

FOREWORD

Facial v. As-Applied Challenges: Does It Matter?

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The Cato Institute's Center for Constitutional Studies is pleased to publish this eighth volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended, plus a look at the cases ahead—all from a classical Madisonian perspective, grounded in the nation's first principles, liberty and limited government. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

Although the Court heard several important cases over the past year, the term was not marked by high-profile, landmark decisions. Accordingly, as we are still taking the measure of the unfolding Roberts Court, I am going to turn this year to one of the more abstract and abstruse questions that has emerged over its brief tenure, drawing the attention of a number of Court watchers in the process: namely, whether the Court is making it more difficult to bring constitutional claims because it is increasingly favoring “as-applied” instead of “facial” challenges.

As we have often said to our readers, we try in this *Review* to make the work of the Court accessible to the educated layman, even when the Court offers us little help in that endeavor, as here. In this matter, however, I am afraid that the complexity is more than the Roberts Court's doing; it is inherent in the subject itself, although the Court's post-New Deal jurisprudence has exacerbated it—or so

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I will argue. Nevertheless, I will try to shed such light as I can on the subject in the brief discussion that follows.

To give the issue something of an ideological hue, however, let me note that the American Constitution Society, the modern liberal answer to the older conservative and libertarian Federalist Society, thought the subject important enough to devote a session to it at its recent national convention. And two quite thoughtful articles on the issue have just appeared, one by Columbia's Gillian E. Metzger in the *Fordham Urban Law Journal*, the other by DePaul's David L. Franklin in a symposium devoted to the subject in the *Hastings Constitutional Law Quarterly*. I will draw on both.

Interestingly, both authors conclude, correctly I believe, that substantive constitutional doctrine is what ultimately drives the Court in treating claims as either facial or as-applied. Their particular focus, however, is on the question many liberals have raised: Is the Roberts Court, through its as-applied approach, making it more difficult to bring constitutional claims about individual rights? Responding to that question more generally, Professor Metzger writes: "The real question in the end is whether the Court is developing specific constitutional doctrines in ways that expand or contract the substantive scope of individual rights." My concern, by contrast, will be rather less with rights—or powers, for that matter—than with whether the Court is faithfully interpreting and applying the Constitution, and how the facial/as-applied distinction plays into that process.

To better place the issue in context, I will start with the barest sketch of what I take to be the appropriate methodology for judicial review. The Constitution, at bottom, authorizes federal powers and then limits both federal and state powers. Through the legitimating doctrine of enumerated powers it limits the objects Congress may pursue. State constitutions do the same, variously, which is for state courts to police. Moreover, under the last of Congress's 18 enumerated powers, the Necessary and Proper Clause, the means Congress may employ toward those enumerated ends must be both necessary and proper—"proper" implying respectful of the powers of the other branches and the states, and of the rights of individuals as well, enumerated and unenumerated alike. States too, since the Civil War Amendments were ratified, must respect those rights.

Article III's implicit provision for judicial review, made explicit in *Marbury v. Madison*, empowers federal courts to hear challenges

to government measures. There are several doctrines that enable courts to avoid reviewing complaints, however. Because courts decide only “cases or controversies” and do not issue “advisory opinions,” they can find that a complaint before them is not “ripe,” or is “moot,” or that the complainant has no “standing” because no particularized damages. Moreover, two years ago in *Bell Atlantic v. Twombly* and just this term in *Ashcroft v. Iqbal* the Supreme Court tightened pleading requirements, making it more difficult to bring claims.

But assuming those obstacles can be overcome, judicial review, at bottom, entails determining, first, whether a statute or regulation, or its execution, is authorized, and, second, whether the means Congress or the government employs are necessary and proper. To challenge a measure, individuals can bring either a facial or an as-applied challenge or both. A successful facial challenge finds the measure, or the part at issue, unconstitutional *per se*, and it is no more. A successful as-applied challenge, as the name implies, finds the measure or its part unconstitutional as applied to the individual, leaving it otherwise intact. But that brief outline only begins the discussion, which is made more difficult because the Court has never articulated a consistent theory of the matter. So we turn now to a bit more detail.

For three main reasons the Court for years has shown a preference for as-applied challenges. First, since the New Deal “constitutional revolution” the Court has accorded the actions of the political branches and the states a fairly robust presumption of constitutionality, a point I will return to later. Second, and closely related, a concern for judicial restraint has rendered the Court deferential to those branches and the states and hence reluctant to find their measures wholly unconstitutional. But third, even with a weaker presumption of constitutionality—and there must be some such presumption if a complaint is to be brought—there is a fairly heavy burden for anyone bringing a facial challenge. As the Court put it in 1987 in the seminal case of *United States v. Salerno*, a facial challenge requires that there be “no set of circumstances” under which the measure is constitutional. Given all of that, it is understandable, as the Court has said, that “as-applied challenges are the basic building blocks of constitutional adjudication.”

Before taking up that approach, however, let us look at three successful and fairly simple facial challenges, one claiming no power,

the other two claiming a right. In 1995, in *United States v. Lopez*, the Court for the first time in 58 years found that Congress had exceeded its power to regulate interstate commerce when, purportedly under that grant, it enacted the Gun Free School Zones Act of 1990. In deciding that facial challenge, the Court needed to take only the first step mentioned above: it needed to find only that Congress was not regulating commerce, much less interstate commerce, and so had exceeded its authority. "Under no circumstances," therefore, could the statute be saved.

Turning now to a simple rights case, where the Court must take that second step, in 2002, in *Lawrence v. Texas*, the Court upheld a facial challenge to a state statute that criminalized homosexual sodomy in the privacy of one's home. Here, the Court could not deny that the state had a general police power to regulate health, safety, and, to some extent, morals; but the means employed went too far, implicating the unenumerated right of the plaintiff to sexual freedom in that context, the exercise of which implicated the rights of no one else. As in the 1965 case of *Griswold v. Connecticut*, which overturned a state statute that criminalized the sale and use of contraceptives by married couples, this use of the police power was not protecting rights, its main function, but violating them. No set of circumstances could justify the law.

Finally, in a somewhat more complicated rights case decided a year ago, *Davis v. FEC*, the Court upheld a facial challenge to the so-called Millionaire's Amendment to the far more complex McCain-Feingold campaign finance law. (More on that law below.) Because the Court had previously upheld the *power* of Congress to regulate federal campaign financing, the question here was the narrower one about the constitutionality of section 319 of the bill, which tripled the contribution limits for House candidates facing opponents who spent their own money beyond the statutory threshold while keeping opponents' contribution limits at the lower level. In effect, the provision amounted to a "categorical burden" on the self-financed candidate's First Amendment speech *rights*, as Professor Metzger put it, so the entire provision had to be severed from the larger bill, not just found unconstitutional as it applied to the plaintiff before the Court.

To complicate matters, however, and return to the powers side, facial challenges can sometimes *validate* measures, argues Professor Franklin, pointing to the 2005 case of *Gonzales v. Raich*, which he

calls an example of “facial adjudication in as-applied clothing.” The plaintiff here, seeking to use home-grown medical marijuana under California law, brought an *as-applied* challenge to the federal Controlled Substances Act (CSA), claiming that the Act, passed pursuant to Congress’s power to regulate interstate commerce, did not apply to her because there was no “commerce” to regulate, much less interstate commerce. Unlike in *Lopez*, that is, Congress had been held previously to have the *power* to regulate the subject—controlled substances in interstate commerce—but that power did not reach home-grown medical marijuana. Thus, we’re back to the first step of judicial review, but asking only if Congress’s power “applies” here. The Court reasoned, however, that when Congress creates a comprehensive regulatory scheme for a product in interstate commerce, it can regulate any subclass of activities that are an essential part of that scheme, even when those activities are entirely noncommercial and local. With that, Professor Franklin believes, the Court “*facially validated* the CSA for Commerce Clause purposes,” for given the character of the activities reached, “it is not too far a stretch to conclude that the Court has in effect outlawed as-applied constitutional challenges under the Commerce Clause.”

Thus, while the Court disfavors facial challenges, neither are they rare. In fact, in two areas of the law—concerning the First Amendment and abortion—there has been a presumption favoring them. Regarding speech, the idea seems to be that case-by-case adjudication would produce uncertainty, would require repeated and costly litigation, and would generally chill speech, so better to find a speech regulation facially unconstitutional, even if there might be a few situations that would justify regulation. In abortion litigation, however, it seems that obverse concerns have been at play. Thus, in 1992, in *Planned Parenthood of Southern Pennsylvania v. Casey*, the Court upheld a facial challenge to the spousal notification provision of a state abortion law even though it would impose an “undue burden” on only a few of the women seeking abortions. And in 2000, in *Stenberg v. Carhart*, the Court upheld a facial challenge to Nebraska’s “partial-birth abortion” statute because it lacked a health exception for those few women who might need such a procedure.

More recently, however, the Court has issued two as-applied abortion decisions, and that has caught the attention of liberals. In 2006, in *Ayotte v. Planned Parenthood of Northern New England*, a facial

challenge was brought against a New Hampshire statute that required parental notice even when an immediate abortion was needed to preserve the minor's health. But a unanimous Court held, as Professor Metzger summarized it, "that this constitutional infirmity need not lead to the statute's being 'invalidated . . . wholesale,' given that 'only a few applications' of the statute 'would present a constitutional problem.'" And in 2007, in *Gonzales v. Carhart*, a 5-4 Court rejected a facial challenge to the federal Partial-Birth Abortion Ban Act, which sought to prohibit intact D&E abortions, notwithstanding that the act was virtually identical to the Nebraska statute the Court had overturned in 2000 in *Stenberg*.

Casey and *Ayotte* can be reconciled, Professor Franklin argues, since the spousal notification provision in *Casey* "was unconstitutional on its face and had to be struck entirely," whereas the parental notification provision in *Ayotte* was "unconstitutional on its face for want of a health exception, but this time the Court concluded that the infirmity could be cured by judicial surgery." In other words, "the plaintiffs' sought-after remedy was narrowed but not denied."

Reconciling *Stenberg* and *Gonzales*, however, is another matter. Writing for the majority in *Gonzales*, Justice Anthony Kennedy argued that the federal ban was more carefully drawn to apply only to the intact D&E procedure. And he held that medical uncertainty about the necessity of the procedure enabled the federal ban to survive a facial challenge despite the absence of a health exception. Yet in *Stenberg* that same medical uncertainty had made a health exception necessary—and its absence proved fatal, facially. Perhaps more telling, in *Gonzales* Kennedy contended that "these facial attacks should not have been entertained in the first instance." Rather, an as-applied challenge was "the proper manner to protect the health of the woman if it could be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure . . . must be used." All of which prompted Professor Franklin to conclude that, after *Gonzales*, "it is hard to resist the conclusion that the Court has abandoned . . . [the] facial approach from *Casey* and has assimilated abortion rights to the traditional model in which as-applied challenges hold sway."

Returning to the First Amendment, at least in the election law context, here too we seem to see movement in that direction—a year ago we saw two decisions rejecting facial in favor of as-applied

challenges. Relying on a 1966 case that found a state poll tax facially unconstitutional, the plaintiffs in *Crawford v. Marion County Election Board* brought a facial challenge to Indiana's recently enacted voter ID law, claiming among other things that the law was politically motivated and burdened discrete classes of potential voters. The Court plurality rejected the challenge, citing the weak evidentiary record plus the state's interest in combating voter fraud, but it hinted at the (remote) possibility that the law might be subject to an as-applied challenge.

And in *Washington State Grange v. Washington State Republican Party* the Court rejected a facial challenge to the state's "blanket primary" system, where primary candidates self-identify by party, regardless of the party's preference. Writing for a majority of five, Justice Clarence Thomas cited judicial restraint and the need to avoid broad or premature constitutional rulings based on "factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge."

A final case brings us back to the complex McCain-Feingold campaign finance regime—the Bipartisan Campaign Reform Act of 2002 (BCRA)—section 203 of which prohibits "electioneering communications" financed from the general treasuries of corporations and labor unions during designated periods before elections. Senator Mitch McConnell and others brought a facial challenge immediately after BCRA's passage, charging that section 203 was overbroad under the First Amendment because it prohibited funding not only campaign ads but issue ads as well. The Court rejected the challenge in 2003 in *McConnell v. Federal Election Commission*. With that, Wisconsin Right to Life (WRTL), a non-profit corporation, brought an as-applied challenge, resulting in a 2006 *per curiam* opinion (WRTL I) that made clear what had been unclear after *McConnell*, namely, that as-applied challenges could be brought against section 203. A year later the case made it back to the Court: In *Federal Election Commission v. Wisconsin Right to Life* (WRTL II) a 5-4 Court upheld WRTL's as-applied challenge. But the opinion also strongly implied that *all* as-applied issue-advocacy challenges would succeed, leading Professor Franklin to call this an example of facial invalidation in as-applied clothing.

But the unwillingness of the Court to go all the way and find section 203 facially unconstitutional prompted a sharp concurrence

by Justice Antonin Scalia, joined by Justices Kennedy and Thomas. The provision is overbroad, Scalia said, and should have been struck on its face because it chills political discourse. And he added, given that seven justices of widely divergent views all agree that the Court's opinion, written by Chief Justice John Roberts and joined by Justice Samuel Alito, "effectively overrules *McConnell* without saying so," the Court has engaged in "faux judicial restraint" amounting to "judicial obfuscation." To that, Alito responded in his own concurrence:

[B]ecause §203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether §203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell* that §203 is facially constitutional.

Because the Court decides questions only properly before it, properly briefed and argued, Alito is probably right. Since this was an as-applied challenge, that judicial restraint leaves open the possibility that an as-applied challenge might fail.

Yet Scalia is right too—if the chance of such a challenge failing, given the opinion in *WRTL II*, is vanishingly thin. And so we come as a practical matter to that thin line, in many cases at least, between facial and as-applied adjudication. And in the issue at hand, it may not be long before the thinness of the line is demonstrated. For the "future case" Alito contemplated, *Citizens United v. FEC*, was just now before the Court; but in a surprise move in its final week the Court held the case over for re-argument on September 9, directing the parties to brief the Court on whether not only section 203 but the Court's closely related 1990 decision in *Austin v. Michigan Chamber of Commerce* should be overturned. Although the government is contending that *Citizens United* abandoned its facial challenge, it is not likely that the Court took the step it did simply to make another as-applied decision in a matter that arises so often with so far-reaching implications. We shall see.

Stepping back, we need to ask whether the Court's choice between facial and as-applied adjudication matters, and whether, as some liberals fear, the Roberts Court is making it more difficult to bring

constitutional claims by increasingly favoring as-applied over facial adjudication. The first question cannot be answered in the abstract. Increasing as-applied adjudication would certainly matter to prospective plaintiffs, since even if the holdings in such litigation reached beyond the case itself to “classes of contexts,” a point Professor Metzger notes, there would still be room for much more litigation, uncertain and costly, than if the challenged measure were to fall completely. But as she also notes, while as-applied rather than facial invalidation may reflect greater judicial restraint, severing parts of statutes can amount to its own brand of judicial activism, upsetting the careful balance of competing interests the legislature may have struck. Better, perhaps, to strike the whole statute and let the legislature go back to the drawing board. And of course the distinction matters insofar as clarity and certainty are legal virtues: as-applied adjudication leaves it open whether the next case brought before a court, with its own set of facts, will or will not be covered by the prior as-applied decision under the statute. Still, there are statutes that cannot be adjudicated facially until experience shows more fully how they will work in practice. Judicial modesty entails limiting judicial speculation.

Regarding the factual predicate to the question whether the Roberts Court is making it more difficult to bring constitutional claims, Professor Metzger concludes that although “resistance to facial challenges is a recurring theme of the Roberts Court, . . . close analysis of the Court’s decisions suggests that its approach to facial and as-applied challenges is largely consistent with prior practice.” There is some evidence, of course, that the distinction matters in areas of particular interest to liberals—abortion and voting, especially, but campaign finance as well, which implicates the First Amendment, at least among conservatives and libertarians. And that brings us to a conclusion that Professors Metzger and Franklin both stress, that what matters most in determining whether the Court takes a facial or an as-applied approach is its substantive constitutional doctrine. As Professor Metzger puts it, “it is substantive constitutional law that determines not just the availability of facial challenges, but in addition the extent to which as-applied challenges represent a meaningful mechanism for asserting constitutional rights.”

If that is so, then attention should be directed ultimately to those substantive doctrines upon which the choice between facial and as-applied adjudication rests. The point emerges nicely in Professor

Franklin's brief discussion of a four-sentence concurrence by Justice Kennedy, joined by Justice Scalia, in the 2004 case of *Sabri v. United States*. There, Franklin observes, the two "pointedly declined to join the section of the majority opinion throwing cold water on facial challenges" in cases like *Lopez*, where the Court decided basic questions about whether Congress "had exceeded its legislative power under the Constitution. . . . For Justices Kennedy and Scalia," Franklin continues, "when 'basic questions' concerning 'legislative power' are at issue, the traditional preference for as-applied challenges ought to give way."

In other words, facial challenges are paradigmatically called for when the Court has before it something of a "First Principle," a "basic question" about whether Congress has the power at all to enact what it has enacted. That is certainly clear in a simple case like *Lopez*. But why not beyond that? The answer to that is clear too. It is because, with the New Deal constitutional revolution, the Court abandoned the doctrine of enumerated powers—and with it the limited presumption of constitutionality, necessary simply to get litigation off the ground, after which the presumption might easily be rebutted, and the burden would shift to the government to justify its action as both authorized, because in furtherance of an enumerated end, and necessary and proper. And the same is true with the scope of state police power, *mutatis mutandis*, which was once understood as granted mainly to secure rights, not to violate them, as with the statutes at issue in *Lawrence* and *Griswold*, two other simple and straightforward cases.

But the Progressive Era, culminating in the New Deal and modern liberalism, ended that simple and straightforward constitutionalism, replacing it with a broad conception of federal and state power, a political bifurcation of rights into "fundamental" and "nonfundamental," a robust presumption of constitutionality, a heavy burden to rebut that presumption, and judicial deference to the political branches to boot—all to facilitate the very social engineering the Constitution was otherwise written to prevent. As Rexford Tugwell, one of the principal architects of the New Deal, once put it: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document intended to prevent them."

And the great irony, of course, is that the liberals today who are concerned about the difficulties they imagine in bringing facial

challenges to protect rights are the very class of people who promoted and still promote the expansive governmental powers that threaten those rights. To be sure, government is appropriately involved in setting the rules for voting or drawing the lines between the rights of expectant women and unborn children. But when government is presumed to have authority over all that it touches today, then the principal restraint on overweening government that the Framers infused in the Constitution is lost, and with it our rights as well. The issue is thus far deeper than whether the Court is taking a facial or an as-applied approach to the case before it. It is about the substance of the matter—whether the Court has grasped the true Constitution.

