it is widely believed that "overbreadth facial challenges" constitute a distinctive and distinctively problematic category, readily distinguished from "valid rule facial challenges,"[172] the distinction is by no means always easy to apply. In any linguistically natural sense of the term, moreover, overbreadth facial challenges are actually quite common.

As defined by Isserles, overbreadth facial challenges are ones in which the challenger must point to cases other than her own to illustrate the vice of the statute that she challenges.[173] An example of this kind of overbreadth analysis comes from obscenity doctrine. The Supreme Court has held that "obscenity" lies beyond the protection of the First Amendment, but it has defined obscenity narrowly, so that a good deal of sexually explicit speech is not technically obscene.[174] In this context, a purveyor of acknowledged obscenity may argue that a statute restricting sexually explicit speech should be deemed overbroad and therefore facially invalid *only* because it would be unconstitutional as applied to others, who are not before the court, and who trade in speech that is sexually explicit but not obscene.

Given his definition of "overbreadth," Isserles concludes that neither strict nor intermediate judicial scrutiny requires overbreadth analysis, properly understood.[175] Instead, those and many other tests that call for close tailoring of statutory terms to further compelling or important government interests "predicate[] facial invalidity on the basis of a constitutional infirmity on the face of the statute, independent of constitutional defects arising from the statute's application to particular cases."[176] A good case to illustrate Isserles's analysis is *United States v. Playboy Entertainment Group*,[177] which invalidated a statutory provision that required cable television operators to implement measures to prevent "signal bleed" from sexually explicit programming as a means of protecting children. In finding that the provision was not narrowly tailored to further a compelling governmental interest, the Court did not conclude that it was invalid because it would be impermissible as applied to some cases. Rather, the Court appeared to believe that the statute was unconstitutional because there were less restrictive means of protecting children from unwanted exposure to sexually explicit programming in *all*

172. *See id.*
173. *See id.*
174. *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining constitutionally unprotected obscenity).
175. *See* Isserles, *supra* note 14, at 416–21.
176. *See id.* at 423.
177. 529 U.S. 803 (2000).

cases[178]—for example, by putting the onus to monitor signal bleed and to complain about it when it occurred on parents who objected.

Although Isserles's distinction of strict scrutiny's narrow tailoring requirement from overbreadth tests is illuminating in some cases, in the end it cannot bear the weight that he, and others who have followed him, place on it. When inquiring whether statutes are narrowly tailored, courts must often anticipate cases that may differ in material respects from the case before them in order to ascertain whether a statute will withstand constitutional attack.

A plain example, already cited above, comes from strict judicial scrutiny as applied in *City of Richmond v. J.A. Croson Co.*[179] Because affirmative action preferences for the actual victims of past discrimination would have been permissible,[180] the vice of the challenged statute, which led the Court to invalidate it, was that it extended minority preferences too broadly.[181]

The intermediate scrutiny test, which the Court has often employed to invalidate statutes that discriminate on the basis of gender, can also elicit a type of overbreadth analysis. The statute invalidated in *Craig v. Boren*,[182] which barred young men but not young women from purchasing low-alcohol beer, reflected a stereotype-based generalization that young men would be more likely than young women to drink excessively and then drive drunkenly. As applied to some young men and young women, that stereotyped generalization would surely have been true. If so, the vice of the statute that called for facial invalidation lay in its overbreadth. Moreover, that vice was not self-evident on the face of the statute, "independent of constitutional defects arising from the statute's application to particular cases,"[183] because some statutes mandating gender-based discrimination are constitutionally valid.[184] In applying intermediate scrutiny, a court must consider a range of actual and possible applications to determine whether, in enough of them, a particular statute's differential treatment of men and women is substantially related to an important governmental interest.

In response to this analysis of *Croson* and *Craig* as reflecting judgments of overbreadth, one might try to argue that the defect of the challenged statutes resided in their reliance on stereotyped generalizations and, thus, pervaded all of the statutes' applications. But this argument elides the crucial point.

178. *See id.* at 827.

179. 488 U.S. 469 (1989).

180. *See id.* at 508–09; *id.* at 526 (Scalia, J., concurring).

181. *See generally* Monaghan, *Overbreadth*, *supra* note 46, at 3 (distinguishing the form of overbreadth analysis concerned with regulatory precision from a form identified with special standing rules).

182. 429 U.S. 190 (1976).

183. Isserles, *supra* note 14, at 423.

184. *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001) (upholding a distinction between American citizen mothers and American citizen fathers of illegitimate children born abroad); Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding the exclusion of women prison guards from duty in "contact positions" in all-male prisons).

Determination of whether the statutes were sufficiently closely related to a compelling or important governmental interest required the Court to consider a broad range of imagined statutory applications and to determine whether, in too many such cases, the generalization on which the statute rested was too inaccurate. The Court could not decide without assessing how the challenged statute would play out with respect to parties other than those immediately before it. And in making decisions, the Court must sometimes consider a statute's potential application to parties whose cases differ significantly from that of the party before it.

Other examples of the Court's embrace of overbreadth facial challenges are even more unmistakable. Consider *United States v. Lopez,*[185] in which the Court struck down a federal statute forbidding the possession of guns in a school zone, on the ground that Congress lacked the power to enact the statute under the Commerce Clause. Because Congress could almost surely have forbidden the possession within a school zone of any gun that had traveled in interstate commerce,[186] the statute's fatal defect lay in its overbreadth.

The Court has sometimes invalidated statutes enacted pursuant to Section 5 of the Fourteenth Amendment on similar grounds. For example, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[187] the Court held a statute that purported to abrogate the states' sovereign immunity in suits for patent infringement to be facially invalid because it applied to too many cases not involving constitutional violations. In striking down the challenged provision, the Court offered no reply to Justice Stevens's argument that the case actually before it involved a constitutional violation for which Section 5 authorized Congress to provide a remedy.[188] In the view of the majority, it was apparently the statute's overbreadth that doomed it.[189]

In sum, even insofar as the conventional wisdom about the rarity of facial challenges might be limited to overbreadth facial challenges, the conventional wisdom is wrong. There is a germ of truth in the Supreme Court's assertion, in *Sabri v. United States*,[190] that it responds more receptively to some kinds of overbreadth facial challenges than it does to others. But the Court's jurisprudence, which generally welcomes facial challenges under virtually all judicially enforceable constitutional provisions, displays no consistent, analytically rigorous effort to differentiate and categorize various kinds of overbreadth.

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185. 514 U.S. 549 (1995).

186. *See* Metzger, *supra* note 24, at 909 & n.14.

187. 527 U.S. 627 (1999).

188. *See id.* at 654 (Stevens, J., dissenting) (asserting that the Court's analysis "has nothing to do with the facts of this case").

189. *Cf.* Franklin, *supra* note 36, at 86–98 (characterizing the review conducted in cases resulting in facial invalidation of statutes under Section 5 of the Fourteenth Amendment and the Commerce Clause as overbreadth review because, although the statutes would otherwise have had some valid applications, they swept too broadly).

190. 541 U.S. 600, 609–10 (2004).

2. The Court Does Not Always Insist on Considering As-Applied Challenges First

Although the Supreme Court sometimes says the contrary, it by no means always, or even typically, prefers as-applied to facial challenges on the grounds that the former furnish narrower bases for decision or that the latter overreach the bounds of judicial competence. To the contrary, the Court frequently eschews opportunities to decide cases on narrow, as-applied bases even when such bases are available. In the domain of the First Amendment, the Court's pronouncement in *Brockett v. Spokane Arcades*[191] that federal courts should always entertain as-applied challenges before considering facial overbreadth claims, and should not rule on overbreadth claims at all if an as-applied challenge succeeded, marked a departure from prior practice. In *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*,[192] the majority cited ten cases that it described as permitting facial rather than partial statutory invalidation at the behest of litigants who claimed that challenged statutes were unconstitutional as applied to them. Since *Brockett*, the Court has upheld facial challenges without first considering whether a statute was constitutional as applied to the plaintiffs in *Board of Airport Commissioners v. Jews for Jesus*[193] and, during the 2009 Term, in *United States v. Stevens*,[194] which struck down a statute criminalizing the commercially motivated creation, sale, or possession of depictions of animal cruelty. Again during the 2009 Term, in *Citizens United v. Federal Election Commission*,[195] the Court could have held a challenged provision of the Bipartisan Campaign Finance Reform Act invalid as applied to the party before it, but instead opted to pronounce it invalid on its face.[196] In doing so, the majority cited the importance of avoiding the chilling of political speech.[197]

Outside of First Amendment overbreadth doctrine and the First Amendment more generally, the Court just as frequently seizes the opportunity to rule on facial, rather than as-applied, grounds. In *Harper v. Virginia Board of Elections*,[198] the Court could have held the poll tax invalid only as applied to the poor, but instead ruled more broadly and held the challenged statute facially invalid.[199] Prior to *Ayotte v. Planned Parenthood of Northern New England*,[200] virtually all of the abortion cases reaching the Supreme Court involved facial attacks in which the Court accepted this framing of the

191. 472 U.S. 291 (1985).
192. 467 U.S. 947, 965 n.13 (1984).
193. 482 U.S. 569 (1987).
194. 130 S. Ct. 1577, 1587 (2010).
195. 130 S. Ct. 876 (2010).
196. *Id.* at 892–96.
197. *Id.* at 896.
198. 383 U.S. 663 (1966).
199. *Id.* at 668.
200. 546 U.S. 320 (2006).

question presented, without pausing to ask whether the challenger could succeed on an as-applied theory.[201]

The Court's frequent openness to facial challenges in preference to as-applied challenges arises partly from the flexibility that the Court accords to parties to shape the issues in litigation. For example, if *Brown v. Board of Education*[202] had been framed differently, the Supreme Court might imaginably have held state statutes mandating racially segregated education unconstitutional only as applied to cases in which the education provided to minorities was not equal to that provided to whites under tangible measures of educational quality.[203] There were almost certainly few if any public school systems in which a plausible case for actual material equality could have been made in 1954.[204] In the Supreme Court, however, the *Brown* plaintiffs chose not to contest lower court findings that the facilities involved in the various consolidated cases were materially equal and thus left the Court with only facial challenges to address.[205]

Even absent the parties' decision to forego as-applied challenges, a Supreme Court that was confident of its ability to formulate a broadly applicable constitutional principle appropriately could have done so in *Brown*,[206] with the effect being a ruling that invalidated the statutes at issue on their faces.[207] An analogy comes from cases in which parties have challenged statutes as impermissibly discriminating on the basis of gender. It is possible to imagine the Court proceeding by seeking the most narrowly as-applied basis for decision in every case. For example, in *Reed v. Reed*,[208] it could have asked if the gender-based generalization or stereotype embodied in the statute before it could permissibly be applied to a particular challenger with respect to whom the generalization or stereotype might well have been inaccurate. But the cases suggest that the Court tends not to think that way. The Justices characteristically think in terms of constitutional rules and principles, which

201. *See* Fallon, *supra* note 21, at 859 n.29.

202. 347 U.S. 483 (1954).

203. The Court had found equal protection violations on this basis in cases involving colleges and graduate schools in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

204. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960) ("[C]olored schools have been so disgracefully inferior to white schools that only ignorance can excuse those who have remained acquiescent members of a community that lived the Molochian child-destroying lie that put them forward as 'equal.'").

205. *See* 347 U.S. at 492.

206. *See generally* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 449, 452 (2009) (maintaining that "judicial issue creation . . . is an essential means of protecting the judiciary's role in the constitutional structure").

207. *Cf.* Meier, *supra* note 1, at 1565 (noting that the Court has not allowed pleading to determine whether it will treat a challenge as facial or as-applied).

208. 404 U.S. 71 (1971).

frequently, perhaps typically, overrun calls for narrowly as-applied analysis.[209] Given a rule of decision, the Justices will apply it, with no further preference for narrow, as-applied analysis. Nearly as frequently, the Court seizes fresh opportunities to formulate broad and broadly applicable rules of decision that push beyond narrow, as-applied decision making and that result in facial invalidation. It has done so in nearly all of the cases establishing the now governing doctrinal tests that dominate constitutional law.[210]

3. Facial Challenges Are Not Limited to Stringent Constitutional Tests

It is not true that only a few constitutional tests license facial challenges. The catalogue of facial invalidations offered above adequately refutes any general claim to the contrary. Nor is it true that only relatively stringent tests call for statutes to be assessed, and potentially held invalid, on their faces. Although separating lax from stringent tests would require difficult exercises in line-drawing, there is no need to quibble about how to classify particular tests in order to establish the crucial point. The rational basis test, which nearly everyone agrees is the epitome of constitutional laxity, sometimes results in statutes being held facially invalid,[211] without a presumption of severability always authorizing the severing of all invalid applications.

It is of course notorious that the Supreme Court sometimes endows the rational basis test with a stringency that the Court disavows in other cases.[212] But even if challenges to statutes do not normally succeed under the rational basis test, they are always possible. In other words, even when the rational basis test has no bite whatsoever, it frames the question as whether challenged statutes are irrational, and thus unconstitutional, on their faces.

4. The Court Does Not Apply an Unqualified or Consistent Presumption of Severability

Regardless of the test of constitutional validity that a court applies, the Supreme Court's cases falsify any claim that, outside of First Amendment overbreadth doctrine, the Justices consistently apply a presumption of severability of the kind that commentators have often imagined—one that wholly postpones to the future the question of how, precisely, the severing even of substantial, invalid statutory applications would occur. The Court clearly requires that specific lines of severance be foreseeable in order for it to reject

209. This is among the core insights of Adler, *supra* note 15.

210. On the significance of doctrinal tests and the "extraordinary adjudication" in which the Supreme Court initially formulates them, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION, 45–101 (2001).

211. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996); Hooper v. Bernallilo Cnty. Assessor, 472 U.S. 612 (1985); U.S. Dep't. of Agric. v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

212. *See* CHOPER ET AL., *supra* note 112, at 1193–94.

facial challenges under tests that are commonly viewed as relatively stringent,[213] including, as Justice Souter noted in *Sabri v. United States*,[214] those applied in cases involving free speech and the rights to travel and abortion. But at least some limits on severability are necessarily assumed, and an unqualified presumption of severability thus rejected, even by some cases applying the rational basis test.

If all of a statute's invalid applications could always be assumed to be severable, without need for any advance specification of exactly how they could be severed, there would be no point in asking whether a statute fails the rational basis test based on its overinclusiveness.[215] Yet the Supreme Court has occasionally invalidated statutes under the rational basis test at least partly on the ground that they pursued a permissible goal by irrationally broad means—such as by excluding all women from an opportunity available to men in *Reed v. Reed*[216] and denying all illegitimate children a benefit available to legitimate children in *Trimble v. Gordon*.[217] By implication, the Court also held that the presumption of severability could not cure the vagueness of a criminal antiloitering statute in *City of Chicago v. Morales*,[218] even though it is unimaginable that the statute could have been vague in all possible applications.

IV.
MAKING (SOME) SENSE OF SUPREME COURT PRACTICE IN REBUFFING AND UPHOLDING FACIAL CHALLENGES

With the conventional wisdom being so mistaken in so many respects, any successful effort to make sense of the Supreme Court's actual practice in dismissing and sustaining facial challenges clearly requires a broad rethinking. In that rethinking, cases in which the Court professes wariness of facial challenges, prominently including those discussed in Part II, cannot be dismissed as mere aberrations. But the enormous number of cases in which the Court has sustained facial challenges, under a wide variety of constitutional provisions and pursuant to a broad range of tests, cannot be blinked away either. Rethinking that aspires to rationalize as much current practice as possible, rather than starting over from scratch or at least calling for wholesale reform, will thus have to be complex.

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213. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504–05 (1985) (rejecting a facial challenge under the First Amendment overbreadth doctrine only after identifying specifically how the challenged statute could be severed to accord with constitutional requirements).

214. 541 U.S. 600, 609–10 (2004).

215. *See generally* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) (discussing overinclusiveness as a basis for statutory invalidation under the Equal Protection Clause and rational basis review).

216. 404 U.S. 71 (1971).

217. 430 U.S. 762, 770–71 (1977).

218. 527 U.S. 41 (1999).

Making sense of Supreme Court practice requires a three-part analysis. First, it is imperative to understand the role of doctrinal tests in guiding the Court to assess the constitutionality of statutes either on their faces or as applied. Second, the Court's approach to severability needs a fresh analysis—one that acknowledges occasional inconsistencies and highlights previously unrecognized complexities. Third, concerns about "premature" adjudication call for enhanced attention to the relationship between principles bearing on the availability of facial challenges and ripeness doctrine.

A. The Role of Reasons

The path to a better understanding of the Supreme Court's practice in dismissing and upholding facial challenges starts with two banalities. Although noted already, both deserve reemphasis. First, all constitutional challenges to the enforcement of rules or statutes are in one sense as-applied, beginning with a challenger asserting that a statute cannot be enforced against her.[219] Second, a court, in accepting or rejecting a challenge to the enforcement of a statute, will do so on the basis of reasons, which very often reflect the tests of constitutional validity that the court applies. If the Supreme Court, in holding a statute unenforceable against a particular challenger, gives reasons broad enough to indicate that the statute cannot be enforced against anyone else, either, then it will effectively have held the statute facially invalid, even if it never employs those words.

Although the Court often says that it always decides cases on the narrowest possible basis,[220] Part III demonstrated that its actual practice falsifies this claim, and rightly so. The Constitution frequently speaks in highly general language that different people, including judges and public officials, would understandably construe and apply quite differently. To the Supreme Court has fallen the task not only of specifying the Constitution's meaning, but also of devising tests and formulae that will ensure the effective implementation—by lower court judges and other officials—of vague, sometimes contestable, values.[221] In order to discharge its responsibilities effectively, the Court must often, inevitably, look beyond the case at hand and establish rules to guide decision makers in other, similar cases. The Court behaves imprudently when it formulates broadly sweeping rules or tests without sufficient knowledge of the range of factual situations to which they will apply.

Sometimes, however, the injunction to rule as narrowly as possible would constitute bad advice, precluding the Court from ruling broadly when a broad

219. *See supra* notes 26–28 and accompanying text.

220. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501–02 (1985).

221. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term–Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56 (1997).

ruling is exactly what the situation calls for.[222] Consider cases in which the Court says categorically that racially segregated public educational facilities are inherently unequal[223] or that a statute prescribing gender-based discrimination is invalid because it is not substantially related to an important state interest[224] or that a statute violates the First Amendment because it discriminates on the basis of content or viewpoint without being justified by a compelling governmental interest.[225] Rather than speaking generally, the Court could typically, if not always, limit its decisions to features peculiar to the case before it.[226] That is, the Court could rule that, regardless of what the Constitution might permit in other cases, it will not allow a particular act of discrimination or the punishment of the particular speech at issue under the particular statute at issue. But the Court would default on its law-declaring and guidance-giving responsibilities if it always took that approach.

Not surprisingly, Justices (and commentators) who disagree about contentious issues will frequently also diverge in their judgments about when the Court should issue broad rulings aimed at ensuring effective implementation of controversial rights in a large swath of cases and when it should stick close to the facts of the case before it. During the 2009 Term, the liberal Justices vehemently protested the majority's decision in *Citizens United v. Federal Election Commission*[227]—an opinion authored by Justice Kennedy—to bypass as-applied objections and hold a key provision of the Bipartisan Campaign Reform Act invalid in all applications.[228] In *Gonzales v. Carhart*, however, the roles were reversed. With Justice Kennedy again writing the opinion, this time it was the typically conservative Justices who insisted that the challenged prohibition against partial-birth abortion—which Justice Kennedy assumed would be unconstitutional as applied to any case in which it threatened a mother's health[229]—should not be invalidated or even tested on its face. Writing for the more liberal Justices, Justice Ginsburg vehemently decried the majority's insistence on an as-applied approach, insisting that a broader

222. Even Cass Sunstein, who argues strongly for judicial "minimalism" as the presumptively correct approach, recognizes that "the choice between minimalism and the alternatives depends on an array of contextual considerations, and it would be extravagant to say that minimalism is always better." CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 38 (1999).

223. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

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

225. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 386–87 (1992).

226. *Cf.* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1333–34, 1350 (2005) (arguing that Supreme Court decisions to hold particular statutes invalid on their faces reflect "strategic" calculations, involving the statutes' propensity to chill constitutionally protected speech, their reliance on race- or gender-based stereotypes, or their tendency to invite invidiously discriminatory law enforcement).

227. 130 S. Ct. 876 (2010).

228. *See* 130 S. Ct. at 932–38 (Stevens, J., dissenting, joined by Souter, Ginsburg, Breyer, JJ.).

229. *See* Gonzalez v. Carhart, 550 U.S. 124, 167–68 (2007).

ruling of facial invalidity was the only practically effective means of ensuring that women would have access to the safest possible abortion procedures.[230] In both cases, as in many others, it is hard to separate what the Justices cast as general claims about the overall propriety of as-applied and facial challenges from views about how broadly particular rights should be defined and how aggressively they should be protected.[231]

A similar analysis applies when the Supreme Court deploys or formulates constitutional tests such as strict and intermediate scrutiny, the First Amendment overbreadth test, and so forth.[232] These tests, like many others, call for the Court to look beyond the specific facts of the challenger's case and potentially to conclude that a statute is invalid in all its applications, as other relevantly similar statutes also would be. Such tests do so by furnishing templates for analysis and for the provision of either narrow or broad reasons for upholding constitutional challenges. Part III.A's lengthy list of constitutional provisions under which the Supreme Court has held statutes facially invalid, often through the application of formulaic tests, suggests that the Court, in applying such tests, frequently upholds facial challenges without noting that it is deciding the case before it on a facial, rather than an as-applied, basis. Part III.B's analysis of all cases decided during six Supreme Court Terms fortifies this conclusion.

An important caution is in order, however. Because the reasons that the Supreme Court articulates for deciding a statute is invalid in one case may not always apply to all other cases involving the same statute, one should not leap too readily to the conclusion that a statute is invalid in all possible applications, even when the Court describes a statute as constitutionally invalid. Two examples, one historic and one relatively recent, illustrate the point. In *Marbury v. Madison*,[233] the Court characterized the inquiry before it as whether an "act" or "law" that was "repugnant to the constitution is void."[234] Consistent with that formulation of the question, much of *Marbury*'s language suggested that a provision of the 1789 Judiciary Act was invalid on its face because it purported to expand the Court's original jurisdiction beyond constitutional limits. Nevertheless, a close parsing of the Court's opinion suggests that the challenged provision remained enforceable insofar as it empowered the Court to issue writs of mandamus in cases that were otherwise within the Court's

230. *See id.* at 187–90.

231. *See generally* David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L.Q. 631 (2009) (linking the decision whether to consider and uphold facial challenges to a broader issue involving the "frames of reference" within which the Court defines constitutional rights).

232. On the significance of doctrinal tests in framing facial challenges, see Fallon, *supra* note 4, at 1342–48; Isserles, *supra* note 14, at 428–51.

233. 5 U.S. (1 Cranch) 137 (1803).

234. *Id.* at 177, 180.

lawful jurisdiction.[235] Language in *City of Boerne v. Flores*[236] may similarly tend to mislead. The Court's opinion in *Boerne* appeared to pronounce the Religious Freedom Restoration Act ("RFRA") unconstitutional on the ground that it created rights against state and local governments that Congress had no power to impose under Section 5 of the Fourteenth Amendment.[237] Subsequently, however, the Court has treated RFRA as valid and enforceable insofar as it creates statutory rights against the federal government, rather than the states,[238] because the Court's reasons for pronouncing RFRA unconstitutional under Section 5 do not hold in cases in which Congress has legislative authority under Article I.

B. The Role of Severability

As commentators have emphasized, presumptions of severability play a crucial role in explaining the Supreme Court's pattern of responses to facial challenges.[239] In the absence of severability, all challenges to statutes would necessarily be facial, for a nonseverable statute that was invalid in some cases would necessarily be invalid as to all.[240] Conversely, severability sometimes dooms facial challenges.[241] But when does the presumption of severability apply, and when does it not apply? Commentators too easily assume that this question has a sharp, rule-like answer.

A reexamination of Supreme Court practice yields a different conclusion. The Justices have not always paid heed to severability issues,[242] and, given their inattention, one could hardly expect consistent adherence to rule-like formulae.[243] The Court unanimously conceded the first point in *Ayotte v. Planned Parenthood of Northern New England*,[244] when it said that the court of appeals had erred in holding a statute regulating abortion facially

235. *See id.* at 175; *see also* Walsh, *supra* note 1, at 755–65 (describing the Supreme Court of the early nineteenth century as declining to enforce statutes insofar as enforcement would violate the Constitution but as not assuming that a statute that was unenforceable in one case would therefore necessarily be unenforceable in another).

236. 521 U.S. 507 (1997).

237. *See id.* at 511 ("We conclude the statute exceeds Congress' power.").

238. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 & n.1 (2006).

239. *See, e.g.*, HART & WECHSLER, *supra* note 5, at 162–63; Dorf, *supra* note 14, at 249–51. Some commentators have asserted that severability is less important in determining the availability of facial challenges than others have maintained. *See, e.g.*, Meier, *supra* note 1, at 1572; Franklin, *supra* note 36, at 64–68.

240. *But see* Walsh, *supra* note 1 (endorsing an approach focused on the extent to which statutes are enforceable, rather than on the question of whether they are valid).

241. *See, e.g.*, Sabri v. United States, 541 U.S. 600 (2004).

242. *See* Metzger, *supra* note 1, at 793 (observing that "the Court has not frequently acknowledged the important role played by severability . . . in facial challenges").

243. *See* Gans, *supra* note 24, at 652 (noting the Court's inconsistency in dealing with severability issues).

244. 546 U.S. 320 (2006).

unconstitutional, rather than severing it, even though the Court itself had "previously invalidated an abortion statute in its entirety because of the same constitutional flaw."[245] In the previous case, the parties had not called the Court's attention to the possibility of severing the statute, Justice O'Connor wrote, and the Justices had simply overlooked it.[246]

Other cases presenting severability issues similarly demonstrate inadvertence, inconsistency, or confusion. In *Brockett v. Spokane Arcades*,[247] the Court insisted that it would not address a facial challenge under the First Amendment overbreadth doctrine in a case brought by a challenger who could prevail on an as-applied challenge.[248] In a case of this kind, the Court said, the statute could and should be severed. As noted above, however, *Brockett* deviated from a number of precedents on this point, and the Court has not subsequently observed *Brockett*'s pro-severing and anti-facial-invalidation stricture in all First Amendment overbreadth cases presenting as-applied as well as facial challenges.[249] To offer just one more example, the Court's initial cases applying a "congruence and proportionality" test to assess the constitutionality of legislation enacted under Section 5 of the Fourteenth Amendment suggested that a statute found wanting under this standard could not be severed,[250] but more recent cases, including *United States v. Georgia*,[251] have ruled otherwise.[252] The Justices have offered no explanation for the seeming change of course that would adequately refute suspicions of inconsistency.

There is no reason, moreover, to think that recent Justices are less attentive to separability issues, or any more inconsistent in resolving them, than were their predecessors. As noted in passing above, commentators have long thought that they had to patch up the Supreme Court's reasoning in the foundational case of *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.*[253] by ascribing to it a presumption of severability to which the Court's opinion made no reference.[254] That ascription seems to solve the problem that commentators have seen in the *Yazoo* opinion, but it leaves open the question of how *Yazoo* related to cases such as the nearly contemporaneous *Lochner v. New York*,[255] which upheld a facial challenge to a law regulating the hours of employment of bakery workers under the same Due Process Clause that was

245. *Id.* at 330–31.
246. *Id.* at 331.
247. 472 U.S. 491 (1985).
248. *See id.* at 504.
249. *See supra* notes 192–197 and accompanying text.
250. *See supra* note 163 and accompanying text.
251. 546 U.S. 151, 158-59 (2006).
252. The Court also rejected a facial challenge based on a statute's purported lack of congruence and proportionality in *Tennessee v. Lane*, 541 U.S. 509 (2004).
253. 226 U.S. 217 (1912).
254. *See supra* notes 45–50 and accompanying text.
255. 198 U.S. 45 (1905).

involved in *Yazoo*. In *Lochner*, the Court made no suggestion that the possibility of statutory severing limited the challenger to asserting as-applied claims.

The Court's sometimes careless practice creates an analytical problem for anyone who seeks to make sense of its pattern of sometimes upholding and sometimes rejecting facial challenges. Nevertheless, I think it possible to make considerable progress in understanding when facial challenges succeed and when they do not by offering some generalizations—not falsifiable by one or even a few counterexamples—about when presumptions of severability will defeat facial challenges to statutes and when they will not.[256] Five such generalizations reveal important, recurring, and generally defensible patterns in the Court's decision making. Of these, the most startling is the second, which contradicts the conventional wisdom that the Court typically presumes statutory severability to be possible without significant attention to the lines along which severing could occur.

First, invalid but unusual or infrequent applications of a statute are always presumptively severable. Even in First Amendment overbreadth cases, a facial challenge can succeed only if a statute is *substantially* overbroad.[257] A relatively few invalid applications are invariably assumed severable under less exacting tests.[258]

Second, when substantial severing would be necessary to save a statute from invalidity, the Court will reject a facial challenge on severability grounds if it can identify a relatively surgically precise way of curing the defect that an applicable test has identified—provided, as will be discussed below, that what I am calling "surgical severing" accords with legislative intent—but not otherwise. For example, if the Court determines that a statute would otherwise be substantially overbroad under the First Amendment overbreadth test, it will normally sever the statute and hold it only partially invalid if, but only if, it can identify a particular, precise way of severing the statute that cures the defect of substantial overbreadth.[259] *Brockett v. Spokane Arcades*[260] illustrates how surgical severing, as specifically imagined when a statute is tested for

256. For the related suggestion that whether to treat statutes as severable depends on relatively ad hoc, pragmatic judgments, see Dorf, *supra* note 14, at 290–91.

257. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); New York v. Ferber, 458 U.S. 747, 772 (1982).

258. *See, e.g.*, *Ferber*, 458 U.S. at 772 (quoting *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting) ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine.")).

259. *See* Reno v. ACLU, 521 U.S. 844, 884 (1997) ("In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction.") (quoting Virginia v. Am. Bookseller's Ass'n., Inc., 484 U.S. 383, 397 (1988)); *see also* Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 575 (1987) (invalidating a resolution as overbroad on its face in the absence of an "apparent saving construction"); Baggett v. Bullitt, 377 U.S. 360, 378 (1964) (finding facial invalidation appropriate where a challenged loyalty oath was "open to . . . an indefinite number" of interpretations).

260. 472 U.S. 491 (1985).

constitutional validity on its face, differs from reliance on an otherwise unspecified, *ex ante* presumption that invalid applications can *somehow* be severed and that absolves a court from responsibility to determine *how*. In holding that an anti-obscenity statute should be severed rather than facially invalidated, the Court identified precisely how the statutory term that gave rise to an overbreadth problem—"lust"—could be limited to remedy the problem of substantial overbreadth: the statute should be invalidated "only insofar as the word 'lust' is taken to include normal interest in sex."[261]

Ayotte v. Planned Parenthood of Northern New England,[262] which signaled the Court's preference for partial rather than facial invalidation of an anti-abortion law, also illustrates the distinction between surgical severing and a presumption that some unspecified way of severing can be found in future cases. It does so by noting that a court's capacity to identify a constitutionally adequate partial invalidation "often depends on how clearly we have articulated the background constitutional rules."[263] In *Ayotte*, the Court unanimously thought that severing was appropriate (if consistent with legislative intent) because background rules established that a statute requiring minors to notify their parents before obtaining an abortion was unconstitutional insofar, but only insofar, as it failed to provide an emergency exception. Invalidating the statute as applied to emergency cases thus offered a surgical solution to the problem that the applicable test of constitutional validity revealed.

Crucially, however—and contrary to the usual understanding of the presumption of severability—the Court ordinarily will not uphold a statute against facial challenge when the statute would require relatively substantial severing in order to survive *unless* it can foresee reasonably precise lines along which severance could occur. How surgically precise the foreseen lines must be in order for a challenged statute to pass constitutional muster will of course vary, depending on the constitutional tests and doctrine that form the background to a particular facial challenge. Almost self-evidently, it takes a more finely grained surgical severance to save a statute from invalidity under a narrow tailoring than under a rational basis test. As I have said already, however, a statute could never be irrational because overbroad if all invalid applications could always be severed from valid ones on an ad hoc basis.

Third, in cases in which a surgical severing would clearly be possible if necessary, the Court sometimes rejects facial challenges without deciding whether a surgical severing is in fact necessary. Illustrations come from *United*

261. *Id.* at 504–05; *see also* Reno v. ACLU, 521 U.S. at 883 (severing the term "or indecent" from a statutory prohibition against "obscene or indecent" communications); United States v. Grace, 461 U.S. 171, 182–83 (1983) (invalidating a ban against expressive displays on Supreme Court grounds as applied to sidewalks but not otherwise).

262. 546 U.S. 320 (2006).

263. *Id.* at 329.

States v. Raines,[264] *United States v. Georgia,*[265] and, more surprisingly, from *Yazoo*.[266] In *Raines*, a suit predicated on conduct by state officials interfering with voting rights, the Court thought it unnecessary to decide whether Congress, under Section 2 of the Fifteenth Amendment, could permissibly have barred private interference with voting rights. There was no need, I would suggest, because even if the challenged statute swept too broadly, the line between public officials and private parties offered a plainly adequate basis for surgical severing if the Court decided in a future case that such was necessary. *United States v. Georgia* appears to reflect the same understanding that a court can presume statutory severability, without deciding whether it is necessary, when the line along which a statute could be surgically severed is clear. In *U.S. v. Georgia*, "no one doubt[ed]" Congress's power to abrogate states' sovereign immunity for actual violations of constitutional rights.[267] If the Court should determine in a future case that Title II of the ADA was invalid as applied to other cases, the obvious cure for the lack of "congruence and proportionality" would be to sever statutory applications not involving actual constitutional violations.

Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.,[268] which now seems to me to have confused and misled both courts and commentators for many decades, would be best explained on the same basis. As argued above, it is a mistake to posit—as commentators frequently have—that when a statute is challenged under the rational basis test, a court can assume, without more, that even a very large proportion of invalid applications can always be severed in unspecified, nonsurgical ways in future cases. If this were so, courts could never hold that statutes are irrational on their faces because they sweep too broadly, as courts occasionally, albeit rarely, do. *Yazoo* is easily distinguishable from cases that have held statutes irrationally overinclusive, however, because in *Yazoo*, unlike those cases, there was an obvious surgical cure if severing turned out to be necessary in a future case. Even if the challenged statute was invalid as applied to cases involving frivolous, excessive, or disputable claims for damages, it could have been so severed as to remain enforceable in cases involving admittedly valid claims, such as the one before the Court.

Fourth, any severing must accord with legislative intent.[269] In cases involving state statutes, severability is therefore primarily a matter of state law.[270] In cases presenting challenges to federal statutes, the Court has shown less than perfect consistency in its articulation of the proper gauge of

264. 362 U.S. 17 (1960).
265. 546 U.S. 151 (2006).
266. 226 U.S. 217 (1912).
267. *Id.* at 158–59.
268. 226 U.S. 217 (1912).
269. *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 331 (2006); HART & WECHSLER, *supra* note 5, at 163–65.
270. HART & WECHSLER, *supra* note 5, at 163.

congressional intent.[271] It seems a fair generalization, however, that the Court assumes that Congress would not wish to retain only relatively anomalous opportunities for a statute's enforcement after most of a statute has been severed.

The Court probably also tends to presume that state legislatures would have similar preferences. This is another possible explanation for the Court's inattention to separability issues in *Lochner*, for example. If all invalid applications of the statute had been severed, there might have been too little left for the Court to think that severing the statute to preserve a few anomalous applications would have accorded with legislative intent. Again, however, the evidence falls far short of establishing that the Court thought about severability at all in many cases in which it has held state statutes constitutionally invalid.

Fifth, the severing of a statute must not require such a creative or unconstrained rewriting as to constitute what the Justices apprehend as "quintessentially legislative"[272] rather than judicial work.[273] It could perhaps go without saying that the degree of "rewriting" that courts can perform in severing a statute is a question of judgment,[274] not governed by hard rule.[275] Clearly, however, the Supreme Court generally feels no obligation to sever statutes in imaginative ways not suggested either by the language of a challenged statute or, as in *Ayotte*, by "background constitutional rules."[276]

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271. *See* HART & WECHSLER'S 5TH EDITION, *supra* note 45, at 183–84 (reciting varying statements of the applicable standard). In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3161–62 (2010), the Court found an invalid statutory provision separable where the remaining provisions were capable of operating independently "and nothing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no [Public Company Accounting Oversight] Board to a Board whose members are removable at will."

272. *Ayotte*, 546 U.S. at 329.

273. *See* Reno v. ACLU, 521 U.S. 844, 884–85 (1997) ("This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'") (quoting Virginia v. Am. Bookseller's Ass'n., Inc., 484 U.S. 383, 397 (1988)); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479–80 (1985) (citing "[o]ur obligation to avoid judicial legislation" as a ground for declining to adopt a saving construction); Aptheker v. Sec'y of State, 378 U.S. 500, 515–16 (1964) (declining to perform a "substantial rewriting" of a statute).

274. *See Ayotte*, 546 U.S. at 329 (observing that "we restrain ourselves from rewrit[ing] state law to conform it to constitutional requirements") (quoting Virginia v. Am. Booksellers Ass'n., Inc., 484 U.S. 383, 397 (1988)).

275. For a relatively recent case apparently testing the outer limits of permissible judicial action to save an otherwise unconstitutional statute, see *United States v. Booker*, 543 U.S. 220 (2005), in which the Court, by 5–4, cured an identified constitutional defect in statutorily mandated sentences under the federal Sentencing Guidelines by rendering the Guidelines "effectively advisory." *Id.* at 245. According to Gans, *supra* note 24, at 664, "[i]t is difficult to find a better example of . . . aggressive judicial lawmaking." *See also* Skilling v. United States, 130 S. Ct. 2896, 2939 (2010) (Scalia, J., concurring in part and concurring in the judgment) (protesting that the majority's "paring down" of a statute to save it from unconstitutional vagueness was "clearly beyond judicial power").

276. 546 U.S. at 329.

For example, in *United States v. Lopez*,[277] the federal statute barring possession of a gun in a school zone would almost surely have been constitutionally permissible as applied to guns that had traveled in interstate commerce.[278] And if most guns travel in interstate commerce, a ruling that severed the statute along these lines would have preserved most of the statute's applications. Nevertheless, to sever the statute in this way would have required an exercise of creative imagination that the Court—which, as I have said, is not always attentive to issues of separability—did not understand itself as required to provide.[279] It is hard to know whether the Court might have responded differently if the parties had framed the case to present a severability issue. As the Court acknowledged in *Ayotte*,[280] it would have severed a statute and held it only partially invalid in *Stenberg v. Carhart*,[281] rather than having pronounced it wholly invalid, if the parties had called that option to the Court's attention.

The Court's practice of not considering the possibility of creative, quasi-legislative ways of severing statutes may help to explain why the Court has seldom paused to consider why statutes discriminating on the basis of race, gender, or status as an alien might be upheld as applied, but only as applied, to cases in which the crude or stereotypical assumptions that underlie those statutes turn out to be correct. A statute so rewritten by a court would be far, far removed from the one written by the legislature.

To recapitulate: the Supreme Court's pattern of reliance and nonreliance on presumptions of severability exhibits reasonable consistency and considerable good sense, as reflected in the five foregoing generalizations. Taken together, these generalizations can explain nearly all of the relevant Supreme Court cases. Nevertheless, the Court's practice does not appear to be rigidly governed by rule. Among other things, the Justices may respond differently in cases in which parties call severability issues to their attention than they would respond, somewhat unthinkingly, in cases in which the parties do not.

C. The Role of Ripeness

In looking at the Court's overall pattern of decisions, it is important to keep in mind a distinction between two easily confused questions. The first is whether a statute is in principle subject to facial challenge. To this question, the normal answer is yes; most tests of constitutional validity potentially frame facial challenges. The second question is whether a particular facial challenge will or ought to succeed. To this question, there are at least three possible

277. 514 U.S. 549 (1995).

278. *See* Metzger, *supra* note 24, at 909.

279. *See id.* at 930 (observing that severing arguably "would stray over the line from judicial narrowing to judicial rewriting of a challenged statute").

280. 546 U.S. at 331.

281. 530 U.S. 914, 922 (2000).

answers, any one of which might be appropriate depending on the facts of a particular case. The first is yes; the second is no. The third, more complex answer is that a facial challenge is premature or not yet ripe for decision at the time when it initially comes before a court.[282] Although the Supreme Court formally invokes ripeness doctrine only relatively rarely, many of its decisions rejecting facial challenges reflect ripeness-related concerns.

In order to rule on a facial attack on the merits, a court must first construe, or specify the meaning of, a statute.[283] It must then apply a test of constitutional validity that may, sometimes, require an assessment of a challenged statute's practical effects. With regard to both of these analyses, a court may sometimes doubt its capacity to judge wisely in the absence of a richer factual record than it has before it. In *United Public Workers v. Mitchell,* for example, the Court appears to have concluded that it could not properly interpret a federal statute barring civil service employees from "tak[ing] any active part in political management or political campaigns" without anticipating myriad, possibly unforeseeable fact situations to which that language arguably might or might not apply.[284] It accordingly dismissed a facial challenge on the ground that most of the allegations in the complaint failed to present a justiciable case or controversy.

Comparable difficulties in anticipating a statute's effects have led the Court to dismiss facial challenges in a number of recent cases. A doctrinal test used to gauge the permissibility of state regulations of electoral processes turns on the severity of the burdens that a challenged statute creates.[285] In *Crawford v. Marion County Election Board*,[286] involving a state law that required would-be voters to present government-issued photo identification, the plurality opinion rejected a facial challenge based on uncertainty about how burdensome the requirement would prove in practice and remitted plaintiffs to bringing as-applied challenges.[287] The "undue burden" standard that the Court now uses to determine whether restrictions on access to abortion violate the Constitution

282. On the connection between facial challenges and ripeness doctrine, see, for example, Monaghan, *Overbreadth, supra* note 46, at 35; Persily & Rosenberg, *supra* note 1, at 1663-65.

283. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting United States v. Williams, 553 U.S. 285, 293 (2008) ("[T]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.")); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) (recognizing that the propriety of facial invalidation depended on a prior question of statutory construction); Broadrick v. Oklahoma, 413 U.S. 601, 618 n.16 (1973) ("[A] federal court must determine what a state statute means before it can judge its facial constitutionality.").

284. 330 U.S. 75, 78 (1947) (internal quotation omitted).

285. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451–52 (2008) (explaining that "[e]lection regulations that impose a severe burden on associational rights are subject to strict scrutiny" whereas "[i]f a statute imposes only modest burdens . . . then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions'") (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

286. 553 U.S. 181 (2008).

287. *See id.* at 200–03.

demands similar calculations of practical effects. Applying that standard in *Gonzales v. Carhart*,[288] Justice Kennedy rebuffed a facial challenge based on uncertainty about whether a statutory ban on so-called "partial-birth abortions" would ever have the effect of barring a procedure that was truly medically necessary to preserve the health of a mother.[289] Challenges to the statute could only be addressed on an as-applied basis, the Court thus ruled.[290]

Apparently mindful of difficulties such as those exhibited in *United Public Workers v. Mitchell*, *Crawford*, and *Carhart*, Justice Souter's "afterword" in *Sabri v. United States* advanced the general, disapproving observation that "facial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually barebones records."[291] In response to this concern, Justice Souter offered the prescriptions that "facial challenges are best when infrequent,"[292] that they are "to be discouraged,"[293] and that the Court does and should allow statutes to be tested on their faces for "overbreadth" only in narrowly delimited categories of cases, especially including those arising under the First Amendment.[294]

Two problems infect this purported restatement of the applicable law. First, difficulties of "premature adjudication" based on "factually barebones records" can arise in First Amendment cases just as much as in those involving other constitutional provisions.[295] Indeed, a sampling of Supreme Court cases suggests that the problem is actually much more likely to arise with respect to statutes that regulate speech or expressive conduct than with those, for example, that classify on the basis of race or gender, or that discriminate against interstate commerce. The meaning and application of statutes in the second category are usually plain.[296] By contrast, identifying the precisely intended bounds of a regulation of speech or expressive conduct can often pose problems, as was the case, for example, in *United Public Workers v. Mitchell*.[297] Second, many more tests than Justice Souter imagines—occasionally including even the rational basis test—will sometimes yield the conclusion that statutes are invalid on their faces because of overbreadth.

A more appropriate response to problems that would arise from premature adjudication of statutes' validity on their faces will often lie in ripeness

288. 550 U.S. 124 (2007).
289. *See id.* at 161–67.
290. *See id.* at 167–68.
291. 541 U.S. 600, 609 (2004) (quoting United States v. Raines, 362 U.S. 17, 22 (1960)).
292. *Id.* at 608.
293. *Id.* at 609.
294. *See id.* at 610.
295. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 87–91 (1947) (holding that plaintiffs asserting only vague and general plans to violate a statute alleged to abridge their First Amendment rights had failed to establish a justiciable case or controversy).
296. *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988) ("[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down.").
297. 330 U.S. at 87–91.

doctrine.[298] As the Supreme Court regularly affirms in cases that it characterizes as involving ripeness issues, a determination of ripeness requires a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[299] Among the reasons that it would be preferable for the Court to respond to worries about "premature" facial challenges by invoking ripeness doctrine is that such an approach would make clear that the considerations that mandate the dismissal of a particular case are not endemic to all facial challenges. In addition, the well-established ripeness test would provoke an express weighing of sometimes competing concerns.

With regard to the pattern of results in facial challenge cases in which the Court has exhibited concerns about prematurity or the inadequacy of the record, three comments may be in order.

First, decisions about prematurity or ripeness are often closely bound up with views about the requisite showing that a challenger must make to establish a constitutional violation. In *Crawford v. Marion County Election Board*, for example, three Justices thought the facts clear enough under applicable law to sustain a facial challenge,[300] while three other Justices, given their different understanding of the Constitution, would have found the challenged voter-identification requirement valid in all applications.[301] Only Justice Stevens, the author of the plurality opinion, along with the Chief Justice and Justice Kennedy, had what I would describe as ripeness-type concerns, involving fact-based uncertainty concerning how many would-be voters the identification requirement might burden, and with what degree of severity, in its application.

The dispute in *Gonzales v. Carhart* about whether the plaintiffs deserved to succeed with a facial challenge or should instead be relegated to as-applied litigation also reflected a substantive constitutional disagreement, this one involving the meaning of the "undue burden" standard under which abortion regulations are tested. Justice Kennedy thought that establishing an undue burden required identifying at least a substantial number of actual cases in which the prohibition of an abortion technique posed a health risk to the mother.[302] Based on this assessment of the law, he concluded that the challengers had not made an adequate showing, even though he reserved the possibility that the requisite proofs might possibly be established in some future cases.[303] By contrast, the dissenting Justices thought a showing that a statute imposed an undue burden on the abortion right in any cases necessarily established that the statute failed

298. For a survey of leading ripeness cases and a discussion of leading theories, see generally HART & WECHSLER, *supra* note 5, at 198–222.

299. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

300. *See* 553 U.S. at 209 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 237 (Breyer, J., dissenting).

301. *See id.* at 204 (Scalia, J., concurring, joined by Thomas, Alito, JJ.).

302. *See* 550 U.S. 124, 164–68 (2007).

303. *See id.* at 167–68.

the "undue burden" test on its face: "The very purpose of [requiring] a health *exception* is to protect women in *exceptional* cases."[304]

Second, in cases in which the Supreme Court rejects a facial challenge based on inadequacies in the record that the plaintiffs have put before it, the significance of its decision should lie in the reasons for its ruling. What the Court meant, or ought to have meant, in cases such as *Crawford v. Marion County Election Board* and *Gonzales v. Carhart* was not that the challenged statutes demonstrably satisfied all applicable tests of constitutional validity, but that the particular parties before the Court had not presented a factual record on which the Court, as informed only by that record, could hold the challenged statutes facially unconstitutional. Rejection of a facial challenge on this basis should not foreclose future facial challenges that the doctrines of claim and issue preclusion do not otherwise bar.[305] If the Court had explicitly rested its holdings on ripeness grounds, as would have been preferable, these implications would be clear.

Third, insofar as the Court is troubled by ripeness-type concerns about premature litigation, a crucial distinction exists between suits for anticipatory relief against the future enforcement of statutes—typically in the form of injunctions or declaratory judgments—and cases in which the challengers appear as defendants in enforcement actions. A party against whom a statute is being enforced coercively is always entitled to argue that the statute is invalid.[306] If an as-applied challenge fails, or if the record fails to support one, a court cannot simply refuse to address a facial challenge that offers a defendant her last chance to argue that the statute being enforced against her is constitutionally invalid. *Sabri* was a case of this kind.[307] Possibly because it so recognized, the Court thus rejected a criminal defendant's facial challenge on the merits[308] before issuing its "afterword" concerning facial challenges' appropriate rarity.

CONCLUSION: PROBLEMS WITH FACIAL CHALLENGES AND THE COURT'S RESPONSE

With previous Parts having shown that the Supreme Court does not categorically disfavor facial challenges, and that few if any transsubstantive rules apply rigidly to determine when facial challenges will succeed, it may be

304. 550 U.S. at 189 (Ginsburg, J., dissenting).

305. *Cf.* Persily & Rosenberg, *supra* note 1, at 1664–65 (making a similar point about the Court's rejection of a facial challenge in *Washington State Grange*).

306. *See* Monaghan, *Overbreadth, supra* note 46, at 28.

307. Sabri, who was indicted under a federal statute proscribing bribery of state, local, and tribal officials of entities that receive over $10,000 in federal funds, moved to dismiss the indictment on the ground that the statute he was accused of violating was unconstitutional on its face. *See* 541 U.S. 600, 603 (2004). The case came to the Supreme Court after the district court agreed and granted Sabri's motion and the court of appeals reversed. *See id.* at 604.

308. *See id.* at 608.

helpful, by way of conclusion, to explore why this state of affairs exists. One reason is conceptual. As Part I explained, all challenges to statutes begin as as-applied challenges, with the distinguishing mark of facial challenges involving the nature and breadth of the reasons that challengers offer in seeking a ruling that a statute cannot validly be applied. With the distinction between as-applied and facial challenges being less fundamental than courts and commentators have often assumed, it should occasion no surprise that the Supreme Court does not always labor self-consciously to draw that distinction, nor treat all challenges that could be described as facial as peculiarly dispreferred.

A second reason why so few categorical rules govern facial challenges is more normative. It emerges if we ask why anyone might think—as the Supreme Court has often, but misleadingly, asserted—that the Court should almost categorically disapprove facial challenges. To state the answer at the outset, there is no good reason why facial challenges should be disfavored categorically, though there are often good reasons why facial challenges should not succeed in particular cases. Better than any other generalization, that banal proposition explains the Supreme Court's patterns of decision.

A brief examination of three possible reasons for thinking that facial challenges ought almost always to be disfavored will illustrate the point. First, the Supreme Court has often proclaimed that it, like all courts, is bound by two rules, to which it has rigidly adhered: "[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of law broader than is required by the precise facts to which it is to be applied."[309] As argued above, this asserted precept sometimes offers wise counsel, but is wholly unsupportable as an unyielding rule. It is the Court's function sometimes to resolve uncertainty and to ensure effective constitutional implementation by laying down broad, clear rules or tests that may have the effect of establishing not just that a particular statute is unconstitutional in all applications, but that many others are, too. Under these circumstances, it should surprise no one that the Court fails to live consistently by the dicta that it will never anticipate a question not strictly before it, nor formulate a broader rule than the facts of the case require. Indeed, these dicta seem self-refuting insofar as they prescribe general rules of judicial conduct that reach beyond the facts of any case in which the Court may utter them.

Second, a categorical dispreference for facial challenges might stand on the grounds that courts should defer to legislatures except in cases of clear

309. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985) (quoting United States v. Raines, 362 U.S. 17, 21 (1960) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))). *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) ("Facial challenges . . . run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (internal quotation marks omitted).

constitutional mistake[310] and that truly clear constitutional mistakes are most likely to emerge, if at all, from legislatures' inability to foresee the consequences of applying statutes to unanticipated cases.[311] The weakness of this argument lies in the premise that courts should not hold statutes unconstitutional—regardless of whether on an as-applied or a facial basis—except in cases of clear constitutional mistake. This is not the place for a deep discussion of that Thayerian precept's normative merits.[312] Suffice it to say that the Supreme Court has long since refused to abide by it on a consistent basis[313] and that few if any modern commentators defend Thayerianism across the board.[314] Stripped of the Thayerian premise, the claim that courts function best when invalidating legislation as applied to problematical cases that the legislature did not foresee shows why the courts should engage in as-applied adjudication, even when they would uphold the statutes in issue against facial challenges.[315] But without the Thayerian premise, a recognition that as-applied challenges are important and appropriate within our constitutional scheme does not imply that facial challenges should be categorically suspect. Sometimes—as, for example, in *Brown v. Board of Education*[316]—facial challenges may be necessary to implement constitutional norms effectively. Once again, no general rule is possible. Contextual considerations matter.

Third, the Supreme Court sometimes says that facial challenges should be rare because of the special difficulties that overbreadth claims present.[317] But not all facial challenges depend on determinations of overbreadth. For example, statutes can be facially invalid because they have forbidden purposes; or violate the plain text of Article I; or display forbidden favoritism by banning some, but not other, speech. What is more, although some overbreadth claims require difficult and arguably premature interpretation on a barebones record, others do not. Many of the First Amendment cases cited in Part III exhibited no difficulty on this score.[318] In my view, many cases challenging race- and gender-based

310. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893).

311. *See* Edward Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1745–48, 1751–52 (2006).

312. *See* Thayer, *supra* note 310, at 135 (defending the premise that courts should invalidate legislation only in cases of clear constitutional mistake).

313. *See, e.g.*, Hartnett, *supra* note 311, at 1737; Richard A. Posner, *The Supreme Court, 1994 Term–Foreword: A Political Court*, 119 HARV. L. REV. 31, 53–54 (2005).

314. For a rare defense of a generally Thayerian approach to judicial review, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

315. *See* HART & WECHSLER, *supra* note 5, at 70 (observing that Congress, in enacting legislation, generally does not and could not determine that it would be constitutionally valid in all possible applications).

316. 347 U.S. 483 (1954).

317. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 609 (2004).

318. *See*, *e.g.*, Board. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 573 (1987)

classification also present overbreadth claims, rooted in the premise that race- and gender-based generalizations are too impermissibly overbroad to be used for some purposes.[319] Rightly, the Court has not hesitated to adjudicate the facial constitutionality of discriminatory statutes. In any event, efforts to derive general prohibitions against facial challenges from the subcategory of overbreadth challenges that impose excessive burdens on the courts' practical competence are, in a word, overbroad.

When one surveys the doctrinal landscape in light of this short review of possible reasons for skepticism of facial challenges, one thus sees roughly what one would expect to see, with one significant exception. As one would expect, facial challenges are not categorically disfavored; they often succeed. As one also would expect, when facial challenges pose special difficulties, the Supreme Court typically rejects them, on one basis or another. The one surprise is that when the Court rejects a particular facial challenge, it sometimes includes broad, seemingly categorical denunciations of facial challenges as a class, possibly tempered by a few narrowly stated exceptions. Remarkably, these denunciations have shaped the conventional wisdom about the availability of facial challenges. The errors of that conventional wisdom should now be plain.

APPENDIX

In order to count facial and as-applied challenges and compare their success rates, my research assistants and I obviously needed to identify which of the cases that the Supreme Court decided during that 2009, 2004, 1999, 1994, 1989 and 1984 Terms fell into either one category or the other. In doing so, we confronted a number of difficulties, some of which we had anticipated and others of which we had not. Some of these difficulties involved conceptual and practical obstacles to maintaining crisp distinctions among facial challenges, as-applied challenges, and other kinds of typically ad hoc constitutional challenges to actions by lower court judges or government officials. Others required methodological decisions about how to tally success rates that others might make differently. After explaining our coding and methodological decisions in general terms, this Appendix provides documentation for the numerical findings reported in the text by listing, in footnotes on a Term-by-Term basis, all of the cases that we coded as falling within the various categories for which we recorded findings.

(invalidating a ban on all "First Amendment activities" at Los Angeles International Airport); Miami Herald v. Tornillo, 418 U.S. 241, 259 (1974) (invalidating a Florida statute that required newspapers to print replies by candidates whose characters or records they attacked).

319. *See supra* notes 179–184 and accompanying text.

A. Conceptual and Practical Challenges

As emphasized above, the conceptual distinction between facial and as-applied challenges is overdrawn and potentially misleading: although facial challenges are narrowly and sharply defined, the category of as-applied challenges encompasses both claims that a statute is invalid as applied only to a particular case and claims that a statute, although not invalid *in toto*, is unconstitutional in many or even most of its intended applications. Examination of all of the Supreme Court's cases from selected Terms reveals further conceptual and practical difficulties in determining whether the Court—regardless of what the parties argued—actually addressed and decided claims that a statute, rule, or policy was invalid on its face.[320]

First, apart from statutes enacted by Congress and state legislatures, it is not always self-evident what kinds of rules and policies could in principle be subject to facial and as-applied challenges. For this purpose, we opted to include written but not unwritten rules and policies adopted by nonjudicial government entities.[321] We also included state common law rules when the Court appeared to understand them as having a clear content susceptible of either facial or as-applied challenge.[322]

Second, in cases in which the Supreme Court rules on constitutional claims, it is frequently not obvious whether the claimant questions the validity of a legal rule or policy—either on its face or as applied—at all. Many Court decisions address the constitutionality of actions by lower court judges, such as rulings on motions at trials, or by governmental officials, such as searches and seizures, that may be authorized, but are not mandated, by statute. As a result, the sorting of constitutional challenges into either the category of a facial or an as-applied challenge sometimes requires difficult, potentially contestable determinations of whether the validity of a statute or rule is at issue in any way.[323]

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320. The Supreme Court faced partly analogous problems of classification under versions of 28 U.S.C. §§ 1254 and 1257 that, prior to their amendment in 1988, *see* Supreme Court Case Selections Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988), vested it with mandatory appellate jurisdiction over certain cases in which the "validity" of "a statute" was "drawn in question." For discussion of the Court's efforts to resolve those problems, see PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 711–24 (3d ed. 1988).

321. Although written rules and policies that are adopted by nonelected bodies—such as administrative agencies and state universities—are as amenable to facial challenges as the enactments of Congress and state legislatures, we excluded challenges to unwritten policies, such as the policy of the California Department of Corrections of racially segregating new inmates in *Johnson v. California*, 543 U.S. 499 (2005). We also excluded the challenge in *Smith v. Robbins*, 528 U.S. 259 (2000), to a procedure for review of lawyers' motions for leave to withdraw from indigents' cases that was established by judicial opinion. But we included the challenge to a highway sobriety checkpoint "program" in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), because it was administered pursuant to written guidelines to which the Court called attention.

322. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265, 268–69 (1990).

323. For example, in both *Graham v. Florida*, 130 S. Ct. 2011 (2010), and *Roper v.*

Third, even in cases that clearly involve the application of a rule or policy, the Court frequently gives no explicit indication whether it understands itself as rendering a ruling on the validity of the statute on its face or only as applied. Absent explicit indications from the Court, we did our best to determine whether the Court's analysis implied that it was concerned with the facial validity of a statute or only with whether the statute was constitutional as applied. In some cases, however, others might have made different judgments. The one conclusion on which all should concur is that the Court does not always sort the cases and issues before it into clearly demarcated categories of facial and as-applied analysis.

Fourth, and perhaps most important, even in cases in which the Court relatively consistently employs the characteristic nomenclature of facial analysis, it is sometimes doubtful whether its signals should be taken at face value. *American Trucking Associations, Inc. v. Michigan Public Service Commission*[324] will suffice to illustrate the difficulty. There, truckers who engaged in both interstate and intrastate commerce brought a dormant commerce clause challenge against a state statute imposing a flat one hundred dollar fee on trucks that did any intrastate hauling at all on the ground that it impermissibly burdened those truckers that also operated interstate. Although the logic of the challengers' theory, if accepted, would not necessarily have entailed the statute's invalidity as applied to purely intrastate truckers, the Court's opinion—which rejected that theory—referred throughout to challenges to "the statute" and "the fee" as if it conceived the challenge as a facial one. In cases such as this, we tried to base our categorization on the

Simmons, 543 U.S. 551 (2005), convicted criminals maintained that their sentences for crimes committed while they were juveniles—life in prison without parole in *Graham*, death in *Roper*—constituted cruel and unusual punishment forbidden by the Eighth Amendment. In both cases, state statutes authorized, but did not flatly require, the sentences. The cases, accordingly, could be construed either as presenting as-applied challenges to the state statutory schemes insofar as they authorized the sentences in issue or as involving as-applied attacks on the sentence alone. In the cases that could plausibly have been categorized as either challenging a statute, on the one hand, or the discretionary actions of government officials, on the other hand, my research assistants and I tried to track the Court's approach and to treat challenges as addressed to the background statutes if, but only if, the Court so framed its analysis. Because the Court in *Graham* and *Roper* specifically referred not only to relevant state statutes, but also to the statutes in other states that would have permitted similar sentences, we coded the cases as involving as-applied challenges to the statutes. We did the same with *Dowling v. United States*, 493 U.S. 342 (1990), which appeared to treat a constitutional objection to the admission of evidence as an as-applied challenge to Rule 404(b) of the Federal Rules of Evidence. By contrast, in *McCreary County v. ACLU of Kentucky*, 545 U.S. 850 (2005), in which officials erected Ten Commandments displays before the enactment of an authorizing resolution and subsequently altered those displays in response to a judicial ruling, we treated the challenge as addressed to officials' conduct rather than a law, ordinance, or resolution. We made similar judgments in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), which rejected a First Amendment-based challenge to a subpoena issued in connection with a statutorily authorized EEOC investigation, and *California v. FERC*, 495 U.S. 490 (1990), which held an order by the California Water Resources Control Board to be preempted by federal law.

324. 545 U.S. 429 (2005).

predominant thrust of the Court's reasoning, but with some attention, too, to clear implications. Because the Court's reasoning in *American Trucking* would appear to preclude the success of as-applied as well as facial challenges in a future case, we classified it as having entertained, and rejected, both facial and as-applied challenges.

If the *American Trucking* Court had ruled for the challengers, however, classification of its ruling would have presented an even more difficult challenge. Much of the Court's language characterizing the issue before it would have suggested that it had sustained a facial attack. As noted above, however, the logic of a ruling that a statute impermissibly burdened interstate commerce would not necessarily have extended to a case applying the challenged fee to trucks operating solely in intrastate commerce. In cases of this kind—in which the Court appeared to speak globally, but we could imagine ways in which a future Court might distinguish some possible cases involving other parties—we took the Court at its apparent word and treated the Court as having held the statute invalid on its face.[325] But this decision was not obviously correct.

B. Methodological Choices

Perhaps our most important methodological choice was whether to count the facial or as-applied challenges that the parties presented, on the one hand, or those that the Court actually adjudicated on the merits, on the other hand. For nearly every purpose, we determined that the latter is the more important number, and our tallies reflect this conclusion. We thus excluded from our count cases that the Court dismissed on jurisdictional grounds, including lack of standing or mootness.[326] We took the same approach to cases in which one

325. We similarly coded *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402, 414 (1985), in which the Court characterized its holding as finding that "program[s]" providing assistance to private schools violated the Establishment Clause, due to their effects in promoting religion or entangling the government with religious institutions, as involving facial invalidations, even though in both cases a relatively small fraction of the assistance went to nonreligious schools. If the defendants in *Ball* and *Aguilar* had continued to make distributions under their programs to nonreligious schools only, they might plausibly have argued that the Court's rationale showed those programs to be unconstitutional only as applied to religious schools, any broader language in the Court's opinion notwithstanding. Another exemplification of the same classificatory problem comes from cases that appear to hold statutes invalid because not "congruent and proportional" to an identified pattern of constitutional violations under Section 5 of the Fourteenth Amendment. In a future case brought under such a statute, but by a plaintiff who had herself pleaded that she was the victim of an actual constitutional violation, it is at least imaginable that the Court would say, as it did in *United States v. Georgia,* 546 U.S. 151, 158 (2006), that "no one doubts" Congress's power to abrogate states' immunity for violations of constitutional rights.

326. Our reasoning was that dispositions such as these leave the Court with no occasion to determine whether to entertain, disprefer, or uphold a facial challenge. We included in this category cases in which the votes of Justices finding a lack of justiciability were necessary to make a majority for the Court's decision, even if some of the Justices in the majority would have decided the case on the merits. *See, e.g.*, Salazar v. Buono, 130 S. Ct. 1803 (2010). But we did not

of the parties challenged the validity of a statute, either on its face or as applied, but in which the Court, although laying out a test or standard for a lower court to apply on remand, did not resolve the challenge itself.[327]

A perhaps more debatable application of the decision to count only adjudications of challenges, not total challenges presented by the parties, involved cases in which the parties addressed constitutional challenges to statutes, either on their faces or as-applied, but the Court obviated those challenges by ruling for the challengers on statutory, rather than constitutional, grounds—sometimes, but not always, by invoking the avoidance canon.[328] Because the Court did not make any constitutional ruling on the merits, we decided to exclude such cases from our count of successful and unsuccessful facial and as-applied challenges. But the exclusion did not come without cost. By omitting cases in which the Court at the very least did not reject the possibility that statutes might have been vulnerable to facial attack but for its statutory interpretation, our count risks understating the Court's openness to facial challenges in practice.

Some cases present a variety of facial or as-applied challenges, or both, under multiple constitutional provisions.[329] In order to avoid artificial inflation of the number of facial challenges relative to cases decided, our tally records *cases* in which the Court has entertained and either upheld or rejected facial and as-applied challenges. In other words, if the Court upheld at least one facial challenge in a case, we list the case as one in which a facial challenge succeeded, and ignore the rejection of other facial challenges in the same case,[330] even if the rejected challenges involved distinct statutory provisions.[331] The one exception to this general rule involves cases in which the Court separately addressed a facial and an as-applied challenge. In tallying the success rates for facial and as-applied challenges, we have separately counted the Court's rulings on distinct facial and as-applied challenges within a single case.

include in this category—which is to say that we treated as having resolved a facial challenge on the merits—*City of Erie v. Pap's A.M.*, 529 U.S. 277, 282–83 (2000), in which two concurring Justices first explained that they regarded the case as moot, but then went on to explain that, if the case were not moot, they, like the plurality, would have rejected the facial challenge at issue on the merits. *See id.* at 307 (Scalia, J., concurring in the judgment).

327. *E.g.*, McDonald v. Chicago, 130 S. Ct. 3020, 3026 (2010); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005); Garner v. Jones, 529 U.S. 244 (2000).

328. *E.g.*, Shepard v. United States, 544 U.S. 13, 16, 25–26 (2005); Jones v. United States, 529 U.S. 848, 857–58 (2000).

329. *See, e.g.*, United States v. Sperry Corp., 493 U.S. 52, 59, 64–65 (1989) (rejecting separate facial challenges under the Constitution's just compensation, due process, and equal protection guarantees).

330. For example, we list *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), as a case in which the Court upheld a facial challenge (under the Free Speech Clause), *id.* at 229–30, and essentially ignore the Court's rejection in the same case of facial challenges under the Due Process Clause and freedom of association doctrine, *id.* at 236–37.

331. For an example, see *Hodgson v. Minnesota*, 497 U.S. 417, 423 (1990).

A final puzzle arose from the quite different postures in which questions about statutes' facial validity can come before the Supreme Court on appeal. A challenger may press a facial challenge that failed in a lower court, or the Court may review a lower court decision that pronounced a statute unconstitutional on its face.[332] Although the resulting differences in the framing of claims of facial invalidity may sometimes influence the Court's analysis, I have grouped all cases in which the Court addressed facial challenges into one category and have recorded the Court's rulings as either upholding or rejecting facial challenges.

C. Term-by-Term Categorizations of Cases

The following Term-by-Term reports of the cases that we assigned to various categories should assist anyone who might want to reexamine or contest the coding and counting decisions that underlie the numerical results reported in the text.

2009 Term: Out of an overall total of eighty-seven cases,[333] the Court ruled on facial challenges in six cases[334] and on as-applied challenges in four cases.[335] Of the six facial challenges that the Court entertained, three succeeded on the merits.[336] Of the four as-applied challenges, one succeeded on the merits.[337]

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332. For cautions about the significance of such pronouncements in some cases, see *supra* note 31 and accompanying text.

333. *The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411 (2010).

334. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 888 (2010); United States v. Stevens, 130 S. Ct. 1577, 1582 (2010); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147–49, 3161 (2010); United States v. Comstock, 130 S. Ct. 1949, 1954 (2010); Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010); Florida v. Powell, 130 S. Ct. 1195, 1199–1200 (2010). Of these, two required significant coding judgments. *Florida v. Powell* presented the question whether a police officer had given an adequate *Miranda* warning by reading from "the standard Tampa Police Department Consent and Release Form 310." *Id.* at 1200. We coded the case as presenting a facial challenge to the form. In *Christian Legal Society*, in which the plaintiff challenged a public law school's policy of barring discriminatory student groups from receiving school funding, the Court held that a stipulation by the parties concerning the nature of the school's policy barred the plaintiff from making arguments about the school's "policy as written" insofar as those arguments contradicted the parties' earlier stipulations. 130 S. Ct. at 2982–84. Because the relevant stipulation addressed the general content of the school's nondiscrimination policy, and not the peculiarities of its application to the Christian Legal Society, we classified the challenge as one to the policy on its face.

335. Doe v. Reed, 130 S. Ct. 2811, 2815–17 (2010); Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010); Milavetz, Gallop & Milavetz v. United States, 130 S. Ct. 1324, 1339–41 (2010); Graham v. Florida, 130 S. Ct. 2011, 2017–18, 2022–23 (2010). Although the Court said in *Doe v. Reed* that the plaintiffs' challenge needed to satisfy the standards applicable to facial challenges because they maintained that the Washington Public Records Act "reach[ed] beyond the[ir] particular circumstances," 130 S. Ct. at 2817, the First Amendment test that the Court applied, if satisfied, would have established that the statute was invalid insofar, but only insofar, as it mandated the disclosure of petitions to have referenda placed on the ballot. We therefore coded the case as presenting an as-applied rather than a facial challenge.

336. *Citizens United*, 130 S. Ct. at 917; *Stevens*, 130 S. Ct. at 1592; *Free Enter. Fund*, 130 S. Ct. at 3147–48, 3164 (2010).

337. *Graham*, 130 S. Ct. at 2034.

2004 Term: Out of a total of seventy-nine cases,[338] the Court decided five cases presenting facial challenges only,[339] three cases presenting as-applied challenges only,[340] and three cases in which the Court failed to distinguish clearly, but its reasoning can be construed as applicable to both.[341] Of the overall total of eight facial challenges that the Court entertained, two succeeded on the merits.[342] Of the overall total of six as-applied challenges, two succeeded on the merits.[343]

1999 Term: Out of a total of seventy-seven cases,[344] the Court ruled on facial challenges in twenty cases[345] and on as-applied challenges in seven cases.[346] Of the twenty facial challenges, twelve succeeded on the merits.[347] Of the seven as-applied challenges, five succeeded.[348]

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338. *The Supreme Court*, *2004 Term—The Statistics*, 119 HARV. L. REV. 415, 420 (2005).

339. Bell v. Cone, 543 U.S. 447, 447–48, 459 (2005); Granholm v. Heald, 544 U.S. 460, 493 (2005); Cutter v. Wilkinson, 544 U.S. 709, 713–14; Wilkinson v. Austin, 545 U.S. 209, 220–21 (2005); Kelo v. City of New London, 545 U.S. 469, 484 (2005).

340. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 567 (2005); Roper v. Simmons, 543 U.S. 551, 564, 568 (2005); Gonzales v. Raich, 545 U.S. 1, 8–9 (2005).

341. United States v. Booker, 543 U.S. 220, 226–27, 229 n.1 (2005); Clingman v. Beaver, 544 U.S. 581, 585 (2005); Am. Trucking Ass'ns, Inc. v. Mich. Pub. Service Comm'n 545 U.S. 429, 431–34 (2005).

342. *Booker*, 543 U.S. at 224 (only to the extent that the Sentencing Guidelines conflict with the *Apprendi* line of cases); *Granholm*, 544 U.S. at 466.

343. *Roper*, 543 U.S. at 578–79; *Booker*, 543 U.S. at 226–27, 229 n.1.

344. *The Supreme Court, 1999 Term—The Statistics*, 114 HARV. L. REV. 390 (2000).

345. L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 34 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000); Reno v. Condon, 528 U.S. 141, 143 (2000); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 383 (2000); Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 458, 463 (2000); Rice v. Cayetano, 528 U.S. 495, 498–99 (2000); United States v. Locke, 529 U.S. 89, 94 (2000); City of Erie v. Pap's A. M., 529 U.S. 277, 282–83 (2000); United States v. Morrison, 529 U.S. 598, 601–02 (2000); Vt. Agency of Natural Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 771–78 (2000); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 806–07 (2000); Miller v. French, 530 U.S. 327, 331 (2000); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000); Dickerson v. United States, 530 U.S. 428, 432 (2000); Apprendi v. New Jersey, 530 U.S. 466, 468–69 (2000); Cal. Democratic Party v. Jones, 530 U.S. 567, 569 (2000); Hill v. Colorado, 530 U.S. 703, 707–08 (2000); Sternberg v. Carhart, 530 U.S. 914, 921–22 (2000); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000); Bd. of Regents of the Univ. of Wis. System v. Southworth, 529 U.S. 217, 221 (2000).

346. Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 347 (2000); Ohler v. United States, 529 U.S. 753, 759–60 (2000); Geier v. Am. Honda Motor Co., 529 U.S. 861, 864–65 (2000); Boy Scouts of Am. v. Dale, 530 U.S. 640, 643–44 (2000); Mitchell v. Helms, 530 U.S. 793, 801 (2000); Carmell v. Texas, 529 U.S. 513, 516 (2000). We also included in this category *Troxel v. Granville*, 530 U.S. 57 (2000), in which the plurality opinion held a statute invalid as applied, *id.* at 75, even though two concurring opinions would have found it facially invalid, see *id.* at 75–76 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment).

347. *Kimel*, 528 U.S. at 67; *Hunt-Wesson, Inc*., 528 U.S. at 463; *Cayetano*, 528 U.S. at 498–99; *Locke*, 529 U.S. at 94; *Morrison*, 529 U.S. at 601–02; *Playboy Entm't Group*, 529 U.S. at 806–07; *Crosby*, 530 U.S. at 366; *Dickerson*, 530 U.S. at 432; *Apprendi*, 530 U.S. at 497; *Cal. Democratic Party*, 530 U.S. at 586; *Sternberg*, 530 U.S. at 921–22; *Santa Fe Indep. Sch. Dist*., 530 U.S. at 317.

348. *Norfolk S. Ry*., 529 U.S. at 347; *Geier*, 529 U.S. at 864–65; *Boy Scouts of Am*., 530 U.S. at 644 ; *Carmell*, 529 U.S. at 552; *Troxel*, 530 U.S. at 75.

1994 Term: Out of a total of eighty-six cases,[349] the Court decided ten cases presenting facial challenges only,[350] six cases presenting as-applied challenges only,[351] and one case presenting both.[352] Of the eleven total facial challenges, seven succeeded.[353] Of the seven total as-applied challenges, four succeeded.[354]

1989 Term: Out of a total of 139 cases,[355] the Court decided seventeen cases presenting facial challenges,[356] fourteen presenting as-applied challenges,[357] and five presenting both.[358] Of the twenty-two total facial

349. *The Supreme Court*, *1994 Term—The Statistics*, 109 HARV. L. REV. 340 (1995).

350. United States v. X-citement Video, Inc., 513 U.S. 64, 66–67, 78–79 (1994); Harris v. Alabama, 513 U.S. 504, 511, 515 (1995); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 339, 356 (1995); Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995); United States v. Lopez, 514 U.S. 549, 551–52 (1995); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995); Fla. Bar v. Went for It, Inc., 515 U.S. 618, 621, 635 (1995); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 642, 651–52 (1995); Miller v. Johnson, 515 U.S. 900, 920–27 (1995).

351. Reich v. Collins, 513 U.S. 106, 109 (1994); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 477–79 (1995); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 178 (1995); Cal. Dep't of Corrections v. Morales, 514 U.S. 499, 504 (1995); Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 751–52, 759 (1995); Hurley v. Irish-American, Gay, Lesbian, and Bisexual Group of Bos., Inc., 515 U.S. 557, 579 (1995).

352. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23, 827–28 (1995).

353. *Plaut*, 514 U.S. at 240; *McIntyre*, 514 U.S. at 356–57; *Rubin*, 514 U.S. at 480, 491; *Lopez*, 514 U.S. at 551; *U.S. Term Limits*, 514 U.S. at 783; *Rosenberger*., 515 U.S. at 837; *Miller*, 515 U.S.at 920–27.

354. *Reich*, 513 U.S. at 108; *Reynoldsville Casket*, 514 U.S. at 751–52, 759; *Hurley*, 515 U.S. at 578–79; *Rosenberger*, 515 U.S. at 837.

355. *The Supreme Court, 1989 Term—The Statistics*, 104 HARV. L. REV. 359 (1990).

356. United States v. Sperry Corp., 493 U.S. 52, 54 (1989); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 220, 223 (1990); Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 333–34 (1990); Preseault v. ICC, 494 U.S. 1, 4–5, 17 (1990); Washington v. Harper, 494 U.S. 210, 213–18 (1990); Boyde v. California, 494 U.S. 370, 372 (1990); McKoy v. North Carolina, 494 U.S. 433, 435 (1990); U.S. Dep't. of Labor v. Triplett, 494 U.S. 715, 717 (1990); United States v. Munoz-Flores, 495 U.S. 385, 387–88 (1990); North Dakota v. United States, 495 U.S. 423, 426 (1990); Westside Cmty. Bd. of Educ. v. Mergens, 496 U.S. 226, 231 (1990); Perpich v. Dep't of Defense, 496 U.S. 334, 336–37 (1990); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990); Hodgson v. Minnesota, 497 U.S. 417, 422–23 (1990); Ohio v. Akron Center for Reprod. Health, 497 U.S. 502, 506–07 (1990); Metro Broad., Inc. v. FCC, 497 U.S. 547, 552 (1990); and Maryland v. Craig, 497 U.S. 836, 840 (1990) (ruling only on a facial challenge, while remanding for a decision on an as-applied challenge). *See id.* at 860.

357. Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 380 (1990); FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 414 (1990); Blystone v. Pennsylvania, 494 U.S. 299, 301, 305–06 (1990); Butterworth v. Smith, 494 U.S. 624, 626 (1990); Adams Fruit Co. v. Barrett, 494 U.S. 638, 640 (1990); Emp't Div. v. Smith, 494 U.S. 872, 874 (1990); United Steelworkers of Am. v. Rawson, 495 U.S. 362, 364–72, 376 (1990); English v. General Elec. Co., 496 U.S. 72, 74 (1990); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 93–94, 97–98 (1990); Milkovich v. Lorain Journal Co., 497 U.S. 1, 3 (1990); Collins v. Youngblood, 497 U.S. 37, 39 (1990); United States v. Kokinda, 497 U.S. 720, 722–23 (1990); Dowling v. United States, 493 U.S. 342, 343–44 (1990); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265, 268–69 (1990).

358. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654–55 (1990); Osborne v. Ohio, 495 U.S. 103, 106–08 (1990); Walton v. Arizona, 497 U.S. 639, 642–44, 647–53, 655 (1990); Lewis v. Jeffers, 497 U.S. 764, 766 (1990); and United States v. Eichman, 496 U.S. 310,

challenges, four succeeded.[359] Of the nineteen total as-applied challenges, five succeeded.[360]

1984 Term: Out of a total of 151 cases,[361] the Court ruled on eighteen cases presenting facial challenges,[362] on nine cases presenting as-applied challenges,[363] and on four cases presenting both.[364] Of the twenty-two total facial challenges, eleven succeeded.[365] Of the thirteen as-applied challenges, four succeeded.[366]

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312 (1990). In *Eichman*, the Court initially characterized the issue before it as presenting an as-applied challenge, see 496 U.S. at 312, but then spoke about the constitutionality of the statute in light of the validity of the government's reasons for enacting it. *See id.* at 315–318.

359. *FW/PBS, Inc*., 493 U.S. at 223; *McKoy*, 494 U.S. at 435; *Eichman*, 496 U.S. at 312; *Hodgson*, 497 U.S. at 422–23.

360. *Butterworth*, 494 U.S. at 626; *Adams Fruit*, 494 U.S. at 649; *Rawson*, 495 U.S. at 376; *Osborne*, 495 U.S. at 122–26; *Peel*, 496 U.S. at 111.

361. *The Supreme Court, 1984 Term—The Statistics*, 99 HARV. L. REV. 322 (1985).

362. Lawrence Cnty. v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 259–60 (1985); Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe. Ry. Co., 470 U.S. 451, 478 (1985); Fed. Elections Comm'n v. Nat'l Conservative PAC, 470 U.S. 480, 482–84 (1985); United States v. Locke, 471 U.S. 84, 91, 103 (1985); Hunter v. Underwood, 471 U.S. 222, 231–33 (1985); Ponte v. Real, 471 U.S. 491, 492–93 (1985); Hillsborough Cnty. v. Automated Med. Labs, 471 U.S. 707, 710–12 (1985); Williams v. Vermont, 472 U.S. 14, 16, 27 (1985); Wallace v. Jaffree, 472 U.S. 38, 56–61 (1985); Ne. Bancorp v. Bd. of Governors, Fed. Reserve Sys., 472 U.S. 159, 174–78 (1985); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 615, 617, 622 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708–10 (1985); Walters v. Nat. Ass'n. of Radiation Survivors, 473 U.S. 305, 307–08 (1985); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593–94 (1985); Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 288 (1985); Cornelius v. NAACP (*NAACP III*), 473 U.S. 788, 795–97 (1985); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 380–81, 397–98 (1985); Aguilar v. Felton, 473 U.S. 402, 407–08, 414 (1985).

363. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 533–36 (1985); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 872 (1985); Tennessee v. Garner, 471 U.S. 1, 5, 11–12 (1985); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 294, 303 (1985); Burger King v. Rudzewicz, 471 U.S. 462, 470 (1985); McDonald v. Smith, 472 U.S. 479, 481–82, 485 (1985); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502–07 (1985); United States v. Albertini, 472 U.S. 675, 679 (1985); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447–50 (1985).

364. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 536 (1985); Wayte v. United States, 470 U.S. 598, 604–06, 610–11 (1985); Zaunderer v. Office of Disciplinary Counsel, 471 U.S. 626, 635 (1985); Baldwin v. Alabama, 472 U.S. 372, 382–86 & n.8 (1985).

365. Lawrence Cnty. v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 270 (1985); FEC v. Nat'l Conservative PAC, 470 U.S. 480, 482–84 (1985); Hunter v. Underwood, 471 U.S. 222, 231–33 (1985); Zaunderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642, 647–49 (1985); Williams v. Vermont, 472 U.S. 14, 16, 27 (1985); Wallace v. Jaffree, 472 U.S. 38, 56–61 (1985); *Hooper*, 472 U.S. at 615–17, 622–23; *Estate of Thornton*, 472 U.S. at 708–10; *Piper*, 470 U.S. at 288 ; *Grand Rapids Sch. Dist*., 473 U.S. at 380–81, 397–98; *Aguilar*, 473 U.S. at 407–08, 414.

366. *Metro. Life Ins*., 470 U.S. at 872; *Garner*, 471 U.S. at 5, 11–12; *Spokane Arcades*, 472 U.S. at 502–07; *City of Cleburne*, 473 U.S. at 437.