

William & Mary Bill of Rights Journal

Volume 18 | Issue 3

Article 4

Making Sense of Facial and As-Applied Challenges

Alex Kreit

Repository Citation

Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657 (2010), <http://scholarship.law.wm.edu/wmborj/vol18/iss3/4>

Copyright c 2010 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<http://scholarship.law.wm.edu/wmborj>

MAKING SENSE OF FACIAL AND AS-APPLIED CHALLENGES

Alex Kreit*

INTRODUCTION

In the conventional account of the basic principles of constitutional adjudication, constitutional challenges can be sorted into two distinct categories: “facial” challenges and “as-applied” challenges.¹ A facial attack is typically described as one where “no application of the statute would be constitutional.”² In contrast, courts define an as-applied challenge as one “under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff’s particular circumstances.”³

* Assistant Professor and Director, Center for Law and Social Justice, Thomas Jefferson School of Law. Thanks to the participants in the Thomas Jefferson School of Law Junior Faculty Writing Workshop as well as Matthew Adler, Joshua Douglas, Michael Rich, and Matt Schaefer. As this Article was going to press, the Supreme Court issued its decision in *Citizens United v. FEC*, in which the Justices engaged in a lengthy exchange concerning the facial and as-applied challenges doctrine. No. 08-205, slip op. (U.S. Sup. Ct. Jan. 21, 2010). Unfortunately, because of the timing, it was not possible to incorporate the relevant points from *Citizens United* into this Article. However, the case shines an even brighter light than many of the Court’s previous decisions on the problems facing the facial and as-applied challenges doctrine that I seek to highlight in this piece. And, although the Court does not address what I argue are the root causes of these problems, at least one aspect of Justice Kennedy’s majority opinion may provide reason for cautious optimism among critics of the facial and as-applied challenges doctrine. Specifically, Justice Kennedy acknowledges that “the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.” *Id.* slip op. at 14.

¹ See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 236 (1994).

² *Sabri v. United States*, 541 U.S. 600, 609 (2004).

³ *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995); see Dorf, *supra* note 1 at 236 (“Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances.”); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321–22 (2000) (summarizing the conventional account of facial and as-applied challenges); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 360 (1998) (“Litigants in the federal courts can attack the constitutionality of legislative enactments in two ways: they can bring a facial challenge to the law, alleging that it is unconstitutional in all of its applications, or they can bring an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts that their case presents.”).

This facial and as-applied distinction provides more than a simple descriptive account of two different results that a court might reach in a given case. Instead, the categories are believed to form the foundation for a set of substantive rules that determine when a court may employ one type of challenge or the other—when a court may strike down a statute in its entirety or only overturn the application of the statute in the case at hand.⁴ Under these rules, the law strongly favors as-applied challenges on the grounds that they are more consistent with the goals of resolving concrete disputes and deferring as much as possible to the legislative process.⁵ Facial challenges, on the other hand, should be used sparingly and only in exceptional circumstances.⁶ Perhaps the most well-known, succinct, and controversial⁷ formulation of this idea was the Supreme Court's statement in *United States v. Salerno* that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully" and will only succeed if a litigant can "establish that no set of circumstances exists under which the Act would be valid."⁸

This account of facial and as-applied challenges is by now a familiar part of the constitutional landscape and is generally accepted in the courts.⁹ Nevertheless, some of the most basic details regarding the characteristics of the facial and as-applied challenges categories and, in particular, how the preference for as-applied challenges actually operates, remain surprisingly unclear.¹⁰ For instance, do the rules regarding

⁴ See Fallon, *supra* note 3, at 1321.

⁵ See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190–91 (2008) (discussing the preference for as-applied challenges to facial challenges); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 55–56 (2006) ("The Court has explained that the act of striking down a statute on its face stands in tension with several traditional components of the federal judicial role, including a preference for resolving concrete disputes rather than abstract or speculative questions; a deference to legislative judgments; and a reluctance to resort to the 'strong medicine' of constitutional invalidation unless absolutely necessary."); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1348 (2005) ("As-applied adjudication, of course, carries with it important benefits. . . . [I]t ensures that courts do not make uncertain speculations about how a law operates outside of the facts generated by the controversy before it.").

⁶ See *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–30 (2006) (discussing the Court's preference for as-applied challenges); Fallon, *supra* note 3, at 1321 ("Traditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge . . ."); Isserles, *supra* note 3, at 361 ("As the Supreme Court has made clear on numerous occasions, facial challenges are appropriate, if at all, only in exceptional circumstances.").

⁷ See *infra* notes 10–16 (discussing criticisms of *Salerno*'s characterization of facial and as-applied challenges).

⁸ 481 U.S. 739, 745 (1987).

⁹ See *Wash. State Grange*, 128 S. Ct. at 1190 ("While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" (citation omitted)).

¹⁰ See Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 880 (2005) ("The distinction between facial and as-applied challenges is more illusory than

facial and as-applied challenges concern substantive constitutional law by limiting the adoption and use of constitutional tests that might lead to the facial invalidation of statutes?¹¹ Or do they relate exclusively to the remedial doctrine of severability,¹² which comes into play only after a court has applied the relevant constitutional test and found a violation?¹³ Or both?¹⁴ Is the key to distinguishing between facial and as-applied challenges the extent to which the court relies on the specific facts in the case at hand to reach its decision?¹⁵ If so, when is it appropriate for a court to consider something other than those specific facts? Is the choice between a facial and as-applied challenge one that the litigant makes when she brings her claim,¹⁶ or is it one that a court makes when it addresses her claim? Neither the case law, nor the academic literature, provides a satisfactory answer to these problems.¹⁷

This Article argues that these important questions remain unanswered because categorizing constitutional cases into “facial” and “as-applied” challenges, and relying on these categories to shape doctrine and inform case outcomes, is an inherently flawed and fundamentally incoherent undertaking. This is because the fate of a statute

the ready familiarity of the terms suggests. The nature of a ‘facial’ challenge is rarely explored in the case law; when a description is provided it usually is only the unhelpful description that such a challenge targets a statute ‘on its face.’”).

¹¹ See generally Gans, *supra* note 5 (discussing facial invalidation as a matter of substantive constitutional law and proposing criteria for determining whether to adopt constitutional rules that lead to facial invalidation).

¹² For an explanation of severability as a remedial doctrine, rather than a form of statutory construction, see David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 656–62 (2008).

¹³ See Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1387 (2000) (“At best, there is a distinction between ‘facial’ and ‘as-applied’ challenges that comes in at the remedial stage, but this is more aptly phrased as a distinction between facial invalidation (where the court completely repeals an invalid rule) and partial invalidation (where the court amends, rather than repeals, an invalid rule).”).

¹⁴ See Fallon, *supra* note 3, at 1342 (describing facial challenges as a product of the relevant doctrinal test and severability considerations).

¹⁵ See *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009) (finding that “a more complete and readily identifiable set of facts that can be evaluated and therefore that draws on a more nuanced application of the Virginia Act” was required in order to entertain an as-applied challenge); PAUL M. BATOR ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 662 (3d ed. 1988) (“Challenges to the validity of a statute as applied to specific facts . . . turn necessarily on a determination of what the adjudicative facts were . . . [and] can always be rephrased simply as an assertion of a federal right or immunity with respect to the operative facts.”).

¹⁶ See, e.g., *Chem. Waste Mgmt., Inc. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995) (“[W]e . . . are unable to reach the merits because petitioners have not made a proper facial challenge. . . . [I]f petitioners are to succeed, they must bring a constitutional challenge as applied specifically to them.”); Dorf, *supra* note 1, at 239 (“Under *Salerno*, a litigant bringing a facial rather than an as-applied challenge gains nothing.”).

¹⁷ See *infra* Part I (discussing the lack of clarity on this question among courts and scholars).

in the face of a constitutional challenge depends on distinct considerations—specifically, the relevant substantive doctrine and the remedial severability rules—that cannot be reduced to a single inquiry or set of rules. Conflating these independent concepts with one another under the “facial” and “as-applied” rubric has only served to confuse each and obscure the real issues that animate the outcome in a given case. Moreover, the as-applied and facial dichotomy has contributed to the increasing lack of clarity across constitutional law by creating an inconsistent and unwarranted presumption against the adoption of robust constitutional tests on the grounds that they might result in facial invalidation of statutes.

This phenomenon is perhaps most easily observed in the Court’s abortion jurisprudence. Beginning with the Supreme Court’s adoption in *Roe v. Wade*¹⁸ of a strict scrutiny standard for evaluating laws prohibiting abortions—which asks whether a statute is narrowly tailored to achieve a compelling government interest¹⁹—federal courts had consistently invalidated, or upheld, challenged abortion regulations in their entirety.²⁰ Justice Scalia called this practice into question, however, in a 1992 dissent from a denial of certiorari.²¹ Relying on the presumption in favor of as-applied challenges, as explained in *Salerno*, Scalia argued that a Guam law outlawing all abortions except upon confirmation by two independent doctors that the pregnancy would endanger the woman’s life or health could not be invalidated “on its face.”²² According to Scalia, this was because a facial challenge can succeed only where there is “no set of circumstances” in which the statute can be constitutionally applied and he could “see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb.”²³

Despite Justice Scalia’s seemingly convincing observation, the Court continued to assess the validity of abortion statutes in their entirety until 2006, when it signaled a shift in favor of as-applied abortion challenges in *Ayotte v. Planned Parenthood of Northern New England*.²⁴ The case involved a New Hampshire statute that required physicians to deliver written notification to a minor’s parents and wait forty-eight hours before performing an abortion on that minor.²⁵ New Hampshire conceded that

¹⁸ 410 U.S. 113 (1973).

¹⁹ *Id.* at 153–56.

²⁰ See Note, *After Ayotte: The Need to Defend Abortion Rights with Renewed ‘Purpose,’* 119 HARV. L. REV. 2552, 2555–57 (2006) (discussing the use of facial and as-applied challenges in the abortion context).

²¹ *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011–13 (1992) (Scalia, J., dissenting from denial of certiorari); see also *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1176–1181 (1996) (Scalia, J., dissenting from denial of certiorari).

²² *Ada*, 506 U.S. at 1012–13 (Scalia, J., dissenting from denial of certiorari).

²³ *Id.*; see also Rachel D. King, Comment, *A Back Door Solution: Stenberg v. Carhart and the Answer to the Casey/Salerno Dilemma for Facial Challenges to Abortion Statutes*, 50 EMORY L.J. 873, 885–87 (2001) (discussing the perceived tension between *Salerno* and the Court’s abortion jurisprudence).

²⁴ 546 U.S. 320, 323 (2006); see also *After Ayotte*, *supra* note 20, at 2257–58.

²⁵ *Ayotte*, 546 U.S. at 323–24.

the law encompassed some small number of cases in which pregnant minors would “need immediate abortions to avert serious and often irreversible damage to their health”²⁶ and that, under controlling precedent, “it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.”²⁷ In a unanimous opinion, the Court presumed the validity of its previous abortion cases²⁸ and, accordingly, quickly determined that the Act would be unconstitutional as-applied to minors in need of an emergency abortion to ensure their health.²⁹ It then turned its attention to the issue of remedy. The Court framed its remedial discussion by noting that the “normal rule” is that courts should employ “partial, rather than facial, invalidation”³⁰ to redress a constitutional violation and then proceeded to treat the distinction between facial and as-applied challenges as purely a question of remedy.³¹

Just one year later, however, the Supreme Court revisited the abortion debate in *Gonzales v. Carhart*,³² this time employing the presumption in favor of as-applied challenges to help shape the appropriate standard for determining whether there was a constitutional violation at all.³³ In *Carhart*, as in *Ayotte*, a group of physicians brought a pre-enforcement challenge to an abortion statute, the federal Partial-Birth Abortion Ban Act of 2003.³⁴ Writing for a five-justice majority, Justice Kennedy rejected the physicians’ claim entirely, citing, among other things, the presumption in favor of as-applied challenges.³⁵ Rather than focusing on remedy, which was not at issue, the Court concluded that the pre-enforcement “facial attack[] should not have been entertained in the first instance.”³⁶ Instead, the Court appeared to indicate, without holding explicitly, that the preference for as-applied challenges meant that only a woman (or her physician) who was facing a specific health risk could challenge the statute.³⁷ As Justice Kennedy explained, “the proper means to consider exceptions

²⁶ *Id.* at 328.

²⁷ *Id.* New Hampshire argued that the statute’s judicial bypass provision and the State’s “competing harms” laws would protect patients and physicians when a minor was in need of an immediate abortion, but the Supreme Court did not address this contention beyond noting that both the district court and circuit court had rejected the argument. *Id.*

²⁸ *Id.* at 323.

²⁹ *Id.* at 328.

³⁰ *Id.* at 329 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)).

³¹ *See id.* at 329–31 (discussing the issue of remedy in the context of “facial challenges” and outlining three principles for addressing the question).

³² 550 U.S. 124 (2007).

³³ *Id.* at 167.

³⁴ *Id.* at 132–33.

³⁵ *Id.* at 167.

³⁶ *Id.*

³⁷ *Richmond Med. Ctr., for Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009) (holding that a doctor could not challenge a Virginia abortion statute following *Carhart* because “[h]e has not indicated that he has any particular patient in mind, nor any discrete factual circumstance that is detailed by medical records or other similarly concrete evidence”). *But see Carhart*, 550 U.S. at 189 (Ginsburg, J., dissenting) (“Surely the Court cannot mean that no

[to the law] is by as-applied challenge” which he defined as those involving “discrete and well-defined instances [when] a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.”³⁸ In this view, the preference for as-applied challenges constrains the constitutional rule itself by forbidding general pre-enforcement challenges and requiring, instead, a “discrete case”³⁹ that involves a plaintiff who has suffered or is facing a particular health risk as a result of the act.⁴⁰

The point here, of course, is not to examine the merits of the result in either *Carhart* or *Ayotte*, but that the accounts of facial and as-applied challenges in each are fundamentally inconsistent with one another. In *Ayotte*, the facial and as-applied challenges doctrine is defined as a remedial consideration that helps to determine the appropriate course of action after a court has already found a constitutional violation.⁴¹ In *Carhart*, facial and as-applied challenges have nothing to do with remedy but rather relate to the circumstances in which a litigant may bring, and a court should “entertain,” a constitutional challenge in the first place.⁴²

The result is a “doctrine” of facial and as-applied challenges that is everything and nothing all at once—broad enough to govern both remedy and substantive law but so empty and meaningless that it only serves to obscure and deflect attention from the real issues at the heart of each. And, because facial and as-applied challenges doctrine is thought to offer generally applicable principles of constitutional adjudication, the problem touches on a wide range of areas across constitutional law.⁴³

To be sure, others have observed that the distinction between facial and as-applied challenges is not as clear-cut as it is traditionally made out to be.⁴⁴ Indeed, at least one

suit may be brought until a woman’s health is immediately jeopardized by the ban on intact D&E.”).

³⁸ *Carhart*, 550 U.S. at 167; *see also id.* (“In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.”).

³⁹ *See id.* at 168 (“The Act is open to a proper as-applied challenge in a discrete case.”).

⁴⁰ Especially troublesome is that the majority appeared to rely on the as-applied challenges presumption to avoid explaining the counters of what a “proper” challenge to the Act would entail. *See id.* at 189 (Ginsburg, J., dissenting) (“[T]he Court offers no clue on what a ‘proper’ lawsuit might look like.”); *id.* at 189–90 (“The Court envisions that in an as-applied challenge, ‘the nature of the medical risk can be better quantified and balanced.’ But it should not escape notice that the record already includes hundreds and hundreds of pages of testimony identifying ‘discrete and well-defined instances’ in which recourse to an intact D&E would better protect the health of women with particular conditions.” (internal citations omitted)).

⁴¹ *See supra* notes 30–31 and accompanying text.

⁴² *Carhart*, 550 U.S. at 167.

⁴³ Since 2006, for example, the Supreme Court has employed the doctrine of facial and as-applied challenges in the context of habeas corpus, campaign finance, and voting rights, among other issues. *See infra* Part III (discussing problems presented by the use of the facial and as-applied challenges dichotomy in different cases).

⁴⁴ *See* Fallon, *supra* note 3, at 1341 (“[F]acial challenges are less categorically distinct from as-applied challenges than is often thought.”); Franklin, *supra* note 5, at 67 (“[T]here is no rigid analytic dichotomy between as-applied and facial challenges.”).

scholar, Michael C. Dorf, has argued that the concepts of “as-applied and facial challenges may confuse more than [they] illuminate[.]”⁴⁵ No article, however, has focused on examining just why it is that the distinction between facial and as-applied challenges is so problematic, or made the case that the doctrine of facial and as-applied challenges should be abandoned entirely.⁴⁶ And, no article has explored the ways in which courts have used the distinction to obscure important issues and unduly restrain substantive constitutional doctrines. This Article aims to fill those gaps.

In Part I, I examine the deep disagreement and confusion among commentators and the courts about the facial and as-applied challenges categories. Part II advances the argument that any attempt to address these problems and construct a coherent doctrine of facial and as-applied challenges is inevitably destined to fail. This is because the categories are incapable of informing the two considerations that typically determine whether a court will strike a law down on its face: the relevant substantive constitutional doctrine and the principles of severability. Part III considers why, if my claims in Parts I and II are correct, the idea that there is a uniform set of principles that govern the use of facial and as-applied challenges has endured. To do this, I explore how the Court has used the doctrine in a number of different settings. I argue that, ultimately, the doctrine reveals itself as little more than a rhetorical device that Justices use to add support for decisions they would have reached without it. Further, I argue that the facial and as-applied challenges doctrine does more harm than good by obscuring the considerations that are truly important in resolving constitutional challenges and artificially tilting constitutional law toward narrower rules and outcomes. I conclude by urging the rejection of the idea that there is, or can ever be, a “law” of facial and as-applied challenges. I suggest instead that courts faced with these issues focus directly on the constitutional rights and rules at issue and principles of severability.

I. WHAT, EXACTLY, IS THE DIFFERENCE BETWEEN FACIAL AND AS-APPLIED CHALLENGES?

The law of facial and as-applied challenges claims to answer the question of when a court can and should strike a statute down in its entirety in response to a successful constitutional challenge. The Supreme Court’s position on this issue can be readily summarized in one word: rarely. The Court has stated its general preference for as-applied challenges consistently, albeit often without much elaboration as to exactly

⁴⁵ Dorf, *supra* note 1, at 294.

⁴⁶ In his seminal article *Facial Challenges to State and Federal Statutes*, Michael C. Dorf suggests abandoning the distinction between facial and as-applied challenges in the conclusion of the piece. *Id.* However, Dorf’s focus was on arguing against the validity of the *Salerno* rule and explaining the interaction between substantive constitutional law, institutional competence, and statutory interpretation in the resolution of facial challenges. *Id.* at 238. In this Article, I pick up Dorf’s brief suggestion and attempt to show in detail why courts should do away with the facial and as-applied challenges categories.

how the preference should be implemented.⁴⁷ It came closest to announcing a test to determine whether a facial challenge is appropriate in *United States v. Salerno* when it announced its “no set of circumstances” test, under which a facial challenge to a statute cannot succeed if it has even a single constitutional application.⁴⁸ Chief Justice Rehnquist, writing for the Court in *Salerno*, cited the First Amendment’s overbreadth doctrine as the sole exception to the this rule.⁴⁹

For the past two decades, most of the scholarly attention to facial and as-applied challenges has revolved around whether the *Salerno* test reflects the Court’s actual practice. Yet, scholars remain hopelessly at odds over what the *Salerno* rule, and the facial and as-applied challenges categories, even mean. Specifically, there is no consensus about whether facial and as-applied challenges doctrine governs severability, the structure of constitutional rights and rules, or some mixture of the two. Michael Dorf, for example, offered an early and compelling criticism of *Salerno* in a 1994 article, in which he argued that *Salerno* presented a “truly draconian” standard that would be nearly impossible for litigants to meet⁵⁰ but that its test did not, in fact, appear to be the law since courts regularly accepted facial challenges that he believed would fail the “no set of circumstances” test.⁵¹ Dorf argued that the *Salerno* test was, at bottom, about severability—an irrebuttable presumption that “if the Act has any constitutional applications, a court should construe them as a separate, constitutional Act.”⁵² According to Dorf, this presumption would cause almost every facial challenge to fail because a court will almost always be able to conceive of at least one circumstance in which the statute may be constitutionally applied.⁵³ As a result, it

⁴⁷ See, e.g., *United States v. Raines*, 362 U.S. 17, 20–21 (1960); *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912).

⁴⁸ *United States v. Salerno*, 481 U.S. 739, 745 (1987). Curiously, the “no set of circumstances” test did not seem relevant to the outcome of the *Salerno* case itself. Instead, the Court appeared to indicate that the challenged portion of the Bail Reform Act would be constitutionally valid in every case. See Dorf, *supra* note 1, at 240–42 (“At best [the “no set of circumstances” test is] . . . a rhetorical flourish to reassure the reader: Because the suit is, after all, a *facial* challenge, the reader need not worry that what is being upheld appears constitutionally questionable.”).

⁴⁹ *Salerno*, 481 U.S. at 745. For the argument that overbreadth does not present an exception to the (separate but related) rule that a litigant cannot successfully challenge a statute that may constitutionally be applied to her, see Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1. A more detailed account of this position, and of the overbreadth rule generally, is beyond the scope of this Article.

⁵⁰ See Dorf, *supra* note 1, at 239–41.

⁵¹ See *id.* at 271–76, 279–81 (arguing that *Salerno* is inconsistent with substantive due process and purpose-based constitutional doctrines).

⁵² *Id.* at 250.

⁵³ Dorf used the *Salerno* case itself as an example of why this is so. *Id.* at 240–42. *Salerno* involved a challenge to a provision of the federal Bail Reform Act that authorized the pretrial detention without bail of an indictee on the basis that no release conditions could assure “the safety of any other person and the community.” *Salerno*, 481 U.S. at 741 (quoting Bail Reform Act of 1984, 18 U.S.C. § 3141(e) (2006)). The respondents argued that pre-trial detention on

would leave litigants with little incentive to bring a facial challenge.⁵⁴ He argued, however, that in practice the Court did not actually follow the *Salerno* test in at least three areas of constitutional law: the Equal Protection Clause, fundamental rights, and doctrines that rely on legislative purpose.⁵⁵ This inconsistency, and the factors that motivated it, led Dorf to conclude that no single consideration governed the use of facial challenges, which, he argued, involves a mixture of substantive constitutional law, institutional competence and statutory interpretation.⁵⁶

Matthew Adler took the critique against as-applied challenges further by arguing that the very concept of an as-applied challenge was fundamentally flawed.⁵⁷ This is so, Adler claimed, because the Constitution exclusively “protects the rights-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules under which the action falls.”⁵⁸ For example, a person who has been punished for burning the American flag could succeed on a First Amendment challenge if she was convicted under a statute that prohibited flag burning, but not if she was convicted under a statute prohibiting arson. Thus, according to Adler, “[t]he very idea [of an as-applied challenge] is a mistake” because “every constitutional challenge involves the facial scrutiny of rules”⁵⁹ and the Supreme Court’s stated preference for as-applied challenges is wrong because it “trade[s] on the mistaken, albeit standard, notion that rule-applications can be properly described as unconstitutional.”⁶⁰

this basis violated the Fifth and Eighth Amendments. *Id.* at 746. The Court rejected both of these claims. *Id.* at 755. However, Dorf argued, it need not have gone that far to reject a facial challenge under the “no set of circumstances” test because “well established law allows a judge to set bail at an amount appropriate to deter flight”; thus, the statute could be constitutionally applied where a “defendant[] would flee regardless of how high bail is set.” Dorf, *supra* note 1, at 241; *see also* Metzger, *supra* note 10, at 883 (“The claim that a statute is unconstitutional in all its applications is usually quite implausible; a little imagination suffices to produce at least one potentially constitutional application; indeed often it produces a fair number of constitutional applications.”).

⁵⁴ Dorf, *supra* note 1, at 239 (“If *Salerno* really set forth the governing standard, however, litigants would rarely bring facial challenges.”).

⁵⁵ *Id.* at 238–39 (“[These] constitutional doctrines . . . are inconsistent with a practice of severing invalid applications of a statute.”); *see also* Gans, *supra* note 5, at 1348 (“*Salerno* ignores the fact that courts, throughout constitutional jurisprudence, craft strategic doctrines that preempt case-by-case review in an effort to make constitutional rights work better in practice, and this proves its undoing.”).

⁵⁶ Dorf, *supra* note 1, at 238–39.

⁵⁷ Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998) (“There is no such thing as a true as-applied constitutional challenge. The very idea is a mistake.”).

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 157.

⁶⁰ *Id.*; *see also* Adler, *supra* note 13, at 1387 (“The Adler Model is clearly inconsistent with the *Salerno* Doctrines. According to the Adler Model, all constitutional challenges are *facial* challenges.”).

Adler's view of the factors animating the facial and as-applied challenges distinction stands in stark contrast to Dorf's. Whereas Dorf interprets the distinction between the two categories (as conceived by the Court in *Salerno*) as turning on severability once a constitutional violation has been found,⁶¹ Adler believes that the difference lies in the nature of constitutional rights themselves—in particular, the extent to which one views the Constitution as protecting certain private behavior as such against all government intrusion or only protecting behavior from intrusion against constitutionally flawed statutes.⁶² Indeed, as Adler explains, his view of facial and as-applied challenges, and his critique of *Salerno*, “gives no primacy to the remedy of partial invalidation over the remedy of facial invalidation; which remedy is appropriate is an open question.”⁶³

In response to *Salerno*'s critics, Marc Isserles attempted to reconcile the case with the areas of law that Dorf and others had identified as inconsistent with *Salerno* by arguing that its “no set of circumstances” concept was not a test at all, “but rather a descriptive claim about a statute whose terms state an invalid rule of law.”⁶⁴ According to Isserles, *Salerno* does not restrict the circumstances in which courts can facially invalidate statutes.⁶⁵ Instead, certain constitutional doctrines lead courts to find defects

⁶¹ Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269, 279–91 (2000) (arguing that facial challenge issues usually can be reduced to questions about severability).

⁶² See Adler, *supra* note 13, at 1387–88.

⁶³ *Id.* at 1387. In response to Adler, Richard Fallon, Jr. argues that facial challenges are not “a distinct category of constitutional litigation” but are instead “best conceptualized as incidents or outgrowths of as-applied litigation.” Fallon, *supra* note 3, at 1324. In Fallon's view, as-applied challenges are those that rely on case-by-case specification of statutes to determine the multiple “subrules” of a statute and sever invalid from valid sub-rules to address the relevant constitutional violation. *Id.* at 1368, 1329–34. Fallon largely accepts Adler's central claim that rights are rights against rules, but argues that the process of identifying and severing subrules accounts for the judicial preference for as-applied challenges. *Id.* at 1329. But see Adler, *supra* note 13, at 1381–84 (arguing that Fallon's description of the use of subrules and severability is imprecise). With respect to facial challenges, Fallon insightfully notes that there is no single, trans-doctrinal formula for identifying the conditions for a facial challenge to succeed and argues that the attempt to outline a single theory of facial and as-applied challenges is largely unhelpful. See Fallon, *supra* note 3, at 1324 (“[T]he incidence and success of facial challenges are not—as the debate between Justices Stevens and Scalia suggests—governed by any general formula defining the conditions for successful facial challenges.”). However, echoing the unhelpful blending of severability and substantive law in the as-applied and facial dichotomy, Fallon claims that severability and substantive constitutional rules are part of a single inquiry that controls the use of facial challenges in each area of constitutional law. See *id.* at 1351 (“In other words, demands for relatively full specification [of statutory subrules] and limits on severability are aspects of the particular constitutional tests developed by the Supreme Court to enforce specific constitutional provisions.”); *id.* at 1356 (“[D]ebates about whether a specific statute should be deemed invalid on its face . . . [involve] issues about the appropriate framing and implementation of particular doctrinal tests.”).

⁶⁴ Isserles, *supra* note 3, at 364.

⁶⁵ *Id.* at 385–86.

in the statutes themselves, independent of any specific applications.⁶⁶ A successful challenge under one of these tests—which Isserles terms a “valid-rule” challenge⁶⁷—“renders every conceivable statutory application invalid”⁶⁸ and thus is consistent with *Salerno*. Although Adler and Isserles ultimately differ in their view of *Salerno*,⁶⁹ similar to Adler, Isserles sees the relevant substantive constitutional test as the central factor underlying the distinction between facial and as-applied challenges.⁷⁰

As this brief overview indicates, commentators are in disagreement over whether the facial and as-applied challenges categories are driven primarily by severability,⁷¹ the relevant substantive constitutional doctrine,⁷² or a mixture of the two. Notwithstanding this lack of agreement on the foundational issue of what differentiates the facial and as-applied challenges categories from one another, the great majority of scholarly attention in this area continues to focus on attempting to determine when facial invalidation of statutes is appropriate as a general matter,⁷³ or whether a particular area of the law is “consistent” with the preference for as-applied adjudication.⁷⁴

The treatment of facial and as-applied challenges in the judiciary, meanwhile, consists almost exclusively of debates over whether the Court is being faithful to the presumption in favor of as-applied challenges in a given case. Any attempt to explain what this presumption actually means is glaringly absent from these exchanges.⁷⁵

⁶⁶ *Id.* at 386.

⁶⁷ *Id.* at 386–87.

⁶⁸ *Id.* at 397.

⁶⁹ Adler, *supra* note 13, at 1390 (disagreeing with Isserles’s claim that *Salerno* can be reconciled with the areas of the law in which the Supreme Court has sustained facial challenges).

⁷⁰ Isserles, *supra* note 3, at 451–52 (arguing that constitutional tests are a primary factor, along with the terms of the statute under consideration and strategic choices made by a litigant, in distinguishing between facial and as-applied challenges).

⁷¹ See, e.g., Dorf, *supra* note 61, at 279–91 (arguing that facial challenges issues can usually be reduced to questions about severability); Metzger, *supra* note 10, at 887 (“[E]xisting scholarship generally agrees that the debate regarding the availability of facial challenges is, at bottom, fundamentally a debate about severability.”).

⁷² See, e.g., Gans, *supra* note 5, at 1341 (“*Salerno* . . . prohibits courts from invalidating a statute on its face because invalidation is a better means of implementing the Constitution than case-by-case adjudication.”); Isserles, *supra* note 3, at 387 (“Finally, principles of statutory severability are not relevant to the determination of facial invalidity under a valid rule facial challenge . . .”).

⁷³ Franklin, *supra* note 5, at 55 (“[W]e can ask the question that has preoccupied courts and scholars for many years, particularly in the individual rights context: In what circumstances should a statute be struck down on its face?”); see also Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 HOFSTRA L. REV. 647 (2002).

⁷⁴ See Metzger, *supra* note 10, at 876–77 (considering whether the facial challenges or as-applied challenges are more appropriate in cases involving Congressional power).

⁷⁵ Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 774 (2009) (“Unfortunately, the Roberts Court has not matched its consistency in preferring as-applied constitutional adjudication with clarity about what this preference means in practice.”).

Moreover, individual Justices often appear to switch between defending, distinguishing, and outright ignoring the preference without explanation when it suits their purposes.

*City of Chicago v. Morales*⁷⁶ is illustrative of the superficial manner in which the Court addresses facial and as-applied challenges and provides a useful entry point for examining the flaws inherent in the use of the facial and as-applied challenges categories. In *Morales*, the Court engaged in perhaps its most detailed discussion of facial and as-applied challenges in recent years, with Justices Stevens, Breyer, and Scalia, each weighing in on the issue at length.⁷⁷ Yet, none of the opinions examined what factors actually distinguish the two concepts and instead argued over whether the majority's decision was consistent with the "rules governing facial challenges."⁷⁸

The case involved a challenge to a Chicago ordinance that made it a crime for two or more people, at least one of whom a police officer reasonably believed to be "a criminal street gang member," to remain in a public place "with no apparent purpose" after the officer had ordered them to disperse.⁷⁹ Justice Stevens, writing for a six-Justice majority on the merits and a three-Justice plurality on the as-applied challenges issue, found the law unconstitutionally vague and invalid in its entirety because it did not establish minimal guidelines for law enforcement, and thereby gave "absolute discretion to police officers to decide what activities"⁸⁰ the law prohibited.

In dissent, Justice Scalia argued at some length that the result should have been foreclosed by *Salerno*'s "no set of circumstances" standard.⁸¹ He devoted the majority of this discussion to defending *Salerno*'s status as settled law, appearing to take it almost as a given that the standard had not been met.⁸² Indeed, according to Scalia, the majority's approach to facial challenges was so far off the mark that it "transposed the burden of proof" and required the city to show that the ordinance was "valid in all its applications."⁸³

Justice Stevens, for his part, appeared to accept Scalia's charge that striking down the Chicago ordinance in its entirety was inconsistent with *Salerno*. Instead, he argued that *Salerno*'s "test" was merely dicta and had never been the decisive factor in any

⁷⁶ 527 U.S. 41 (1999).

⁷⁷ *Id.* at 52–56 (plurality opinion); *id.* at 71–72 (Breyer, J., concurring); *id.* at 74–83 (Scalia, J., dissenting); see also Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 159–61 (providing an overview of the *Morales* Court's discussion of the facial and as-applied challenges issue).

⁷⁸ *Morales*, 527 U.S. at 74 (Scalia, J., dissenting).

⁷⁹ *Id.* at 47 (majority opinion) (outlining the provisions of the ordinance).

⁸⁰ *Id.* at 61 (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 63 (Ill. 1997)).

⁸¹ *Id.* at 74 (Scalia, J., dissenting). Justice Scalia's argument against the use of a facial challenge in the case led Justice Stevens to describe the first portion of Scalia's dissent as "virtually a facial challenge to the facial challenge doctrine." *Id.* at 55 n.22 (plurality opinion). Indeed, Scalia indicated that he believed the whole proposition of a court striking a statute down in its entirety was "highly questionable." *Id.* at 74 (Scalia, J., dissenting).

⁸² *Id.* at 74–80.

⁸³ *Id.* at 81.

Supreme Court case.⁸⁴ Justice Stevens did not, however, propose an alternative approach to guide the Court in employing facial challenges beyond concluding that “a facial challenge” was “appropriate” in the case before the Court because “vagueness permeate[d] the ordinance.”⁸⁵ Moreover, Stevens argued, even if the restrictive *Salerno* standard applied to federal courts’ interpretations of federal statutes, it was the Illinois Supreme Court that had struck the ordinance down and state courts should not be bound by *Salerno* because it is a “prudential doctrine.”⁸⁶ Strikingly absent from Stevens’s opinion was any discussion of what differentiated facial and as-applied challenges or an explanation of how and in what sense the Chicago ordinance could constitutionally be applied.

Justice Scalia provided the sole account of how the law could be constitutionally applied and, accordingly, the sole explanation for why it could not be struck down in its entirety under *Salerno*. The discussion came at the very end of Scalia’s treatment of the facial and as-applied challenges issue.⁸⁷ He began his analysis by reiterating *Salerno*’s proposition that under the “normal criteria for facial challenges,” the government “can defeat [a] facial challenge by conjuring up *a single valid application* of the law.”⁸⁸ From there, true to that standard, Scalia proceeded to offer a single, somewhat elaborate, example of what he believed to be a set of facts in which the ordinance could be constitutionally applied. Scalia envisioned a set of facts reminiscent of the musical *West Side Story*, in which a street gang (“the Jets”) is standing around “staking out their turf” by “flashing gang signs and displaying their distinctive tattoos to passersby” when, pursuant to the ordinance, a police officer orders them to disperse but they fail to do so.⁸⁹ Scalia’s explanation for why it would be constitutional to apply the ordinance in that situation was limited to the following comment:

Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That

⁸⁴ *Id.* at 55 n.22 (plurality opinion). Strangely, despite arguing that “[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation,” Justice Stevens ultimately pulled back from this position by concluding that the Court did not need to “resolve the viability of *Salerno*’s dictum” and acknowledged the (albeit doubtful) possibility that it may “be appropriate for the federal courts to apply the *Salerno* standard in some cases.” *Id.* at 55–56 n.22.

⁸⁵ *Id.*

⁸⁶ *Id.* (“[T]he threshold for facial challenges is a species of third party . . . standing, which we have recognized as a prudential doctrine . . .”).

⁸⁷ *Id.* at 80–82 (Scalia, J., dissenting).

⁸⁸ *Id.* at 81.

⁸⁹ *Id.* at 81–82.

should settle the matter of respondents' facial challenge to the ordinance's vagueness.⁹⁰

Far from settling the matter, however, Justice Scalia's conclusory statement that his example represents a valid application of the Chicago ordinance, and accordingly precludes a "facial" challenge under *Salerno*, only raises questions. This is because, contrary to Scalia's conclusion, it is by no means self-evident that the ordinance could constitutionally be applied to his *West Side Story* example. That conclusion only follows if we accept two unstated assumptions about as-applied and facial challenges: one about the nature of constitutional rights and the other about the nature of severability. To see why this is so, consider: what does it mean for a law to have constitutional applications?

With respect to the nature of substantive constitutional rights, Justice Scalia concludes that the Chicago ordinance could have constitutional applications because activity that could constitutionally be punished generally (such as the Jets example) also falls under the ordinance.⁹¹ On this view, it would only be unconstitutional to apply the ordinance to individuals who were engaged in conduct that was constitutionally immune from punishment under *any* statute. Though Scalia avoids this point, along with the question of when a litigant would be able to bring a successful as-applied challenge to the Chicago ordinance under his approach,⁹² it follows from his analysis. According to Scalia, the reason it would be constitutional to apply the Chicago ordinance in his example is that the Jets' "*conduct* [would] justif[y]"⁹³ a dispersal order. Therefore, only people whose conduct does not justify punishment—those who "would not have known they had it coming"⁹⁴—would be able to claim the ordinance could not be applied to them. Importantly, instead of providing a justification for this view of constitutional rights—in which the Constitution is concerned exclusively with conduct and not laws⁹⁵—Justice Scalia fails to address the matter entirely and instead obscures the issue amidst a detailed discussion of "facial" and "as-applied" challenges doctrine.

The amorphous presumption in favor of as-applied challenges, however, has no bearing on Scalia's conduct-oriented assumption about constitutional rights. An equally plausible account of the constitutional right at issue in *Morales* would render the conduct of an individual punished under the Chicago ordinance irrelevant. Under

⁹⁰ *Id.* at 82.

⁹¹ *Id.* at 81.

⁹² Though Justice Scalia argues that it is "doubtful whether some of these respondents could even sustain an *as-applied* challenge on the basis of the majority's own criteria," he does not come to a firm conclusion on even that point, let alone explain what would be required for an as-applied challenge in his view. *Id.* at 82–83.

⁹³ *Id.* at 82 (emphasis added).

⁹⁴ *Id.*

⁹⁵ See Monaghan, *supra* note 49, at 5 (discussing this view of as-applied challenges as involving "fact-dependent claims of privilege").

this view, the relevant constitutional rule would grant individuals a right not to be punished pursuant to a law that is insufficiently clear as to what conduct it prohibits, regardless of whether that person's conduct could be punished under a different statute. Justice Breyer made a similar point in his *Morales* concurrence in which he argued the Court's decision was not inconsistent with *Salerno*.⁹⁶ As Breyer explained, "[t]he ordinance is unconstitutional, not because a policeman applied [his] discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case."⁹⁷ Indeed, it seems that a vagueness doctrine would necessarily be concerned with statutes rather than actions. After all, the problem in these cases is not that a person's actions are "vague," or a police officer's dispersal order is "vague," it is that the law (or some portion of the law) is vague. It is that the law itself fails to give constitutionally sufficient notice of what it prohibits. Under this view of the right, *all* applications of the insufficiently clear Chicago ordinance—including Justice Scalia's *West Side Story* hypothetical—would be unconstitutional and *Salerno*'s "test" would be met.

Assuming, however, that Justice Scalia was correct that the Chicago ordinance could be constitutionally applied in some circumstances but not others, his conclusion that striking the law down in its entirety could be done only by "ignoring our rules governing facial challenges"⁹⁸ requires making a second assumption: that unconstitutional applications *always* can be severed from a statute. Indeed, Scalia argues that a single example of a constitutional application of the ordinance alone should prevent the Court from striking it down in its entirety.⁹⁹ But, he says nothing about how constitutional violations under the ordinance could be remedied or how the ordinance's constitutional and unconstitutional applications should be severed from one another. Would the law remain unchanged despite its unconstitutional applications, thereby forcing citizens with the choice between complying with an unconstitutional dispersal order and refusing and hoping for the best in court? If the unconstitutional applications should be severed, could it be done without a significant judicial re-drafting of the law?¹⁰⁰ Scalia was not alone in his failure to address these questions. Indeed, despite the central role that "facial" and "as-applied" challenges played in *Morales*, none of the opinions even so much as *mentioned* the issue of severability. The failure of the Justices to address the issue—which many commentators argue is a central, if

⁹⁶ *Morales*, 527 U.S. at 71 (Breyer, J., concurring).

⁹⁷ *Id.*; see also *id.* ("The city of Chicago may be able validly to apply some *other* law to the defendants in light of their conduct. But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than could it apply an (imaginary) statute that said, 'It is a crime to do wrong,' even to the worst of murderers.").

⁹⁸ *Id.* at 74 (Scalia, J., dissenting).

⁹⁹ *Id.* at 82 ("That should settle the matter of respondents' facial challenge to the ordinance's vagueness.").

¹⁰⁰ Cf. Gans, *supra* note 12, at 697 ("[O]verreliance on as-applied challenges may force courts to perform radical surgery on the statutes they invalidate, a task for which they are ill equipped.").

not *the* central, factor in distinguishing facial and as-applied challenges¹⁰¹—reveals the depth of confusion over what the facial and as-applied challenges categories even mean, let alone the nature of the “rules” that govern their use.

Despite deep uncertainty about these fundamental issues, the distinction between “facial” and “as-applied” challenges continues to play an important role in the courts in a wide variety of substantive areas of constitutional law. Federal appeals courts generally describe *Salerno*’s “no set of circumstances” concept as the controlling test for resolving facial challenges across almost all constitutional doctrines.¹⁰² And, while the Supreme Court recently acknowledged disagreement among the Justices over the continuing vitality of the *Salerno* formulation,¹⁰³ it continues to rely on the distinction between facial and as-applied challenges and, in particular, the preference for as-applied challenges, in guiding its decisions.¹⁰⁴

As the discussion of *Morales* above demonstrates, however, it is surprisingly unclear what this preference actually means. Courts often seem to be talking past one another in their discussions of the issue—sometimes treating it as a preference for severability, sometimes as a rule governing substantive constitutional rights, and still other times as a limitation on the use of pre-enforcement challenges.¹⁰⁵ The result is a facial and as-applied challenges doctrine that distracts and detracts from the analysis

¹⁰¹ See *infra* notes 146–49 and accompanying text (discussing commentators who have advanced this position).

¹⁰² See *Morales*, 527 U.S. at 80 (Scalia, J., dissenting) (“Unsurprisingly, given the clarity of our general jurisprudence on this point, the Federal Courts of Appeals *all* apply the *Salerno* standard in adjudicating facial challenges.”); *United States v. Kaczynski*, 551 F.3d 1120, 1124–25 (9th Cir. 2009) (applying the *Salerno* standard); *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150 (9th Cir. 2008) (“Thus, a policy of general applicability is facially valid unless it can *never* be applied in a constitutional manner.”); *Franklin*, *supra* note 5, at 56 (“Lower courts in many cases have treated *Salerno* as setting forth an across-the-board threshold test for the availability of facial challenges, regardless of the constitutional clause being relied upon by the claimant, with the exception of First Amendment overbreadth claims and (in most circuits) abortion rights claims.”); *id.* at 56 n.76 (collecting cases).

¹⁰³ *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (“While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a ‘plainly legitimate sweep.’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739–40 (1997) (Stevens, J., concurring in judgements))).

¹⁰⁴ See, e.g., *id.* (holding that the challenged statute was facially valid under either the *Salerno* standard or a more limited standard, and that facial challenges fail where a statute has a “plainly legitimate sweep”); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735 (2006) (arguing that several early Roberts Court decisions indicate that the Court is increasingly relying on the facial and as-applied challenges distinctions); Metzger, *supra* note 75 (discussing the Roberts Court’s increased reliance on the facial and as-applied challenges doctrine).

¹⁰⁵ See, e.g., *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009) (rejecting a challenge where “the Virginia Act ha[d] never been applied, nor threatened to be applied”).

of the underlying issues in a case, rather than informing it. The problem goes beyond merely contributing to confusion in the law. In recent years, courts have begun to employ the amorphous preference for as-applied challenges to shape substantive constitutional doctrines, in favor of restrained rules and against more robust ones.¹⁰⁶ This is not to say that narrow constitutional rules are inherently problematic—sometimes a narrow rule may represent the most faithful realization of the relevant constitutional clause. The trouble is that in using the so-called “preference” for as-applied challenges to justify a narrow constitutional rule, courts have begun to avoid and obscure the real issue: whether the particular constitutional provision is best implemented by a narrow rule or a broader one. Before considering this problem, however, it is useful to take a more detailed look at exactly why the “facial” and “as-applied” terms are inherently indisposed to a precise definition.

II. IS A COHERENT LAW OF FACIAL AND AS-APPLIED CHALLENGES POSSIBLE?

While the current account of facial and as-applied challenges fails to delineate the roles that severability and the nature of substantive constitutional rights play in the distinction between the two categories, it does not necessarily follow that the project of building a set of rules to govern when each type of challenge may be used is inherently flawed. One might argue that a uniform set of rules for facial and as-applied challenges is workable and that the problem today is simply that the categories have not yet been sufficiently well defined. If courts and commentators could just develop a clearer understanding of the relationship between substantive constitutional rules and severability in the use of facial and as-applied challenges, the claim might go, then a single set of rules for resolving when a court should strike down a law in its entirety would be workable. The difficulty with this position is that a deeper examination of both constitutional rights (and the related tests and rules that give effect to those rights) as well as the principles of severability reveals that attempting to create a single inquiry or uniform set of rules to govern facial and as-applied challenges is both futile and undesirable. While the “facial” and “as-applied” challenges labels may be a convenient way to describe the outcome in a given case, that outcome ultimately depends on a unique mixture of the facts of the case, the relevant constitutional protection, and principles of severability. A “doctrine” of facial and as-applied challenges would add nothing to these inquiries. Indeed, as we will see in Part III, the effort to create one has done much to detract from them.

A. Facial and As-Applied Doctrine as a Framework for Interpreting Constitutional Rights?

Consider, for example, a hypothetical law that makes it a crime to “be an immediate family member of a person who commits a felony.” Avon conspires with his

¹⁰⁶ See, e.g., *Wash. State Grange*, 128 S. Ct. at 1194–96 (holding that possibility that voters might misinterpret candidates’ party designation was not sufficient to strike down state initiative controlling procedure for primaries).

nephew D'Angelo to sell heroin in Baltimore, Maryland. After a meticulous and dramatic investigation, the police learn that D'Angelo is scheduled to transport a large quantity of drugs from Philadelphia to Baltimore at Avon's instruction. The police stop D'Angelo while he is driving back to Baltimore with the drugs and convince him to turn state's evidence. They then arrest Avon and charge him with both conspiracy to distribute a controlled substance and violating our hypothetical law. Avon pleads guilty to the conspiracy charge but challenges the "immediate family member" law on the grounds that it violates the substantive due process prohibition against vicarious criminal liability in the absence of personal guilt.¹⁰⁷ How might the facial and as-applied challenges categories help inform the resolution of Avon's claim?

Avon's challenge to the law will likely rise or fall based on how one views the Constitution's prohibition against punishment based on "guilt-by-association." On the one hand, Avon can argue that the personal guilt rule means the government may not impose criminal liability *on the basis of* having a non-criminal relationship with someone who commits a crime. From this view, the "immediate family member" law would be inherently flawed because it provides for criminal punishment on precisely that prohibited basis. The fact that, in this particular case, Avon did have a punishable relationship with D'Angelo and a direct involvement in D'Angelo's felonious drug activity would be irrelevant to his constitutional claim.¹⁰⁸ Our hypothetical law, by its terms, makes being the family member of someone who has committed a felony the sole basis for punishment. Accordingly, while there would be no doubt about the constitutionality of Avon's conspiracy conviction, the punishment imposed by our hypothetical statute would be an unconstitutional violation of the personal guilt requirement.¹⁰⁹

Alternatively, however, we could view the personal guilt requirement as granting a much more limited right: the right not to be punished for another's conduct if the

¹⁰⁷ See *Scales v. United States*, 367 U.S. 203, 224–25 (1961) (holding that the Constitution requires "personal guilt" to impose criminal punishment in the form of a "sufficiently substantial" relationship between the defendant's actions and the third party's crimes); see also Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585 (2008) (discussing the due process personal guilt requirement). I have decided to use this relatively obscure and undefined constitutional rule in order to minimize unnecessary doctrinal baggage in analyzing the difficulties in using the "facial" and "as-applied" concepts to resolve questions of substantive constitutional law and severability.

¹⁰⁸ See *Scales*, 367 U.S. at 225–26 (noting that the resolution of a personal guilt claim turns on "an analysis of the relationship between the [defendant] and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability").

¹⁰⁹ Cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (holding in the context of a vagueness challenge that, while the activity in the case was "clearly within the city's constitutional power to prohibit . . . [i]t cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed").

accused did not, *in fact*, have a sufficiently substantial connection to that conduct.¹¹⁰ Viewing the right this way, the law itself would be almost a peripheral concern. Instead of looking at the basis of punishment under the statute, a court tasked with resolving Avon's challenge would, to use one oft-cited definition of an as-applied challenge, "'ask[] simply whether the challenger's activities are protected.'"¹¹¹ If the right were characterized in this fashion, Avon would be out of luck as his conspiratorial relationship with D'Angelo indisputably puts that relationship well within the constitutional reach of the criminal law.¹¹² Only a relative who was not involved in Avon and D'Angelo's drug conspiracy would be able to successfully challenge a conviction under the "immediate family member" law.¹¹³

As this discussion demonstrates, the status of our hypothetical statute would depend on the nature of the constitutional right against punishment in the absence of personal guilt. If the right meant that the government could not punish someone on the basis of having a non-criminal relationship, such as a friendship or family relationship, with someone who has committed a crime, then the law would be incapable of a single constitutional application. If, however, the right meant only that an individual could not be punished for another's crimes unless he had a non-tenuous relationship with those crimes, there would be many constitutional applications of the law.

Which view of the personal guilt requirement is the better one? Whatever the best approach is, it would seem that the doctrine of facial and as-applied challenges would be an unhelpful distraction to reaching an answer. After all, either outcome in the hypothetical scenario above would be entirely consistent with the letter of *Salerno*'s "no set of circumstances" test. Instead, the answer presumably should turn on which approach would most faithfully implement the underlying constitutional protection. On this view, facial and as-applied challenges doctrine would be agnostic on substantive constitutional law and would at most govern the severability of constitutional applications in a statute when a court finds a constitutional violation.¹¹⁴

As discussed above, however, courts have at times appeared to treat the presumption in favor of as-applied challenges as a presumption or rule about the nature of all constitutional rights.¹¹⁵ Specifically, some courts seem to have implied that they view

¹¹⁰ See *Scales*, 367 U.S. at 224–25.

¹¹¹ See Monaghan, *supra* note 49, at 5 (citing GERALD GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 1187 (10th ed. 1980)).

¹¹² *Scales*, 367 U.S. at 227 (holding that the personal guilt rule permits liability based on an association with criminal acts where the defendant "knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities").

¹¹³ Dorf has referred to this conception of constitutional rights as a "privileged-conduct-only rule," while Monaghan has described it as a "fact-dependent claim[] of privilege." Dorf, *supra* note 1, at 244–45; Monaghan, *supra* note 49, at 5.

¹¹⁴ Cf. Isserles, *supra* note 3, at 364 ("*Salerno*'s 'no set of circumstances' [rule] is not a 'test' that prescribes an application-specific method of determining constitutional invalidity, but rather a descriptive claim about a statute whose terms state an invalid rule of law.").

¹¹⁵ See *infra* Part II.B; see also *United States v. Raines*, 362 U.S. 17, 21 (1960) ("[The Court is bound by the rule] never to formulate a rule of constitutional law broader than is

the presumption in favor of as-applied challenges to mean that constitutional rights are conduct-oriented rights.¹¹⁶ Thus, one might argue that the presumption in favor of as-applied challenges should mean that constitutional rights protect only individual conduct or action and, to resolve constitutional challenges, courts should engage in a fact-specific inquiry to determine whether the conduct at issue was constitutionally “protected.” Protected conduct would be immune from government regulation under any and all circumstances. Unprotected conduct, by contrast, could be regulated under any and all applicable laws. A statute would have constitutional applications—and accordingly be immune from facial invalidation—if some of the conduct regulated by the statute was not itself constitutionally protected. Michael Dorf has referred to this view of constitutional rights and adjudication as a “privileged-conduct-only rule”¹¹⁷ and Matthew Adler as an “act-shielding” structure of rights.¹¹⁸ The effect of the approach would be to “prohibit[] courts from invalidating a statute on its face because invalidation is a better means of implementing the Constitution than case-by-case adjudication.”¹¹⁹ As discussed above, this conduct-oriented view of constitutional rights was at the heart of Justice Scalia’s dissent in *Morales*. Recall that there Scalia stated, and even the Justices in the majority seemed to agree, that the Chicago anti-loitering ordinance had constitutional applications simply because it encompassed conduct that would be within the city’s constitutional power to prohibit under a different ordinance.¹²⁰

The trouble with adopting a universally applicable rule about the nature of constitutional rights like the conduct-oriented view is that it is at odds with the way courts treat a variety of constitutional rights.¹²¹ Perhaps the most obvious examples are constitutional doctrines that look to legislative purpose.¹²² Under purpose-based rules

required by the precise facts to which it is to be applied.”) (quoting *Liverpool, N.Y. & Phila. S.S. Co., v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885)).

¹¹⁶ See, e.g., *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009) (holding that doctor had no standing to bring an as-applied challenge to Virginia’s ban on partial-birth abortion because he could not allege specific conduct or patients to which the ban had been applied).

¹¹⁷ Dorf, *supra* note 1, at 244–45.

¹¹⁸ Adler, *supra* note 57, at 33 (“[C]onstitutional rights are not act-shielding.”).

¹¹⁹ Gans, *supra* note 5, at 1341.

¹²⁰ *City of Chicago v. Morales*, 527 U.S. 41, 82 (1999) (Scalia, J., dissenting) (“Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That should settle the matter of respondents’ facial challenge to the ordinance’s vagueness.”).

¹²¹ See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (arguing that courts employ prophylactic rules in a number of settings to secure constitutional rights).

¹²² See Isserles, *supra* note 3, at 440–41 (“[W]ith one curious exception, all of the Court’s notable decisions invalidating statutes on the grounds of illegitimate governmental purpose have been facial invalidations.”).

“[s]tatutes that seem innocuous on their face will nonetheless be held unconstitutional if the court concludes that the legislature enacted them” for an impermissible reason.¹²³ Courts have adopted purpose-based limits on legislative action as a means of implementing a variety of constitutional rights,¹²⁴ from the Equal Protection Clause¹²⁵ to Free Exercise Clause.¹²⁶ Of course, by definition, constitutional rules focused on legislative purpose grant rights that do not depend upon the protected status of a litigant’s own conduct. This is because purpose-based rules give individuals the constitutional right not to be targeted by the government for the wrong reasons.¹²⁷ If a particular statute was enacted for an invalid reason, the deficiency will “pervade[] all of the provision’s applications”¹²⁸ and the statute will have no constitutional applications.

It is not surprising, then, that the improper purpose doctrine is often cited as a counter-example to the claim that facial challenges are “infrequent.”¹²⁹ The key point for our purposes, however, is not that purpose-based restrictions inevitably lead to “facial challenges” to statutes¹³⁰ or that they might conflict with *Salerno*, but that

¹²³ Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1785 (2008).

¹²⁴ See Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 6–10 (2007) (providing an overview of some of the areas where the court has employed a purpose-based test to enforce constitutional provisions).

¹²⁵ See, e.g., *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1044–45 (11th Cir. 2008) (explaining the established rule that courts should hold an otherwise valid statute unconstitutional if racial discrimination was a substantial or motivating factor for the enactment of the law).

¹²⁶ See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) (striking down an ordinance that regulated animal slaughter under the Free Exercise Clause because “[t]he record . . . compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances”); see also *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding unconstitutional an amendment to the Food Stamp Act that denied food stamps to households composed of unrelated persons on the grounds that its purpose was to prevent hippies from participating in the program); Nelson, *supra* note 123, at 1861–71 (discussing the relationship between improper legislative purpose and the unconstitutional conditions doctrine).

¹²⁷ See Adler, *supra* note 57, at 26–29 (explaining the Equal Protection Clause “discriminatory purpose” rule and noting that it does not protect individual actions but instead grants a right to be free from impermissible government statutes).

¹²⁸ Dorf, *supra* note 1, at 279.

¹²⁹ See, e.g., Nelson, *supra* note 123, at 1876–79 (“[T]he rise of purpose tests in a particular area of constitutional law will correlate with the rise of facial challenges in that area. This linkage may help account for some of the alleged mismatch between the Court’s rhetoric about the rarity of successful facial challenges and the Court’s actual practices.”).

¹³⁰ Indeed, while purpose-based rules often result in the invalidation of a statute in its entirety, they can also give rise to as-applied challenges where the improper purpose is attributable to the government actor implementing the law and not the one that adopted it. A prime example here is the law of vindictive prosecution, which prevents criminal prosecutions under otherwise valid statutes if the prosecution is pursued because of an improper motive. The doctrine prevents the government from adding new charges after a conviction to retaliate

they are irreconcilable with the view that the constitution only grants rights to individuals to engage in certain conduct. Purpose-based restrictions demonstrate that the constitution can restrict government action as such and allow litigants to succeed in a constitutional challenge to one statute even if their conduct could be regulated under a different statute.

Moreover, constitutional rules that focus on the government's action rather than an individual's conduct are by no means limited to the improper purpose doctrine. In the context of the Commerce Clause, for example, the Supreme Court held a provision of the Gun Free School Zones Act (GFSZA) unconstitutional on the grounds that it regulated noncommercial activity, which was outside the scope of Congress's authority.¹³¹ The provision at issue in *United States v. Lopez* made gun possession within 1,000 feet of a school a federal crime.¹³² The Court struck down the provision in its entirety, concluding that possession of a gun in a school zone was an act that "by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."¹³³ The constitutional problem was not that Lopez's conduct in the case was somehow immune from all federal regulation, but that he had a right not to be punished under a statute that made engaging in non-commercial activity, which the federal government did not have the authority to regulate, the sole basis for punishment.¹³⁴ Indeed, although the Court did not discuss the issue, the federal government almost surely could have criminalized Lopez's own conduct under a more narrow statute. This is because Lopez was not simply in possession of a firearm. He had taken the weapon to school with him in order to sell it to someone else.¹³⁵ Congress surely has the power to regulate possession with the intent to distribute—a "commercial" activity—under the Court's Commerce Clause jurisprudence and, as Lopez's actions make clear, plenty of individuals who were engaged in that type of conduct fell under the GFSZA's reach. But, this does not mean that apply-

against a defendant for a successful appeal or to discourage the defendant from exercising his right to free speech. *See* *North Carolina v. Pearce*, 395 U.S. 711 (1969) (holding that the imposition of a more severe sentence after retrial must be supported by the record and not be based on the prosecutor's vindictiveness); *United States v. P.H.E., Inc.*, 965 F.2d 848, 853 (10th Cir. 1992) ("[A] prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be . . . dismissed, irrespective of whether the challenged action could possibly be found to be unlawful."). Even if there is sufficient evidence to sustain the charges, courts have found that the constitution grants defendants a right not to be targeted for additional punishment for an impermissible reason. *United States v. DeMarco*, 550 F.2d 1224, 1227 (9th Cir.) ("[The rule] prevent[s] chilling the exercise of [constitutional] rights by other defendants who must make their choices under similar circumstances in the future."), *cert. denied*, 434 U.S. 827 (1977).

¹³¹ *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

¹³² *Id.* at 580.

¹³³ *Id.* at 561.

¹³⁴ *Id.* at 567.

¹³⁵ Brief for the United States at 15, *Lopez*, 514 U.S. 549 (No. 93-1260).

ing the GFSZA to someone who had possessed a gun with the intent to distribute it was necessarily constitutional because that is not what the statute prohibited. It provided for punishment based on the mere act of possession, which the Court found to be an unconstitutional basis for federal regulation.¹³⁶ Accordingly, the law as it was written could not be constitutionally applied to anyone. As the Court explained, a similar law that “limit[ed] its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce” might have been constitutional, but the GFSZA did not have a “jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”¹³⁷ Interestingly, none of the *Lopez* opinions so much as mentioned the terms “facial” or “as-applied” challenges.

Examples of other doctrines that focus on the validity of the government’s action or the terms of the statute (rather than on the defendant’s conduct) include the Establishment Clause’s prohibition against laws that grant too much discretion in government officials to advance religion¹³⁸ and, of course, the First Amendment’s overbreadth rule against laws that have a “chilling effect” on free speech.¹³⁹ Indeed,

¹³⁶ *Lopez*, 514 U.S. at 567–68.

¹³⁷ *Id.* at 561–62; see also Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1154 (2003) (arguing that enumerated powers such as “the Commerce Clause state[] a condition for the validity of legislation, rather than stating a test for the validity of the application of Congress’s will to particular sets of circumstances”).

¹³⁸ Gans, *supra* note 5, at 1373–78 (discussing excessive discretion in the Establishment Clause context). Constitutional doctrines that prohibit giving officials excessive discretion are, of course, not limited to the Establishment Clause context. See, e.g., *Louisiana v. United States*, 380 U.S. 145, 152 (1965). In that case, the Court struck down a voting law that “practically place[d] [a government official’s] decision[s] beyond the pale of judicial review [because] he can enfranchise and disfranchise voters at his own sweet will and pleasure without let or hindrance.” *Id.*

¹³⁹ See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 497 n.5 (2007) (Scalia, J., concurring in part and concurring in the judgment) (“Our normal practice is to assess *ex ante* the

contrary to some of the traditional descriptions of facial and as-applied challenges, the fact that many constitutional provisions do not shield individual conduct from all laws and instead give rights-holders protection only against constitutionally flawed government action should not be surprising. After all, much of the Constitution focuses attention on the constitutionality of government action rather than the status of individual conduct.¹⁴⁰ The Fourth Amendment, for example, describes “[t]he right of the people to be secure in their persons, houses, papers, and effects,” but the right is only good against a specific type of government action, namely, “unreasonable searches and seizures.”¹⁴¹ Even the First Amendment does not direct itself primarily toward individual conduct, but provides that “Congress shall make no *law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.”¹⁴²

My intention in raising these examples, however, is not to make a broad claim about the nature of constitutional rights. Indeed, while many constitutional protections are not conduct oriented and focus on government action, in some contexts, the Court appears to have interpreted constitutional provisions as granting rights privileging specific individual conduct. In *Wisconsin v. Yoder*,¹⁴³ for example, the Supreme Court held that a mandatory school attendance policy could not constitutionally be applied to Amish parents who, for religious reasons, kept their children out of school after the eighth grade.¹⁴⁴ There was no constitutional deficiency in the statute itself or any of its provisions, nor was there any allegation of discriminatory enforcement.¹⁴⁵ The Court, however, held that the Amish litigant’s religious beliefs constituted an “area[] of conduct . . . beyond the power of the State to control, even under regulations of general applicability.”¹⁴⁶

risk that a standard will have an impermissible chilling effect on First Amendment protected speech.”).

¹⁴⁰ See generally Adler, *supra* note 57 (arguing that all rights are “rights against rules”); see also Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 43 (2009) (arguing that “many if not most structural rights would not be enforceable in the absence of the free availability of facial challenges to statutes that infringe those rights”).

¹⁴¹ U.S. CONST. amend. IV.

¹⁴² U.S. CONST. amend. I (emphasis added); see also Dorf, *supra* note 1, at 248 (observing that the First Amendment and the Supremacy Clause both “direct[] courts to focus on the constitutionality of a challenged *statute* rather than on the privileged or unprivileged character of the conduct of the litigant challenging it”).

¹⁴³ 406 U.S. 205 (1972).

¹⁴⁴ *Id.* at 218–19.

¹⁴⁵ *Id.* at 220–21, 236.

¹⁴⁶ *Id.* at 220. But see *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”); *id.* at 885–86 (“[A] private right to ignore generally applicable laws . . . is a constitutional anomaly.”); Adler, *supra* note 57, at 37–38 n.144 (arguing that the case did not necessarily recognize an “act-shielding” right because it left “open the possibility that [a different result would be reached] for the very same

Again, my goal here is not to advance one particular view of constitutional rights by dismissing the possibility of conduct-oriented rights. What the foregoing discussion is meant to show is that the “doctrine” of facial and as-applied challenges is entirely unhelpful to the project of interpreting the constitution and implementing its protections through constitutional rules and doctrine. *Salerno*’s dictate that a statute be unconstitutional in every application for it to be unconstitutional “on its face,” along with similar formulations of the preference for as-applied challenges, simply begs the question of how we define the constitutional protection and doctrine at issue and what it means for a law to be unconstitutional in each application. The facial and as-applied concepts are incapable of answering this question; only the text and interpretation of the relevant constitutional provision can provide an answer.¹⁴⁷ Any doctrine of facial and as-applied challenges that claims to guide the Court’s implementation of constitutional protections will face this same insurmountable problem.

B. Facial and As-Applied Challenges as a Remedial Doctrine?

Of course, just because the distinction between facial and as-applied challenges cannot help guide the Court’s interpretation of the meaning of constitutional rights, it does not follow that the categories are necessarily useless. The law of facial and as-applied challenges might still be intelligible as a doctrine of constitutional remedy.¹⁴⁸ On this view, the presumption in favor of as-applied challenges would be agnostic about the scope of constitutional rights. Instead, it would govern remedial decisions by, for example, requiring courts to “sever” a statute any time it had both constitutional and unconstitutional applications. As discussed above, a number of scholars

action pursuant to another neutral rule”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120–21 (1990) (discussing the relationship between the *Smith* and *Yoder* decisions).

¹⁴⁷ Cf. 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, 658 (2009) (“The choice of frame of reference, like questions regarding the reach of ‘free speech’ in the First Amendment or the meaning of ‘equal protection’ in the Fourteenth Amendment, must depend on the text of the Constitution and the sundry authorities regularly relied upon for gleaning the text’s meaning.”).

¹⁴⁸ There is dispute about whether severability is best conceived as an interpretive or remedial doctrine. See Gans, *supra* note 12, at 642 (discussing this debate). In a recent article, David Gans persuasively argues the case for treating severability as a remedial doctrine, noting that “[i]t asks a remedial question about the scope of the relief a court should order, not an interpretive question about the statute’s meaning.” *Id.* at 643; see also *id.* at 656–62 (arguing that severability is a remedial doctrine). My critique of viewing the facial and as-applied challenges distinction as a method for understanding the law of severability is not affected by the remedial versus interpretive question. Thus, for the sake of simplicity and ease of differentiating facial and as-applied challenges doctrine as a concept of severability versus a concept of substantive constitutional law, this Article refers to and discusses severability as a remedial doctrine.

have taken the view that questions about the use of facial and as-applied challenges can generally be reduced to questions about remedying constitutional violations.¹⁴⁹ With respect to severability, the facial and as-applied categories have at least some relevance to the task at hand. After all, the categories describe, and the remedial decision determines, the fate of a statute with unconstitutional applications. But, once again, the facial and as-applied distinction and its simplistic presumption in favor of as-applied challenges are ultimately unhelpful. This is because the facial and as-applied dichotomy assumes that courts have only two options to address a statute with unconstitutional applications: either strike the law down in its entirety or sever the parts of the law with unconstitutional applications from those with constitutional applications. This assumption is problematic because most difficult severability problems involve many different options for remedying the law's constitutional deficiency. Similarly, in some instances severing the provisions that involve unconstitutional applications may significantly alter the entire law in other ways.¹⁵⁰ Courts faced with these severability questions must choose between altering the law (and in what way) or scraping the law entirely. Arguably in some circumstances, courts may even consider adding to the reach of a law explicitly or implicitly to cure a constitutional problem in a statute.¹⁵¹ The facial and as-applied challenges categories do little to inform these issues and, as a result, add nothing to the law of severability.

To begin to see why this is so, consider a hypothetical statute that makes it a crime "to conspire with a family member." Unlike our hypothetical law criminalizing "being an immediate family member of a person who commits a felony," this new law incorporates an element of personal guilt into the statute itself. But, it also makes family status a basis of punishment. Assuming that this aspect of the law was constitutionally problematic, what would be the appropriate solution? On the one hand, arguably all of the statute's applications would be unconstitutional because all would involve the prohibited use of family status. On the other, this constitutional deficiency could be efficiently addressed by excising the "with a family member" language from the law. But, while redrawing the statute to eliminate unconstitutional applications would be easy as a technical matter, it would result in a completely different law than the legislature enacted. Which result would the presumption in favor of as-applied challenges

¹⁴⁹ See *supra* notes 54–72 and accompanying text.

¹⁵⁰ Gans, *supra* note 12, at 641 ("As *Booker* powerfully illustrates, severing an invalid provision or application from a complex statute does more than simply remove it; it simultaneously changes the underlying statutory scheme.").

¹⁵¹ See, e.g., *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result) ("Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."). But see *United States v. Booker*, 543 U.S. 220, 325 (2005) (Thomas, J., dissenting in part) (arguing that while a court may strike provisions through severability, "it may not proceed 'by inserting [applications] that are not now there'" (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876))).

require? Would the analysis change if the jurisdiction also already made simple conspiracy a crime but with a less severe punishment than for the crime of conspiring with a family member?

The 2006 case *Randall v. Sorrell*¹⁵² illustrates in greater detail why the facial and as-applied challenges categories cannot provide a basis for a coherent remedial doctrine. In *Randall*, the Supreme Court struck down Vermont's campaign contribution limits scheme in its entirety even though Justice Breyer, in his opinion for the plurality, indicated that it might have been possible for the Court to address the law's constitutional flaws by severing certain provisions and leaving other parts of the law intact.¹⁵³ The contribution limits system at issue in *Randall* was part of a broader 1997 Vermont campaign finance law that also limited campaign expenditures, provided for disclosure and reporting requirements, and created a voluntary public financing system for gubernatorial races.¹⁵⁴ A group of politicians, voters, and political parties challenged the expenditure and contribution limits aspects of the law on First Amendment grounds.¹⁵⁵ With respect to the expenditure limits, the Court found that the limits were unconstitutional in their entirety¹⁵⁶ under the seminal 1976 case *Buckley v. Valeo*.¹⁵⁷ The contribution limits presented a more difficult question but the Court held that they too violated the First Amendment citing, among other factors, the impact that the restriction on contributions by political parties would have on "the right to associate in a political party"¹⁵⁸ and the law's failure to index contribution limits to adjust for inflation.¹⁵⁹

In light of these determinations, the Court had at least three possible avenues to remedy the constitutional defects: (1) strike down the Vermont campaign finance law as a whole (including the unchallenged reporting and disclosure provisions), (2) strike down as little of the law as possible, meaning the expenditure limits and some provisions of the contribution limits, or (3) strike down both the expenditure and contribution limits in their entirety but leave the other aspects of the law untouched. The Court discussed the question of remedy only briefly, limiting its analysis to the second

¹⁵² 548 U.S. 230 (2006).

¹⁵³ *See id.* at 262.

¹⁵⁴ *Id.* at 237–39.

¹⁵⁵ *Id.* at 239–40.

¹⁵⁶ *Id.* at 240–46.

¹⁵⁷ 424 U.S. 1 (1976). The Court also considered, and rejected, Vermont's argument that *Buckley* should be overruled. *Randall*, 548 U.S. at 243.

¹⁵⁸ *Randall*, 548 U.S. at 256.

¹⁵⁹ *Id.* at 261. In addition to these two reasons, the Court found that the overall impact of the limits on the ability of challengers to raise enough funds to wage a competitive campaign, the Act's failure to exempt the out-of-pocket expenses of volunteers from the contribution limit, and the absence of a special justification for such tight restrictions in the record (such as, for example, evidence that Vermont has an especially serious corruption problem as compared to other states) were all factors that, taken together, made the contributions limit unconstitutional. *Id.* at 253–62.

and third options.¹⁶⁰ It found that severing some of the law's contribution limits provisions was not a realistic option because "[t]o sever provisions to avoid constitutional objection here would require us to write words into the statute (inflation indexing), or to leave gaping loopholes (no limits on party contributions)."¹⁶¹ In addition, the Court observed, there were a number of different ways in which the Vermont Legislature could address its constitutional objections.¹⁶² Accordingly, it concluded that the "Vermont Legislature would have intended us to set aside the statute's contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified."¹⁶³

One thing was glaringly absent from the Court's remedial analysis: the presumption in favor of as-applied challenges. Indeed, none of the opinions even so much as mentioned the terms "as-applied" or "facial" challenge. The omission might seem surprising given the trend toward viewing the presumption in favor of as-applied challenges as primarily concerned with severability. But, when one considers the *Randall* Court's options for remedying the First Amendment problems in Vermont's law, it quickly becomes clear that the facial and as-applied challenges categories would have been of little value. The most that could be said for how the facial and as-applied challenges doctrine might have applied in *Randall* is that it should have led the Court to more seriously consider the path of leaving as much of the contributions limits scheme as possible intact. It is not clear, however, how this reading would differ from the long-standing presumption that statutes should be severed where possible.¹⁶⁴ Perhaps more to the point, the problems facing the *Randall* Court were ones that a presumption in favor of severability or as-applied challenges could not help solve—namely, that following the presumption in favor of severability in the case of the Vermont contribution limits scheme would have dramatically altered the statute

¹⁶⁰ *Id.* at 262.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* By comparison, in *Buckley v. Valeo*, the Court decided to sever unconstitutional restrictions on campaign spending from the rest of the Federal Election Campaign Act. 424 U.S. 1, 108–09 (1976). This result has been criticized for resulting in an ill-considered system. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 407 (2000) (Kennedy, J., dissenting) ("[The campaign finance system's] unhappy origins are in our earlier decree in *Buckley*, which by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system . . .").

¹⁶⁴ *See* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 218–21 (1993) (discussing the history of the presumption in favor of severability and noting that while there have been some periods of confusion and dispute, the Court generally has embraced a presumption in favor of severability); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1961 (1997) ("When the Court applies a presumption of severability, however, it presumes that Congress intends its statutes to take effect to the maximum extent that the Constitution permits.").

and required the Court to choose between many different options about which parts of the law to sever.¹⁶⁵

The facial and as-applied challenges categories, which present severability as an either-or option, are inherently incapable of guiding decisions about these types of questions. They do not help answer tough severability problems, such as how to balance the interest in severability against the prospect of dramatically altering a statute, or how to choose between different options when there is more than one way to eliminate a statute's unconstitutional applications. Instead, under the Court's precedent, difficult severability questions are guided by considering legislative intent, which is viewed as the central principle of severability analysis.¹⁶⁶ Regardless of whether one thinks legislative intent is a wise test or whether some other principle should serve as the touchstone of severability analysis, the facial and as-applied challenges categories are incapable of offering a helpful alternative. They may be able to describe the outcome after a court has decided whether to "sever" a law with unconstitutional applications, but they do nothing to help tell the court how to make that decision.

III. WHY THE FACIAL AND AS-APPLIED CHALLENGES CATEGORIES DO MORE HARM THAN GOOD

In the previous sections, I have argued that the law of facial and as-applied challenges is fundamentally incoherent. As it stands today, even the most basic question of whether the preference for as-applied challenges relates to the interpretation of constitutional rights, severability, or a mixture between the two, remains unanswered. And, as I have claimed, the problem is not that the categories have been poorly defined, but that they are naturally refractory to being governed by a single inquiry or set of rules.

If this is so, one understandably might wonder what should be made of the Court's decisions debating faithfulness to the facial and as-applied challenges doctrine. Why do Justices from across the ideological spectrum continue to rely on it if the factors

¹⁶⁵ See *Randall*, 548 U.S. at 262 (describing difficulties with severing the unconstitutional provisions of the state campaign expenditure law).

¹⁶⁶ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."); *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."); see also Nagle, *supra* note 164, at 204–06 (providing a history of the doctrine of severability and the role of legislative intent in severability determinations). In a recent article, David Gans makes a compelling argument against the current practice of focusing on legislative intent in addressing severability questions and arguing that courts should be more restrained in severing statutes and less hesitant to strike them down in their entirety. See Gans, *supra* note 12, at 669 ("In short, we need to develop a better severability doctrine—one that puts effective limits on the authority of courts to rewrite statutes.").

that distinguish facial from as-applied challenges are still so unclear? And, if the doctrine is truly useless, what impact if any does it have in cases where it is employed? As this section will show, the “doctrine” of facial and as-applied challenges turns out to be nothing more than a rhetorical device to help bolster a decision that actually turns on other considerations. The presumption in favor of as-applied challenges is especially appealing to a Justice who would like to see a narrower constitutional rule or remedy applied in the case at hand because the as-applied presumption offers the veneer of an ideologically neutral, process-oriented doctrine that applies across all areas of constitutional law. Moreover, precisely because the doctrine is so poorly defined and malleable, it can be used to support a narrower outcome in almost any circumstance.

More important and problematic, however, is the impact that it has on the cases in which it is employed. In this section, I argue that the Court’s reliance on facial and as-applied challenges doctrine is more than just unhelpful—it is a harmful distraction that leads to a lack of clarity in the law and an artificial preference for constrained definitions of constitutional rights.

To see why this is so, let’s begin by returning to the abortion decisions discussed at the beginning of this Article.¹⁶⁷ Perhaps the most sustained and well-known debate about the proper use of facial and as-applied challenges has occurred in the area of the Court’s abortion jurisprudence. Nevertheless, after years of back-and-forth, the relationship between facial and as-applied challenges and abortion rights remains unclear at even the most fundamental level. Recall, for example, that in the span of two years, the Supreme Court issued one decision, *Ayotte*, that framed the “facial” and “as-applied” distinction as a remedial doctrine to be employed once a constitutional violation has been found and another decision, *Carhart*, that treated the categories as informing the constitutional standard for assessing the merits of a litigant’s claim.¹⁶⁸

The interaction between the facial and as-applied categories and the scope and meaning of the governing constitutional rule for abortion challenges has been at the heart of this confusion. Since the seminal 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶⁹ the Court has subjected regulations of pre-viability abortions to an “undue burden” test.¹⁷⁰ Under this framework, a woman has a right to choose to terminate her pregnancy before viability.¹⁷¹ Thus, the state may not prohibit pre-viability abortions.¹⁷² It may, however, regulate pre-viability abortions so long as the regulations do not impose an “undue burden” upon the right to an abortion.¹⁷³ “An undue burden exists, and therefore a provision of law is invalid, if

¹⁶⁷ See *supra* notes 18–42 and accompanying text.

¹⁶⁸ See *supra* notes 24–42 and accompanying text.

¹⁶⁹ 505 U.S. 833 (1992).

¹⁷⁰ *Id.* at 878 (plurality opinion).

¹⁷¹ *Id.* at 871.

¹⁷² *Id.* at 846 (majority opinion) (“[T]he right of [a] woman to choose to have an abortion before viability and to obtain it without undue interference from the State [is reaffirmed].”).

¹⁷³ *Id.* at 878 (plurality opinion).

its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”¹⁷⁴ After viability, the government may “proscribe[] abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹⁷⁵

Not long after *Casey* announced the undue burden standard, lower courts began to struggle with its relationship to *Salerno*’s “rule” that a facial challenge can succeed only if “no set of circumstances exists under which the Act would be valid.”¹⁷⁶ The root of the apparent tension between the two cases was the *Casey* Court’s explanation for striking down one of the provisions of the Pennsylvania abortion statute: “[I]n a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”¹⁷⁷ This seemed to be fundamentally at odds with *Salerno*’s dictate. After all, if the law presents an undue burden in only “a large fraction” of cases,¹⁷⁸ then there must be some cases in which it does not pose an undue burden, and therefore, there are some circumstances in which the law could constitutionally be applied.

The Supreme Court waded into the subject in a handful of opinions accompanying denials of certiorari. In these opinions, the Justices debated whether *Salerno* or *Casey* provided the controlling standard in the context of abortion cases.¹⁷⁹ Justice Scalia, accompanied by Chief Justice Rehnquist and Justice Thomas, argued that *Salerno* governed all facial challenges and meant that courts could not strike down abortion laws in their entirety on the basis that they posed an undue burden in a “large fraction” of cases.¹⁸⁰ On the other side, Justices O’Connor and Souter did not disagree that the standards were in conflict but took the view that the *Casey* standard now governed facial challenges in abortion cases.¹⁸¹ So, although the Justices have debated

¹⁷⁴ *Id.*; see also *id.* at 877 (“Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”).

¹⁷⁵ *Id.* at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164–65 (1973)).

¹⁷⁶ *United States v. Salerno*, 481 U.S. 739, 745 (1987). For a pre-*Casey* example, see *Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O’Connor, J., concurring in denial of certiorari) (discussing lower court opinion that granted summary judgment in a challenge to an abortion statute by relying on *Salerno*).

¹⁷⁷ *Casey*, 505 U.S. at 895.

¹⁷⁸ *Id.*

¹⁷⁹ See *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996); *Fargo Women’s Health*, 507 U.S. at 1013.

¹⁸⁰ See *Janklow*, 517 U.S. at 1177–78 (Scalia, J., dissenting from denial of certiorari).

¹⁸¹ *Fargo Women’s Health*, 507 U.S. at 1014 (O’Connor, J., concurring in denial of certiorari). Meanwhile, Justice Stevens argued that *Salerno*’s standard for facial challenges was dicta. *Janklow*, 517 U.S. at 1174 (Stevens, J., memorandum respecting denial of certiorari). Adding to the confusion, in a later case outside of the abortion context, Justice Souter, in an opinion joined by five other Justices, described the abortion undue burden standard as an ex-

the relationship between *Salerno* and *Casey*, they have all characterized the question as an issue of which case governs the constitutional rule for challenges to abortion laws.¹⁸² This is a striking example of the view that the facial and as-applied challenges doctrine controls substantive constitutional rules across all areas of constitutional law. On this view, if *Salerno* were controlling, challenges to abortion statutes would not be governed by substantive due process doctrine, but by a universally applicable facial and as-applied challenges rule.

On closer inspection, however, the apparent conflict between *Salerno*'s "no set of circumstances" rule and *Casey*'s undue burden test becomes illusory. Just as we saw in the context of vagueness in *Morales* and the hypothetical law criminalizing being "an immediate family member of a person who commits a felony," there is only a conflict if one first accepts a "privileged conduct" view of constitutional rights. The conclusion that *Casey* and *Salerno* are inconsistent with one another is premised on the assumption that the undue burden test means that each woman seeking an abortion has an individual right not to be unduly burdened by government regulation. Once one makes that assumption, then unless a law burdens each and every woman who may possibly fall under its reach, *Salerno*'s supposed standard would prevent a facial challenge. An equally plausible view, however, is that *Casey*'s undue burden test has nothing to do with burdens on particular individuals but rather sets a standard for legislative action.

Ironically, Justice Scalia himself adopted this view of an undue burden test in 2008, albeit in the context of the right to vote. In *Crawford v. Marion County Election Board*, the Court considered a challenge to an Indiana law that required citizens to present photo identification in order to vote.¹⁸³ The lead opinion, authored by Justice Stevens, upheld the law, finding that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute,"¹⁸⁴ but held open the possibility of a later challenge. Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment, but argued that the Court should have foreclosed the possibility of a future challenge to the law on the ground that the constitutional standard for evaluating voting laws requires a "general assessment of the burden"¹⁸⁵ imposed

ample of an instance where the Court had "recognized the validity of facial attacks alleging overbreadth" as an exception to *Salerno*'s rule. *Sabri v. United States*, 541 U.S. 600, 609–10 (2004); *see also* *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (noting the debate about the standard for facial challenges to abortion statutes but concluding, "[w]e need not resolve that debate"); *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 627 (4th Cir. 2005) ("[S]even circuits have concluded that *Salerno* does not govern facial challenges to abortion regulations. . . . Only the Fifth Circuit has suggested otherwise.").

¹⁸² *See, e.g., Janklow*, 517 U.S. at 1179 (Scalia, J., dissenting from denial of certiorari) (characterizing the apparent conflict between *Salerno* and *Casey* as presenting the issue "what is the standard for a challenge to the facial constitutionality of an abortion law?").

¹⁸³ 128 S. Ct. 1610 (2008).

¹⁸⁴ *Id.* at 1615.

¹⁸⁵ *Id.* at 1626 (Scalia, J., concurring in the judgment); *see also id.* ("Weighing the burden

by the law, and does not permit “an individual-focused” or “case-by-case approach.”¹⁸⁶ As Justice Scalia explained, although a voting law will “affect[] different voters differently,” the question of whether it imposes an unconstitutional burden should be answered in the abstract because what some may characterize as individual burdens “are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters.”¹⁸⁷ Thus, the relevant question is whether the law “imposes a severe and unjustified *overall* burden upon the right to vote.”¹⁸⁸

Justice Scalia did not discuss facial and as-applied challenges in his *Crawford* concurrence. But, it is easy to see that if one adopts this view of the undue burden standard, the supposed conflict with *Salerno* disappears. If a law imposes an overall undue burden on the right at issue—for example, by burdening a “large fraction of cases” in the parlance of *Casey*¹⁸⁹—it will fail the test. And, by definition, there will be “no set of circumstances . . . under which the Act would be valid.”¹⁹⁰ For this same reason, *Salerno* and *Casey* are only “inconsistent” if one takes the view (rejected by Scalia in *Crawford*) that “individual impacts are relevant to determining the severity of the burden” and “a single plaintiff” could succeed by claiming “a severe burden” in their case.¹⁹¹

As this discussion demonstrates, the determinative question about the scope of *Casey*’s undue burden test is not, and should not be, its relationship to the principles of facial and as-applied challenges. After all, the existence of a conflict between an undue burden test and the facial and as-applied challenges doctrine depends entirely on how one defines the undue burden test.¹⁹² Instead, courts should be asking which

of a nondiscriminatory voting law upon each voter . . . would effectively turn back decades of equal-protection jurisprudence.”).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1625.

¹⁸⁸ *Id.* at 1626–27 (emphasis added).

¹⁸⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

¹⁹⁰ *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see* *Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128, 148 (4th Cir. 2008) (striking down a Virginia abortion statute in its entirety and explaining that even though “[a] doctor attempting in good faith to comply with the Virginia Act will accidentally violate the Act in a small fraction of cases . . . the doctor never knows prior to embarking on [the] procedure whether a violation will occur. Thus, *every time* a doctor sets out to perform [the procedure], he faces the unavoidable risk of criminal prosecution”).

¹⁹¹ *Crawford*, 128 S.Ct. at 1625 (Scalia, J., concurring in the judgment).

¹⁹² *Compare, e.g., Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 179 (4th Cir. 2009) (“[The] rare circumstance where a fetus accidentally emerges to an anatomical landmark intact and alive and its head then becomes lodged in the cervix . . . does not justify rendering invalid the Virginia Act for all other circumstances.”), *with id.* at 195 (Michael, J., dissenting) (“The majority considers how often a standard D&E becomes an accidental intact D&E, when the critical question is how often (and whether) the Virginia Act imposes a burden on a woman’s ability to obtain a (pre-viability) standard D&E abortion. . . . The record here establishes that the Virginia Act threatens criminal liability—and thus imposes a burden—in

view of the test would most faithfully and effectively implement the constitutional right. And, as *Crawford* demonstrates, there is no single universally applicable standard for defining the scope and substance of constitutional rules. Rather, constitutional rules and tests are derived on a doctrine-by-doctrine basis in light of the constitutional protection at issue. In his *Crawford* concurrence, for example, Justice Scalia argued that a case-by-case approach to weighing the burden would be especially problematic in the case of voting rights because it “is an area where the dos and don’ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive.”¹⁹³ In the context of abortion rights, however, discussion of these issues has been pushed to the side by an irrelevant debate about *Salerno*. As a result, the intense focus on the facial and as-applied challenges categories has only served to confuse and obfuscate the issues that are truly important. Similarly, it has created an artificial and unsupported impression that a robust constitutional standard that tests statutes based on their overall burden is an anomaly that is inconsistent with the non-ideological and structural norms of facial and as-applied challenges.¹⁹⁴

The point here, of course, is not that one view of the undue burden standard is better than the other. It is that the facial and as-applied challenges categories do not present a principled basis for defining constitutional protections. The Court should define constitutional rules based on the constitutional protection at issue. Yet, Justices on both sides of the ideological spectrum continue to rely on the facial and as-applied challenges categories to support narrower constitutional rules.

This brings us back to the Court’s most recent abortion decision, *Carhart*, which limited the scope of the rule that the government cannot ban an abortion procedure that is “necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.”¹⁹⁵ The year before *Carhart*, in *Ayotte*, the Court applied the health exception rule to a New Hampshire statute that prohibited doctors from per-

every case that calls for a standard D&E.”).

¹⁹³ *Crawford*, 128 S.Ct. at 1626; see also *Richmond Med. Ctr.*, 570 F.3d at 196 (Michael, J., dissenting) (“There is simply insufficient time in an individual case to pose an as-applied challenge to a statute regulating abortion.”). For an argument in favor of an “individual-right/practical-barrier” model in the context of voting rights burden cases, see Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 659–67 (2008) (discussing some of the attractive qualities of an individual-right oriented view of the undue burden standard for voting rights).

¹⁹⁴ Cf. Steven G. Calabresi, *Substantive Due Process after Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1521 (2008) (“If Justice Kennedy sticks with an insistence on as applied over facial challenges in future substantive due process cases, there will be a whole lot fewer new constitutional rights that will be found either by the Supreme Court or by lower federal and state courts relying on the Supreme Court’s loose language.”).

¹⁹⁵ *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 327–28 (2006)).

forming an abortion on a minor until forty-eight hours after delivering written notification to the minor's parents.¹⁹⁶ There, New Hampshire conceded that the Act had unconstitutional applications because it would prevent a minor from obtaining an immediate abortion even in situations where it was medically necessary for her health.¹⁹⁷ The Court unanimously held that this deficiency did not necessarily require total invalidation of the law, treating the as-applied challenges presumption as a severability doctrine.¹⁹⁸ In *Carhart*, by contrast, the Court relied on the facial and as-applied challenges categories to help define the content of the health exception rule. Writing for the majority, Justice Kennedy argued that "facial attacks" to the Federal Partial Birth Abortion Ban Act of 2003 "should not have been entertained in the first instance."¹⁹⁹ Instead, he concluded that as-applied challenges were "the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used."²⁰⁰ Kennedy did not elaborate on this new standard,²⁰¹ but it appears to require litigants to identify specific and narrow medical circumstances in which a banned procedure would be medically necessary in order to meet the health exception requirement.²⁰²

Prior to *Carhart*, the Court's constitutional rule dictated that a health exception was required if there was "substantial medical authority" to show that banning the procedure at issue "could endanger women's health."²⁰³ If a law failed this standard, then, as discussed in *Ayotte*, a court could enjoin its application to instances where the procedure was determined to be medically necessary.²⁰⁴ Though Justice Kennedy did not address the issue, presumably a successful challenge under *Carhart*'s test would similarly result in an injunction to shield medically necessary procedures.²⁰⁵ Accord-

¹⁹⁶ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

¹⁹⁷ *Id.* at 327–28.

¹⁹⁸ *Id.* at 330 ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"); *id.* at 331 (discussing severability clause).

¹⁹⁹ *Carhart*, 550 U.S. at 167.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 189 (Ginsburg, J., dissenting) ("But the Court offers no clue on what a 'proper' lawsuit might look like.").

²⁰² *Id.*

²⁰³ *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

²⁰⁴ *Ayotte*, 546 U.S. at 331.

²⁰⁵ *Cf. Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 197 (4th Cir. 2009). (Michael, J., dissenting) ("This evidence will be no different if Dr. Fitzhugh is forced to file another lawsuit."). For an argument in support of Kennedy's approach to as-applied challenges in this area, see Kevin C. Walsh, *Frames of Reference and the "Turn to Remedy" in Facial Challenge Doctrine*, 36 HASTINGS CONST. L.Q. 667, 669 (2009) ("Although certain particulars of Justice Kennedy's opinion for the Court are confounding, its insistence on as-applied adjudication going forward is entirely appropriate for establishing discrete health-based exceptions to the general partial-birth abortion ban.").

ingly, under either *Carhart*'s test or the earlier standard, the Court could remedy a constitutional violation by applying severability principles to avoid invalidating the law in its entirety. In other words, from the perspective of the facial and as-applied challenges categories—at least assuming they are defined by whether a law is struck down in its entirety—the two standards appear to be on exactly the same footing.

The only difference between the two rules is that *Carhart*'s raises the burden for showing that there has been a constitutional violation in the first place. Under *Carhart*, it is no longer enough to show that there is substantial medical authority that a health exception is necessary. A litigant must instead define discrete and specific circumstances that are likely to occur where the procedure is medically necessary. Regardless of whether this standard is preferable, the facial and as-applied challenges categories do not justify its adoption. To be sure, *Carhart*'s standard is narrower than the previous rule, but there is no overarching principle of constitutional adjudication in favor of narrow constitutional rules. Indeed, it is difficult to envision what a presumption in favor of narrow constitutional rules would even mean because it would almost always be possible to adopt an even more narrow rule. Yet, as *Carhart* demonstrates, the facial and as-applied challenges distinction provides an easy rhetorical device to support the adoption of constrained constitutional rules.²⁰⁶

This is problematic because it may lead courts to adopt rules that do not represent the most faithful implementation of the relevant constitutional protection simply because the rule is narrow. It also allows courts to avoid grappling with some of the more difficult questions that may arise from their holdings. This is because a court can cite the facial and as-applied challenges doctrine to reject earlier holdings and rules without directly confronting inconsistencies or even explaining how the new standard is different from the old.²⁰⁷ By turning the issue into a question about the use of facial challenges, a court can say that it is rejecting the “facial” attack, but that future as-applied challenges may be successful, and then move on without explaining what a proper “as-applied” challenge would look like. As Justice Ginsburg observed in her *Carhart* dissent, for example, the majority in that case did not foreclose as-

²⁰⁶ For recent and insightful arguments on how the Court's emphasis on facial challenges has been used to undermine constitutional protections of individual rights, see Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 598 (2009) (arguing that the Court has relied on the facial and as-applied challenges doctrine to “excuse[] [itself] from providing predictability and guidance as to the scope and contours of individual rights”); Maya Manian, *Rights, Remedies and Facial Challenges*, 36 HASTINGS CONST. L.Q. 611, 626 (2009) (arguing that “the Roberts Court's less than coherent approach to as-applied and facial challenges appears to be yet another example of the Court's retreat from substantive protection of individual rights, cloaked in procedural jargon”).

²⁰⁷ David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 715 (2009) (“By emphasizing the norms of judicial modesty that lie at the heart of the traditional model [of facial and as-applied challenges], the Court can try to soften the blow of an effective overruling, as in *Carhart* . . .”).

applied challenges to the federal partial birth law, but it “offer[ed] no clue on what a ‘proper’ [as-applied] lawsuit might look like.”²⁰⁸ Similarly, while the majority argued that “[i]n an as-applied challenge the nature of the medical risk can be better quantified and balanced”²⁰⁹—echoing a common argument that as-applied challenges prevent against the “‘premature interpretatio[n] of statutes’ on the basis of factually barebones records”²¹⁰—*Carhart* involved an extensive factual record, as Justice Kennedy himself noted in oral argument.²¹¹ There, Kennedy wondered aloud: “I read all the doctors’ testimony in this case, hundreds of pages . . . trying to imagine how an as applied challenge would be really much different from what we have seen already.”²¹² In his *Carhart* opinion, however, instead of addressing this important and difficult question, Justice Kennedy simply repeated the convenient but unsupported maxim that as-applied challenges are the best mechanism for courts to make factual determinations.²¹³

While the Court’s abortion jurisprudence nicely illustrates how the presumption in favor of as-applied challenges can be used to provide rhetorical support for narrow views of constitutional rights, its treatment of the Bipartisan Campaign Reform Act of 2002’s (more commonly known as “McCain-Feingold”) ban on corporate and union “electioneering communications” provides perhaps the clearest example of how the as-applied and facial challenges doctrine can be used to disregard precedent without actually overruling it.²¹⁴ Prior to McCain-Feingold, federal campaign finance law employed the so-called “magic words” standard for regulating corporate and union advertising.²¹⁵ If an advertisement used phrases that expressly advocated for the election or defeat of a candidate, such as “Elect John McCain,” then corporations and unions could not pay for the ads from their general treasuries.²¹⁶ All other ads were considered “issue ads” and thus went unregulated, even though many “issue ads” were the functional equivalent of a campaign advertisement.²¹⁷ Among McCain-

²⁰⁸ *Gonzales v. Carhart*, 550 U.S. 124, 189 (2007) (Ginsburg, J., dissenting).

²⁰⁹ *Id.* at 167 (majority opinion).

²¹⁰ *Sabri v. United States*, 541 U.S. 600, 609 (2004) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

²¹¹ Transcript of Oral Argument at 21, *Carhart*, 550 U.S. 124 (No. 05-380); see David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 16 (quoting and discussing Justice Kennedy’s remarks during oral argument in *Carhart*).

²¹² Transcript of Oral Argument at 21, 23, *Carhart*, 550 U.S. 124 (No. 05-380).

²¹³ See *supra* notes 193–98 and accompanying text.

²¹⁴ For two recent and engaging discussions of facial and as-applied challenges in the context of election law, see Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009) and 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).

²¹⁵ *McConnell v. FEC*, 540 U.S. 93, 126 (2003) (discussing the “magic words” standard).

²¹⁶ See *id.*

²¹⁷ See *id.* at 126–28 (“While the distinction between issue and express advocacy seemed

Feingold's various reforms, it aimed to eliminate what many proponents of campaign finance regulation considered a loophole for "sham" issue ads.²¹⁸ Under the law, corporations and unions could not spend general treasury funds on "electioneering communication," which it defined as television advertising that "refer[red] to a clearly identified candidate for Federal office" and aired within "30 days before a primary or preference election" or "60 days before a general, special, or runoff election."²¹⁹ Unions and corporations remained free to create segregated Political Action Committee (PAC) funds, however, which were subject to federal regulation including disclosure requirements, in order to run such ads.²²⁰

The Court first addressed the McCain-Feingold "electioneering communication" provision in the 2003 case *McConnell v. FEC*, as part of a broad-ranging challenge to numerous aspects of the law.²²¹ There, the plaintiffs argued that the ban on "electioneering communication" was unconstitutionally overbroad and accordingly invalid in its entirety.²²² They argued that the ban regulated a large amount of "genuine issue advocacy"—ads that were genuinely focused on legislation or a policy issue and were unlikely to affect an election but that were, nonetheless, subject to McCain-Feingold's bright line rule because they mentioned a federal candidate and were run shortly before an election.²²³ A five-Justice majority that included Justice O'Connor upheld the restriction, finding that "the vast majority of ads" covered by the provision were "intended to influence the voters' decisions and ha[d] that effect."²²⁴ Moreover, the Court explained, any burden on genuine issue ads would be minimal as "corporations and unions may finance genuine issue ads during [the pre-election] timeframe[] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund."²²⁵ The opinion left open the possibility that a future "as-applied" challenge might succeed, however, in the case of "pure" issue ads.²²⁶

neat in theory, the two categories of advertisements proved functionally identical in important respects."); see also Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1072–74 (2008) (describing the evolution of the distinction between "issue" advertising and "express advocacy" advertising).

²¹⁸ See *McConnell*, 540 U.S. at 132 ("BCRA's central provisions are designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections.").

²¹⁹ 2 U.S.C. § 434(f)(3)(A) (2006).

²²⁰ *McConnell*, 540 U.S. at 204.

²²¹ 540 U.S. 93 (2003).

²²² *Id.* at 190–92.

²²³ *Id.*; Hasen, *supra* note 217, at 1075–76.

²²⁴ *McConnell*, 540 U.S. at 206.

²²⁵ *Id.*

²²⁶ *Id.* at 207 (finding that the "plaintiffs [had not] carried their heavy burden of proving [the electioneering communications provision was] overbroad" because the law's "application to pure issue ads" was not "substantial").

Just four years later, with Justice Alito having filled Justice O'Connor's seat after her retirement, the Court appeared to effectively overrule *McConnell* in *FEC v. Wisconsin Right to Life* (hereinafter *WRTL*).²²⁷ In *WRTL*, the plaintiffs sought to run advertisements in Wisconsin during the proscribed time period in opposition to the filibuster of federal judicial nominees that included the sign-off line "Contact Senators Feingold and Kohl and tell them to oppose the filibuster."²²⁸ Because the ads referred to Senator Feingold, who was a candidate for reelection at the time, they fell within the "electioneering communication" provision in McCain-Feingold and could only have been paid for with PAC funds.²²⁹ The plaintiffs challenged the application of the law to their ads.²³⁰ Chief Justice Roberts, writing the principal opinion for a fractured Court, found that the First Amendment allowed only for the regulation of issue ads if they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," which he labeled "the functional equivalent of express advocacy."²³¹ The holding had the effect of overruling *McConnell* by adopting a rule that seems largely indistinguishable from the earlier "magic words" test.²³²

As Justice Souter explained in dissent, to see how Chief Justice Roberts's opinion "produces the result of overruling *McConnell*'s holding," one "need merely ask what the law would have been if, back in 2003, this Court had held [the McCain-Feingold electioneering provision] facially unconstitutional."²³³ This question is easy to answer because McCain-Feingold included a fallback provision, to be used in the event the law's original "electioneering communication" definition was held unconstitutional.²³⁴ The fallback definition of "electioneering communication" was an ad that "attacks or opposes a candidate for [federal] office (regardless of whether the communication

²²⁷ 551 U.S. 449 (2007). The Court originally heard oral argument in the case just two weeks before Justice O'Connor retired, following Justice Alito's confirmation and swearing in. It issued a brief *per curiam* opinion six days after the argument remanding the case on the basis that the district court had erroneously concluded that *McConnell* foreclosed all as-applied challenges to the law. *Wis. Right to Life v. FEC*, 546 U.S. 410 (2006).

²²⁸ *Wis. Right to Life*, 551 U.S. at 459.

²²⁹ *See id.* at 460.

²³⁰ *Id.*

²³¹ *Id.* at 469–70. In dissent, Justice Souter argued that the principal opinion's "reasonable interpretation" test may be even more restrictive of government regulation than the "magic words" formula and that "on [its] reasoning it is possible that even some ads with magic words could not be regulated." *Id.* at 526–27 (Souter, J., dissenting).

²³² *See id.* at 531 ("The Chief Justice thus effectively reinstates the same toothless 'magic words' criterion of regulable electioneering that led Congress to enact BCRA in the first place."); Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life*, 2006–2007 CATO SUP. CT. REV. 77, 87 ("[T]he decision goes so far toward eviscerating § 203 that it effectively overrules *McConnell*'s holding that the section is valid on its face.").

²³³ *Wis. Right to Life*, 551 U.S. at 533.

²³⁴ 2 U.S.C. § 434(f)(3)(A)(ii) (2006). For an engaging examination of fallback provisions generally, see Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303 (2007).

expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.”²³⁵ Chief Justice Roberts did not explain whether there was any difference between the fallback law’s “suggestive of no plausible meaning” definition and his own “susceptible of no reasonable interpretation” standard. But it is difficult to conceive of a case that would meet one but not the other. This led Justice Souter to conclude that “the principal opinion institute[s] the very standard that would have prevailed if the Court formally overruled *McConnell*.”²³⁶

Indeed, seven members of the *WRTL* Court—three of whom concurred in the result—believed that the principal opinion effectively overruled *McConnell*,²³⁷ a conclusion with which commentators are also in near universal agreement.²³⁸ Yet, Chief Justice Roberts’s opinion barely entertains the possibility that it could be at odds with *McConnell*. Instead, it “is written in a lawyerly and sophisticated way to make it appear as though [the decisions are] consistent.”²³⁹ At the heart of this portrayal is Chief Justice Roberts’s reliance on the facial and as-applied challenges categories, which he used to “distinguish” *McConnell* by implying that the cases involved two entirely distinct issues. As Chief Justice Roberts put it, although “*McConnell* already held that BCRA § 203 was facially valid,” the *WRTL* ads “present the separate question whether § 203 may constitutionally be applied to these specific ads.”²⁴⁰ And later, in Roberts’s attempt to square the *WRTL* holding with *McConnell*’s finding that “the vast majority of ads” covered by the law were not constitutionally protected “genu-

²³⁵ 2 U.S.C. § 434(f)(3)(A)(ii).

²³⁶ *Wis. Right to Life*, 551 U.S. at 534 (Souter, J., dissenting); *see also id.* (“This backup sounds familiar because it is essentially identical to The Chief Justice’s test for evaluating an as-applied challenge to the original definition of ‘electioneering communication’ . . . There is neither a theoretical nor a practical basis to claim that *McConnell*’s treatment of § 203 survives.”).

²³⁷ *See id.* at 498–99 n.7 (Scalia, J., concurring) (“Indeed, the principal opinion’s attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so.”).

²³⁸ *See, e.g.,* Hasen, *supra* note 217 (“[I]t is fair to say that the principal opinion in *WRTL II* effectively overruled *McConnell*.”); Michael J. Kasper, *Magic Words and Millionaires: The Supreme Court’s Assault on Campaign Funding*, 42 J. MARSHALL L. REV. 1, 19 (“Despite the niceties of the distinction between facial and as-applied challenges, the Court effectively reversed itself.”).

²³⁹ Hasen, *supra* note 217, at 1086.

²⁴⁰ *Wis. Right to Life*, 551 U.S. at 464. This portion of the opinion somewhat awkwardly described the dispute as follows: “Appellants contend that *WRTL* should be required to demonstrate that BCRA is unconstitutional as applied to the ads. After all, appellants reason, *McConnell* already held that BCRA § 203 was facially valid. These cases, however, present the separate question whether § 203 may constitutionally be applied to these specific ads.” *Id.* (internal citations omitted).

ine issue ads,”²⁴¹ he explained that “[c]ourts do not resolve unspecified as-applied challenges in the course of resolving a facial attack, so *McConnell* could not have settled the issue we address today.”²⁴² Accordingly, *McConnell*’s “‘vast majority’ language [was] beside the point” because *McConnell* had only “found that such ads had an ‘electioneering purpose’” whereas Roberts’s opinion held that “‘purpose’ is not the appropriate test for” as-applied challenges.²⁴³ Thus, by employing the facial and as-applied challenges categories, Chief Justice Roberts was able to make an “end run” around *McConnell* and avoid having to grapple with principles of stare decisis.²⁴⁴ Stare decisis was a non-issue according to Roberts because *McConnell* was a “facial challenge” case whereas *WRTL* was an “as-applied” challenge case. As I have argued throughout this Article and as *WRTL* itself readily demonstrates, however, this is a distinction without a difference.²⁴⁵

The failure to honestly address the precedential value of *McConnell* is problematic in itself.²⁴⁶ An equally troubling outgrowth of *WRTL*’s as-applied challenges fueled end-run around stare decisis, is that it has left a muddled and incoherent doctrinal framework for addressing corporate and union political advertising regulations. Here, Roberts’s opinion in *WRTL* seemed to imply that there may be two entirely different doctrinal tests for facial and as-applied challenges. In explaining why *McConnell*’s

²⁴¹ *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

²⁴² *Wis. Right to Life*, 551 U.S. at 476 n.8.

²⁴³ *Id.*; see also *id.* (“For the reasons we have explained, ‘purpose’ is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy.”). In this footnote, Roberts also advanced an alternative argument based on facial and as-applied challenges semantics that “the ‘vast majority’ statement was not necessary to the Court’s facial holding in *McConnell*” because “[t]he standard required for a statute to survive an overbreadth challenge is not that the ‘vast majority’ of a statute’s applications be legitimate.” *Id.*

²⁴⁴ See Gans, *supra* note 12, at 656 n.76 (“Framing the case as one concerning the standard for an as-applied challenge enabled Chief Justice Roberts’s opinion to effectively overrule *McConnell* without considering stare decisis.”); see also Metzger, *supra* note 75, at 797 (noting that the Roberts’s Court’s facial and as-applied challenges “decisions are notable for their strategic aspect, with the Court using the facial/as-applied distinction as a mechanism to avoid directly overruling recent precedent and achieve a majority or unity on a decision”); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1537–38 (2008) (citing *WRTL* as a case in which “Roberts and Alito abandoned the principle of stare decisis, and did so in a particularly insidious manner . . . [by] purport[ing] to respect a precedent while in fact cynically interpreting it into oblivion”).

²⁴⁵ *Wis. Right to Life*, 551 U.S. at 499 n.7 (Scalia, J., concurring) (“This faux judicial restraint is judicial obfuscation.”). Richard Hasen has theorized that Chief Justice Roberts’s likely motivation for taking this approach was that he “apparently did not want to pay a political cost for appearing to move too quickly to overturn precedent.” Hasen, *supra* note 217, at 1091.

²⁴⁶ Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sept. 27, 2007, at 92, 98 (“[The] decision to overrule [*McConnell*] not explicitly but through a laughably cynical subterfuge, by claiming practically every conceivable issue ad to be an exception to *McConnell*’s ban on such ads, is as demeaning to the Court as it is threatening to our democracy.”).

holding that it is constitutional to regulate ads which “are intended to influence the voters’ decisions and have that effect”²⁴⁷ was not controlling in *WRTL*, Chief Justice Roberts found simply that *McConnell* “did not adopt any test as the standard for future as-applied challenges.”²⁴⁸ While the holding will have the practical effect of allowing corporations and unions to run most any political advertisement they wish free from regulation by refraining from using “magic words” that expressly advocated for a candidate’s election or defeat, it is also likely to create needless headaches in a handful of close cases as courts are left to ponder how to read *WRTL* without *completely* eviscerating *McConnell*.²⁴⁹ Thus, instead of “creat[ing] a more honest and more easily applied campaign finance jurisprudence . . . [by] purport[ing] to resolve the issue in [*WRTL*] without overturning a single precedent, [the Court] creat[ed] even more incoherence.”²⁵⁰

The abortion and campaign finance regulation examples both involved the use of the facial and as-applied challenges doctrine to impact substantive law. But the categories are equally distracting and counter-productive when employed as part of severability analysis. *United States v. Booker*²⁵¹ provides perhaps the best recent illustration of why the facial and as-applied challenges distinction does not add value to the standard rules of severability and, accordingly, is not useful as a remedial doctrine. In *Booker*, the Supreme Court famously struck down provisions of the Federal Sentencing Guidelines, changing them from a mandatory to an advisory scheme.²⁵² The Guidelines’ constitutional defect was that they required judges to make factual determinations about a wide array of “sentencing factors,”²⁵³ such as whether the defendant had brandished a firearm during the commission of the offense,²⁵⁴ in order to determine a defendant’s sentence. This practice contravened the Court’s Sixth Amendment rule that it is unconstitutional to sentence an individual to a punishment greater than the maximum sentence authorized by facts found by the jury or admitted to by the defendant in a plea agreement.²⁵⁵ Not all of the Guidelines sentences were

²⁴⁷ *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

²⁴⁸ *Wis. Right to Life*, 551 U.S. at 466. The Court rejected the FEC’s “conten[tion] that *McConnell* already established the constitutional test for determining if an ad is the functional equivalent of express advocacy: whether the ad is intended to influence elections and has that effect.” *Id.* at 465; *see also id.* at 466–67 (“The fact that the student coders who helped develop the evidentiary record before the Court in *McConnell* looked to intent and effect in doing so, and that the Court dealt with the record on that basis in deciding the facial overbreadth claim, neither compels nor warrants accepting that same standard as the constitutional test for separating, in an as-applied challenge, political speech protected under the First Amendment from that which may be banned.”).

²⁴⁹ *See, e.g., Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (applying *McConnell* and *WRTL*).

²⁵⁰ Hasen, *supra* note 217, at 1085.

²⁵¹ 543 U.S. 220 (2005).

²⁵² *Id.*

²⁵³ *Id.* at 242.

²⁵⁴ U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2)(C) (2007).

²⁵⁵ *Booker*, 543 U.S. at 238; *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

constitutionally problematic, however.²⁵⁶ This is because, under the Guidelines, the jury verdict or plea agreement sets an initial sentencing range based on the offense that is then adjusted based on the judge's findings.²⁵⁷ In many instances, the judge's findings do not involve any enhancements to the sentencing range whatsoever, while in many others the enhancements might increase the available sentencing range, but the sentence the judge actually imposes is still within the range authorized by the jury verdict or plea agreement alone.²⁵⁸ In these instances, there is no Sixth Amendment violation under the Court's test. Accordingly, the sentencing figures at the time *Booker* was decided indicated that "the Guidelines could be constitutionally applied in their entirety, without any modifications, in the majority of cases sentenced under the federal guidelines."²⁵⁹

The *Booker* Court was sharply divided, with one five-Justice majority writing the merits opinion that held judicial fact-finding under the Guidelines that increased a defendant's sentence above what was authorized by the jury verdict or plea agreement alone was unconstitutional, and a different five-Justice majority writing the remedial opinion which converted the Guidelines from a mandatory to a discretionary scheme.²⁶⁰ The remedial majority accomplished this result by invalidating, in its entirety, the provision that made application of the Guidelines mandatory as well as a second provision relating to the standard for appellate review under the Guidelines.²⁶¹ The remedial dissent, meanwhile, argued for a remedy that would retain the Guidelines system in its entirety but engraft onto it a jury trial requirement, thereby "preventing

("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

²⁵⁶ *Booker*, 543 U.S. at 273.

²⁵⁷ *Id.*

²⁵⁸ *Booker*, 543 U.S. at 275 (Stevens, J., dissenting in part) ("[A] majority of the cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*." (quoting *Hearings on Blakely v. Washington Before the S. Comm. on the Judiciary*, 108th Cong., 2d Sess. 2 (2004) (testimony of Comm'rs John R. Steer and Hon. William K. Sessions III))).

²⁵⁹ *Id.* at 276 (internal quotations omitted). Indeed, one of cases in *Booker* involved a sentence that was not unconstitutional. *Id.* at 313 (Thomas, J., dissenting in part) ("Application of the Federal Sentencing Guidelines resulted in impermissible factfinding in *Booker*'s case, but not in *Fanfan*'s. Thus *Booker*'s sentence is unconstitutional, but *Fanfan*'s is not.").

²⁶⁰ Justice Ginsburg was the only Justice to join both the merits and remedial majority opinions. *Id.* at 226, 244.

²⁶¹ *Id.* at 245–46 (majority opinion).

the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit).”²⁶²

It is difficult to see much of a connection at all between the facial and as-applied challenges categories and the two remedial options in *Booker*.²⁶³ Both of the proposed remedies—turning the Guidelines from a mandatory to advisory scheme or shifting the job of finding facts that would increase a defendant’s sentence from the judge to the jury—would fundamentally alter the system Congress enacted.²⁶⁴ Thus, the Court was presented with a decision about how best to redesign a complex, detailed sentencing scheme so that it would conform with a constitutional rule that rendered one of its central features—mandatory judicial fact-finding—unacceptable.

The facial and as-applied challenges categories, of course, have nothing to say about which of these options would be more faithful to Congress’s intent (the lynchpin of severability analysis), which would be less disruptive as a practical matter, or which would be better as a matter of policy. In the context of severability analysis, the categories are artificial and mechanical: any invalidation of a provision or statute in whole is a “facial” challenge; anything else is an “as-applied” challenge. Even as a purely technical matter, however, it is hard to see how one option or the other would more closely fit within the as-applied challenges category. While the majority’s remedy was certainly a “facial challenge” as it involved striking down two of the Guidelines’ provisions in their entirety,²⁶⁵ the dissenters’ proposed approach was also a far cry from the traditional definition of an “as-applied” challenge. The dissenters’ remedy would have meant engrafting a new requirement, at least implicitly, onto the Guidelines that the government charge in the indictment and prove to the jury beyond

²⁶² *Id.* at 246 (describing the approach proposed by the remedial dissent). *But see id.* at 325 (Thomas, J., dissenting) (“By allowing jury factfinding in some cases, however, we are no more ‘engrafting’ a new requirement onto the statute than we do every time we invalidate a statute in some of the applications that the statute, on its face, appears to authorize.”).

²⁶³ The Court had other options, of course. For example, it could have invalidated the Guidelines in their entirety and left it to Congress to create a new sentencing scheme that would comply with its holding. The Court’s discussion, however, was limited to these two alternatives. *See id.* at 258–59 (majority opinion) (explaining briefly why the Court did not view invalidating the Guidelines in their entirety as a viable option); *see also* Gans, *supra* note 12, at 665–66 (“*Booker* views severability in binary terms. . . . [B]ut, of course, these two choices hardly exhaust the range of ways a legislature might respond to the Court’s holding that the Sentencing Guidelines, as written, violate the Sixth Amendment’s jury-trial guarantee.”).

²⁶⁴ *Booker*, 543 U.S. at 246 (“Both approaches would significantly alter the system that Congress designed.”); Metzger, *supra* note 10, at 891 (“[B]oth the [*Booker*] majority’s and the dissenters’ efforts to determine whether, in light of the Court’s Sixth Amendment holding, Congress would have chosen to retain judge-based sentencing or nondiscretionary sentencing seem impossibly counterfactual, given the centrality of both these features to the sentencing system Congress established.”).

²⁶⁵ *Booker*, 543 U.S. at 245.

a reasonable doubt any conduct that could lead to sentencing enhancements.²⁶⁶ As a result, a number of the Guidelines' provisions, such as the sentencing enhancement based on a defendant's contemptuous behavior at trial, would have been rendered a nullity as a practical matter even if they were not technically invalidated.²⁶⁷

Nevertheless, in their remedial dissents Justices Stevens and Thomas reserved some of their strongest criticism for the majority's approach to facial challenges. Justice Stevens devoted the first section of his dissent to the argument that the majority's remedy was inconsistent with the law of facial and as-applied challenges.²⁶⁸ He claimed that a court may only invalidate a provision of a statute in its entirety if it "is unconstitutional in all or nearly all of its applications."²⁶⁹ Because the Guidelines could be applied constitutionally in a large number of cases, Stevens argued, "there is no justification for the extreme judicial remedy of total invalidation of any part of the . . . Guidelines."²⁷⁰ Justice Thomas similarly argued that, "[g]iven the significant number of valid applications of all portions of the current sentencing scheme, we should not facially invalidate any particular section of the Federal Rules of Criminal Procedure, the Guidelines, or the SRA" and should instead "invalidate only the application [of the provisions applied] to Booker, at his previous sentencing hearing."²⁷¹

²⁶⁶ *Id.* at 254–55 ("Would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished or discharged it, whether he threatened death, whether he caused bodily injury, whether any such injury was ordinary, serious, permanent or life threatening . . . ?").

²⁶⁷ *See id.* at 255 ("How would the court take account, for punishment purposes, of a defendant's contemptuous behavior at trial—a matter that the Government could not have charged in the indictment?") (citing U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2004)); *see also* 18 U.S.C. § 3661 (2006) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); FED. R. CRIM. P. 32(c)(1) ("At the sentencing hearing, the court . . . must rule on any unresolved objections to the presentence report. . . . For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing.").

²⁶⁸ *Booker*, 543 U.S. at 275–80 (Stevens, J., dissenting in part) (arguing that severing sections of the Guidelines to turn them into an advisory system was inconsistent with the Court's "facial invalidity cases").

²⁶⁹ *Id.* at 274. Stevens acknowledged that the Court has "debated the proper interpretation of various precedents concerning facial challenges to statutes" but argued that the "debate was immaterial to [his] conclusion here, because it borders on the frivolous to contend that the Guidelines can be constitutionally applied 'only in a fraction of the cases [they were] originally designed to cover.'" *Id.* at 275 n.1 (alteration in original) (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

²⁷⁰ *Id.* at 280.

²⁷¹ *Id.* at 319–20 (Thomas, J., dissenting in part). Justices Thomas and Stevens wrote separately because of differences over the use of legislative history in addressing severability and the characterization of severability principles. *See Metzger, supra* note 10, at 892 (explaining that while Justice Thomas viewed the remedial question as a severability issue, Justice Stevens

After leading their dissents with discussions of facial challenges, however, both Justices Stevens and Thomas went on to acknowledge that facial invalidation of a law with constitutional applications was indeed possible under severability principles. Justice Stevens began his severability discussion by noting that “[e]ven though a statute is not facially invalid, a holding that certain specific provisions are unconstitutional may make it necessary to invalidate the entire statute.”²⁷² Justice Thomas characterized the standard for severability as allowing for facial invalidation of a statute that has constitutional applications, though only if “the Legislature clearly would not have enacted the constitutional applications independently of the unconstitutional application.”²⁷³ And so, immediately after arguing that the majority’s remedy was incompatible with the standard for facial and as-applied challenges because it invalidated a statutory provision with constitutional applications, Justices Stevens and Thomas both conceded that invalidating a statute that has constitutional applications on its face is perfectly acceptable after all so long as the result is warranted under severability doctrine. In other words, notwithstanding their strident rhetoric about facial challenges, Stevens and Thomas agreed that the remedial question was ultimately a question of severability law, which in fact permits “facial” invalidation of a statute or

argued that the real issue was constitutional avoidance rather than severability).

²⁷² *Booker*, 543 U.S. at 280 (Stevens, J., dissenting in part). Justice Stevens argued that severing a statute’s provisions was not appropriate, however, in the case of “application severability.” In a footnote, Stevens conceded that the Court had struck down entire statutes that had constitutional applications in prior cases, but distinguished these cases on the grounds that they “did not, as the majority would have us do, strike down *particular parts* of the statute.” *Id.* at 283–84 n.8 (emphasis added); *see also id.* at 284 n.8 (“None of these cases stands for the sweeping proposition that where parts of a statute are invalid in certain applications, the Court may opine as to whether Congress would prefer facial invalidation of some, but not all, of the provisions necessary to the constitutional violation.”) Stevens’s concession further highlights the irrelevance of the facial and as-applied challenges distinction in addressing severability questions. Even under Justice Stevens’s view of severability, courts would be able to invalidate entire statutes that had constitutional applications on their face—just not “particular parts of the statute.” *Id.*

²⁷³ *Id.* at 323 (Thomas, J., dissenting in part). Oddly, in the sentence immediately before his description of the standard for facial invalidation according to severability principles, Justice Thomas argued that the presumption of severability was “a manifestation of *Salerno*’s general rule that we should not strike a statute on its face unless it is invalid in all its applications.” *Id.* Of course, Justice Thomas’s standard for severability is fundamentally incompatible with *Salerno*’s rule because, like all theories of severability, it allows courts to invalidate a statute in its entirety even if it is not “invalid in all of its applications.” *Id.* at 314 (discussing the Court’s holding in *Salerno*). Indeed, arguably the main function of severability doctrine is to guide those determinations.

provision that is capable of constitutional applications.²⁷⁴ Accordingly, the “doctrine” of facial and as-applied challenges added nothing to the remedial debate in *Booker*.

The facial and as-applied challenges discussion in *Booker* was more than just unhelpful, however. It detracted from the case, and in particular the dissents, by serving as a distraction from the truly important remedial questions and clouding the dissenters’ approach to severability. The Court was presented with a decision between making the Guidelines advisory and turning factual determinations for sentencing over to a jury.²⁷⁵ Each option would significantly change how federal sentencing functioned. By focusing on facial and as-applied challenges, however, the dissenters pushed the practical impact of these options to the background. The thrust of the dissenters’ facial and as-applied challenges arguments seemed to be that the Court should choose whichever remedy would make the fewest mechanical changes—as judged by the elimination of words or provisions from the statute—to existing law.²⁷⁶ Even the dissenters, however, ultimately admitted that severability analysis was controlled by legislative intent.²⁷⁷ And, of course, it is hard to imagine that legislatures are concerned with how a court’s remedy would impact the semantics of a law rather than how it would affect its real world application.²⁷⁸ To be sure, the dissenters ultimately addressed legislative intent and made strong arguments that their solution was preferable from that perspective.²⁷⁹ But, in relying on facial and as-applied challenges, they largely glossed over the fact that their proposed solution was also a dramatic change from the Guidelines scheme, which served to undercut the strength of their arguments about the merits of each approach.²⁸⁰

²⁷⁴ See Metzger, *supra* note 10, at 892 (“Justice Stevens’ . . . claim that the Court lacked authority to facially invalidate provisions that could have constitutional applications” was “wrong as a matter of logic” and contradicted by his later acknowledgment that “the unconstitutionality of some parts of a statute may force its invalidation as a whole if those provisions are not severable.”).

²⁷⁵ See *id.* at 890.

²⁷⁶ See *Booker*, 543 U.S. at 325 (Thomas, J., dissenting in part) (“While all of the remedial possibilities are thus, in a sense, second best, the solution Justice Stevens and I would adopt does the least violence to the statutory and regulatory scheme.”).

²⁷⁷ Metzger, *supra* note 10, at 891.

²⁷⁸ *Booker*, 543 U.S. at 248 (“Neither can we determine likely congressional intent mechanically. We cannot simply approach the problem grammatically, say, by looking to see whether the constitutional requirement and the words of the Act are linguistically compatible.”).

²⁷⁹ See, e.g., *id.* at 291–96 (Stevens, J., dissenting in part) (arguing that Congress had considered and rejected an advisory sentencing system).

²⁸⁰ Justice Scalia’s opinion, which focused exclusively on the practical impact of the majority’s remedy, was the exception here and demonstrates what a distraction the facial and as-applied challenges categories were in Stevens’s and Thomas’s dissents by comparison. See *id.* at 304 (Scalia, J., dissenting in part) (“The majority’s remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.”).

Perhaps more problematic, by advancing the facial and as-applied challenges argument, the dissenters did not leave themselves room to seriously consider the remedial option of scrapping the Guidelines in their entirety. While invalidating the Guidelines entirely may or may not have been the best outcome, the absence of any serious discussion of the possibility in *Booker* is striking. This is because the merits decision in *Booker* left the Court facing the sort of choice where the argument for holding a law that is capable of constitutional applications invalid in its entirety is generally thought to be at its strongest. The only way for the Court to save the Guidelines was to make dramatic changes that would leave them fundamentally different from the scheme Congress enacted.²⁸¹ Similarly, this was not a situation where the legislative options for enacting a new law that would comply with the Court's decision were limited. It is easy to imagine a wide array of sentencing schemes that would be constitutional under the Court's Sixth Amendment rule. As discussed above, this was exactly the sort of scenario in which the Court in *Randall v. Sorrell*²⁸² decided to strike down Vermont's campaign finance contribution limits system in its entirety without so much as mentioning facial or as-applied challenges.²⁸³ And, *Randall* reached this result even though the Vermont law surely could have been "constitutionally applied" to prohibit, for example, an individual from donating \$1 million to a campaign. In-

²⁸¹ See, e.g., *id.* at 325 (Thomas J., dissenting in part) ("Applying the Guidelines constitutionally . . . might seem at first glance to violate [adherence to congressional intent]. . . . [Yet] [i]n the end, nothing except the Guidelines as written will function in a manner perfectly consistent with the intent of Congress . . .").

²⁸² 548 U.S. 230 (2006).

²⁸³ See *supra* notes 150–61 (discussing the *Randall* Court's decision to strike down the Vermont law in its entirety because reforming the system would have required significant changes and under such circumstances the legislature would have intended for the Court to set aside the limits in their entirety to leave it free to draft a constitutional scheme); see also, e.g., *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (striking down a Pennsylvania tuition reimbursement law in its entirety because severing unconstitutional applications would have "create[d] a program quite different from the one the legislature actually adopted"); Gans, *supra* note 12, at 690–92 (arguing that the *Booker* Court should have invalidated the Guidelines in their entirety). Interestingly, prior to the successful Sixth Amendment challenge to the Federal Sentencing Guidelines, federal courts disputed remedial issues about the Guidelines in the context of challenges based on separation of powers arguments. The split among approaches to severability of the Guidelines was so wide that, after the Supreme Court upheld them as constitutional, one observer expressed relief that the decision had "[m]ercifully . . . pretermitted" severability questions about the sentencing law. Nagle, *supra* note 164, at 218; see *id.* at 216–18 (providing an overview of early cases that dealt with severability of the Guidelines); see also *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1268 (9th Cir. 1988) (refusing to sever provisions curtailing good-time credits after finding the Guidelines unconstitutional under a separation of powers theory; "Congress having chosen a 'comprehensive' approach to making sentencing more determinate, we will not sever companion sections of the guidelines system that would introduce piecemeal reforms").

deed, the *Randall* Court itself indicated that some of the law's contributions provisions were constitutional.²⁸⁴

Yet, even though Justice Stevens referenced the option of completely invalidating the Guidelines and indicated that it may be a favorable alternative to the majority's approach, neither he nor any of the other Justices seriously entertained the idea.²⁸⁵ Of course, one can only speculate about the reasons for this omission, but assuming the dissenters had preferred invalidating the statute entirely to the majority's approach, their use of the facial and as-applied challenges rhetoric to defend their first-choice jury trial remedy effectively blocked them from advancing that position. This is because the as-applied challenges argument framed the remedial question in terms of which outcome would depart least from the original text of the statute.²⁸⁶

In this way, the facial and as-applied challenges categories are more than just a distraction to the task of fashioning a remedy to a constitutional violation. They can work to limit remedial options by implying that grammatical fidelity is the sole criteria upon which the outcome should be judged. As cases like *Randall* make clear, however, that view is far from the Court's actual severability doctrine, which looks primarily to legislative intent and allows the presumption of severability to be overcome by competing considerations, such as when the only way to save a statute is by dramatically altering its scope.²⁸⁷ Moreover, as *Booker* itself demonstrates, in some cases the remedial options do not fall neatly into the "facial" or "as-applied" boxes even if viewed merely as descriptive categories. As a result, employing the categories as part of severability analysis causes confusion, not clarity, and leads to less uniformity from case-to-case than would result if courts were to analyze all remedial questions by relying on severability doctrine alone.

CONCLUSION

Courts and most commentators treat the so-called presumption in favor of as-applied challenges as a well-established and universally applicable principle of constitutional adjudication. This is true even among critics of *Salerno*'s more controversial "no set of circumstances" formulation. This Article presents a challenge to this conventional account of facial and as-applied challenges. I argue, first, that as it stands now the facial and as-applied challenges doctrine is fundamentally incoherent.

²⁸⁴ *Randall*, 548 U.S. at 269–70 (Thomas, J., concurring in the judgment).

²⁸⁵ *Booker*, 543 U.S. at 292 (Stevens, J., dissenting in part) ("[T]he Court has the burden of showing that Congress would have preferred the remaining system of discretionary Sentencing Guidelines to not just the remedy I would favor, but also to *any* available alternative, including the alternative of total invalidation, which would give Congress a clean slate on which to write an entirely new law.").

²⁸⁶ Cf. Gans, *supra* note 12, at 665 (arguing that severability doctrine gave the *Booker* Court a "limited set of options" that led it to view the remedial question "in binary terms").

²⁸⁷ *Randall*, 548 U.S. at 262.

The most basic questions about its meaning, such as whether the doctrine relates to constitutional interpretation, severability, or a combination of the two, remain unanswered. At a minimum, any effort to reconcile the inconsistencies in the law of facial and as-applied challenges that other commentators have persuasively identified will need to clearly resolve this problem.

This Article also claims, however, that the project of crafting a doctrine of facial and as-applied challenges is destined to fail because the facial and as-applied categories are inherently incapable of being reduced to a single generally applicable set of rules. This is because determinations about the fate of a constitutional challenge to a statute involve a number of different considerations, none of which are amenable to being governed by principles derived from the two categories. With respect to the task of interpreting the constitution and implementing its protections through constitutional rules, any rule about the use of facial challenges simply begs the question of the definition of the particular constitutional protection at issue. The Court can implement constitutional provisions through conduct-oriented tests that focus on individual action, through tests that focus on government action, or by combining the two approaches. As a result, the only way a doctrine of facial and as-applied challenges could conceivably govern the Court's design of constitutional rules and tests is if it were to impose a uniform approach to constitutional interpretation by, for example, holding that the Constitution protects only individual conduct. A look at the landscape of constitutional law, however, indicates that such a uniform set of rules for interpreting different constitutional rights would be disruptive, undesirable, and without any discernable basis in the Constitution. The facial and as-applied challenges categories fair somewhat better, perhaps, if they are viewed as being strictly related to remedial considerations. At least in that context, the labels accurately describe the two most likely outcomes in most constitutional challenges. But, even here, a "doctrine" of facial and as-applied challenges adds nothing to the law of severability and, indeed, ultimately detracts from it. This is because most difficult questions in the area of constitutional remedy require a court to choose from a number of possible remedies, not just two. In a complex regulatory scheme like Vermont's campaign finance law, for example, the constitutional deficiency may result not from any single provision but from a number of provisions working in concert.²⁸⁸ In that situation, a court might technically be able to save the law by severing some of the provisions in different combinations. Should the court attempt to save the law by deciding which combination of changes it prefers or scrap the law entirely? The facial and as-applied challenges categories cannot help guide courts in these circumstances.

Finally, this Article considers why, if all of the foregoing is correct, the Court operates in many cases as if there is a uniform and well-established law of facial and as-applied challenges. I argue that upon closer examination, the Court's "doctrine" of facial and as-applied challenges turns out to be little more than a rhetorical device

²⁸⁸ *Id.* at 253.

used to add support to the narrower remedy or constitutional rule in a given case. As a result, the Court's use of facial and as-applied challenges is more than just unhelpful; it is a harmful distraction that leads to a lack of clarity in the law and an artificial preference for constrained definitions of constitutional rights. To be sure, these problems are not unique to the context of the facial and as-applied challenges doctrine.²⁸⁹ The doctrine, however, provides an especially convenient tool for a Court to avoid directly confronting conflicting precedent or to help justify adopting a narrow constitutional rule.

All of this, I believe, suggests that the Court would be better served by acknowledging that there is, in fact, no uniform law of facial and as-applied challenges and that there almost surely never will be. Instead, when confronted with an argument that a law or provision should be struck down in its entirety, the Court should focus its attention on more thoroughly and directly addressing the underlying issues—namely, the constitutional right and doctrine at issue along with principles of severability—that actually animate the outcomes in constitutional challenges.

²⁸⁹ See, e.g., Stone, *supra* note 244, at 1537–41 (noting various instances in which the Court has “abandoned the principle of stare decisis” by “purport[ing] to respect a precedent while in fact cynically interpreting it into oblivion”).