Holding Legislatures Constitutionally Accountable Through Facial Challenges

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Introduction

The doctrine of constitutional avoidance assumes that legislatures intend to draft laws that meet constitutional standards and, therefore, that courts should construe statutes whenever possible to avoid finding constitutional infirmities.[1] Yet it should be obvious that legislatures do not always act with a pure heart. The democratic system is by its nature bound to produce laws now and again that reflect bias, ignorance, or hostility to certain groups or certain conduct.[2] Moreover, legislatures sometimes deliberately defy United States Supreme Court pronouncements with which they disagree.[3] When such influences produce laws that infringe individual constitutional rights, it is the courts' job to step in to invalidate these laws.

This Article argues that facial challenges and facial invalidations can help to promote constitutional accountability among legislatures. The traditional view of statutes as embodying constitutional and unconstitutional applications is unhelpful and misleading when such

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1. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1961 (1997).

2. *See* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2009) [hereinafter Borgmann, *Legislative Fact-Finding*]; Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 BROOKLYN J.L. & POL'Y 101 (2008) [hereinafter Borgmann, *Judicial Evasion*].

3. *See* Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753 (2006) [hereinafter Borgmann, *Legislative Arrogance*]; Note, *After* Ayotte*: The Need to Defend Abortion Rights with Renewed "Purpose,"* 119 HARV. L. REV. 2552, 2562–65 (2006) [hereinafter Note, *After* Ayotte]; William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 898 (2001); Note, *Should the Supreme Court Presume That Congress Acts Constitutionally?*, 116 HARV. L. REV. 1798, 1800 (2003).

statutes deliberately or recklessly infringe individual rights. When a legislature defies constitutional requirements that the Supreme Court has clearly laid out, or when a legislature's stated justifications for a rights-infringing law are not supported by a solid factual foundation, a legislature repudiates its duty to uphold the United States Constitution. That shortcoming infects the entire law; it is not limited to some subset of potential applications. It is the courts' duty in such cases, not to reward or accommodate the legislature's failure, but to protect individual rights from it. Complete, pre-enforcement invalidation of the law in such circumstances satisfies constitutional norms and vindicates the courts' critical role in protecting individual rights from majority oppression.[4]

The Roberts Court, however, has thus far moved in the opposite direction, viewing facial challenges with increased skepticism and hostility. The very early Roberts Court issued one decision in which it suggested that its primary concern with facial challenges was the breadth of the remedy.[5] The Court held that, in response to a facial challenge to a statute's constitutionality, the Court should issue a narrower remedy whenever possible.[6] In later cases, however, the Court has gone further, simply denying facial challenges outright without considering the possibility of more limited relief.[7] In these cases, the Court has focused more on the pre-enforcement nature and broad-ranging context of facial challenges, expressing a preference for "concrete evidence" that a law has harmed, or will likely harm, particular classes of individuals.[8] While placing a heavy burden on plaintiffs to demonstrate actual or likely harm, the Court has tended to defer to legislative factual assertions regarding the purposes that underlie rights-infringing laws, even where those purposes are quite likely pretextual.[9] The Roberts Court's intolerance for facial challenges thus does more than perpetuate the Court's longstanding confusion over the standard by which to assess such challenges; it permits the Court to withdraw from its critical role in safeguarding individual rights.

The notoriously vexing question of facial and as-applied challenges has received significant scholarly attention. Legal scholars have proposed a variety of approaches to the problem of facial challenges. Michael Dorf

4. *See* sourced cited *infra* note 21.

5. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006); *see also infra* Part II.A.

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

7. *See, e.g.*, Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008); Baze v. Rees, 128 S. Ct. 1520 (2008); Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008); Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007); *see also infra* Part II.B.

8. *See, e.g.*, *Crawford*, 128 S. Ct. at 1622; *see also infra* Part III.A.

9. *See infra* Part III.B.

claims that the line between facial and as-applied challenges is not nearly as clear as the Supreme Court has suggested, and he argues that courts should stop conceptualizing these as distinct categories of cases.[10] Richard Fallon has argued that facial and as-applied challenges largely track (or should track) the substantive constitutional tests the Court applies in a given case.[11] Matthew Adler has argued that there is no such thing as a substantive "as-applied" challenge, and he focuses instead on the different types of remedies courts employ.[12] Gillian Metzger believes there is a logical distinction between facial and as-applied challenges (although one that the Court does not always accurately identify), and she argues that ordinary rules of severability provide a sound guide for the Court in deciding the appropriate remedy when presented with a facial challenge.[13]

A critical question in the facial challenge puzzle is the role of constitutional norms.[14] The Supreme Court has often claimed that separation of powers concerns require courts to tread lightly in invalidating laws, and, therefore, that as-applied rulings are the preferred remedy for constitutional challenges.[15] But this Article argues that laws that violate important individual rights uniquely and distinctly warrant facial invalidation.[16] The Court and commentators have often, however, overlooked this point. Metzger, for example, tries to reconcile the Court's approach to facial challenges in the context of congressional powers cases, where Congress has acted to protect or expand rights, with its approach in cases alleging violations of rights under the Fourteenth Amendment or the Bill of Rights, without considering whether constitutional norms warrant treating these contexts differently.[17] Adler asserts that an examination has not yet been made of whether his model of analyzing facial and as-applied

10. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

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

12. Matthew D. Adler, *Rights, Rules, and the Structure Of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371 (2000).

13. Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005).

14. *See* Fallon, *supra* note 11, at 1351–52.

15. *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006); *see also* Metzger, *supra* note 13, at 878.

16. *See* Fallon, *supra* note 11, at 1352.

17. *See* Metzger, *supra* note 13 (arguing that Section 5 and other congressional power challenges should be subject to ordinary presumption of severability); *cf.* Borgmann, *Legislative Fact-Finding*, at 4, 38–39, 49–50 (arguing that Court should view legislative fact-finding skeptically where legislation threatens individual rights, but that more deference might be warranted where legislation expands or protects individual rights).

challenges will more likely promote constitutional norms than those of Fallon and others, and he stresses the importance of such an inquiry.[18]

I argue that constitutional norms suggest a role for facial challenges in maintaining the proper balance of power between the judiciary and the legislature when laws infringe important individual rights.[19] Richard Fallon has recognized this role for facial challenges, albeit under more limited conditions:

> [W]here constitutional values are unusually vulnerable, the Supreme Court can authorize the robust protection afforded by tests that invite rulings of facial invalidity and preclude the case-by-case curing of statutory defects. This approach most commends itself when a constitutional provision both affords protection to speech or conduct that is especially prone to "chill" and reflects a value that legislatures may be unusually disposed to undervalue in the absence of a significant judicially established disincentive.[20]

The courts have a special responsibility to protect individual rights from majoritarian oppression.[21] When courts deny facial challenges in such

18. *See* Adler, *supra* note 12, at 1420 ("Comparing these outcomes is clearly a difficult task. But it is not, I believe, a task we can avoid. . . . [L]egal scholars (and the Supreme Court) must undertake an empirical and instrumental assessment of proposed doctrinal structures, one that seeks to determine which structure best promotes the norms and values (moral or otherwise) given force by the Bill of Rights.").

19. This Article assumes that courts play an important role in checking majoritarian abuses of individual rights. In particular, it assumes that courts, while by no means perfect protectors of individual rights, do a better job than the legislatures of dispassionately assessing the supposed factual bases for rights-infringing legislation. *See generally* Borgmann, *Legislative Fact-Finding*, *supra* note 2; Borgmann, *Judicial Evasion*, *supra* note 2. An evaluation of the effectiveness of judicial review in protecting individual rights, especially those of unpopular minorities or groups lacking political power, is beyond the scope of this Article. For an excellent examination of judicial review and individual rights, in particular female and lesbian sexual freedom, see Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1 (2007).

20. Fallon, *supra* note 11, at 1352 (footnotes omitted). I disagree with Fallon, however, that substantive constitutional tests as presently articulated by the Court always correctly determine when facial invalidation is appropriate. *See infra* Part IV; Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 48, 55.

21. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 68 (1980); DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 175–76 (2008); Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty*, 60 STAN. L. REV. 937, 954–58, 964–66 (2008); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 355 (1997); Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 801 (2006); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706–08 (2008); Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 13 (2006); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L.

contexts, they reward legislatures for passing unconstitutional laws, since the laws will remain on the books even after successful (as-applied) challenges by one or more litigants.[22] This approach also inappropriately assigns legislative functions to the courts.[23] Legislatures that pass blatantly unconstitutional laws should not rely on the courts to rewrite them to fit constitutional guidelines.[24] When unpopular minorities or controversial rights are at issue, legislatures may knowingly enact unconstitutional legislation in response to public hysteria and/or constituent pressure, comforted by the thought that the courts will step in to clean up the mess.[25] Instead of taking constitutional responsibility and upholding their oath to remain loyal to the United States Constitution,[26] they leave the courts to do their dirty work.[27]

When laws infringe significant individual rights,[28] courts have reason to be concerned that the legislation has a proper justification and is not

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REV. 1169, 1174 (reviewing MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005)); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

22. *See* Note, *After* Ayotte, *supra* note 3, at 2564–65.

23. *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–30 (2006); Blount v. Rizzi, 400 U.S. 410, 419 (1971); Adler, *supra* note 12; Brief of Respondents at 32–42, *Ayotte*, 546 U.S. 320 (No. 04-1144).

24. Reno v. ACLU, 521 U.S. 844, 884–85 (1997); *see also* Note, *After* Ayotte, *supra* note 3, at 2560 (discussing "institutional convenience" to courts of granting facial invalidations in abortion cases rather than engaging in difficult line–drawing).

25. *See* Neal Devins, *How* Pennsylvania v. Casey *(Pretty Much) Settled the Abortion Wars*, YALE L.J. (forthcoming 2009) (manuscript at n.36) (discussing states in which "prevailing political norms backed the enactment of legislation at odds with Supreme Court decision–making" on abortion); *see also* Note, *After* Ayotte, *supra* note 3, at 2564 (noting that *Ayotte* removes "disincentive to pushing the envelope in every abortion statute").

26. *See* U.S. CONST. art VI, cl. 3.

27. For example, an electronic newsletter commented on a state legislative hearing addressing the sale of video games:

> The Louisiana State House has voted unanimously to approve a bill that would ban the sale of violent video games to minors, and classify such games in the same category as pornography. . . . Although debate in the House included talk that *similar bills have routinely been struck down by the courts* as unconstitutional, the House voted 102-0 to approve the bill. "That's for the courts to decide," said Rep. Danny Martiny (R–Kenner), the Associated Press reported.

Digital Media Wire Daily, http://www.digitalmediawire.com/archives_051806.html (last visited Mar. 20, 2009) (emphasis added).

28. It is beyond the scope of this Article to determine the particular individual rights that warrant closer purpose scrutiny, and facial invalidation, by the courts. In another Article, I offer a tentative description of such rights. *See* Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 36–37. In any event, the set should not be narrowed to include only "fundamental" rights or those otherwise accorded heightened scrutiny. The Court is rapidly moving away from such neat

based on animus or hostility to unpopular rights or politically powerless minorities, or even simply on a mistaken factual foundation. The legislative process does not lend itself to dispassionate, neutral fact-finding.[29] A legislature bent on restricting rights lacks both the incentive and the capacity to question its own fact-based justifications.[30] Even where a proper purpose is asserted as the basis for a rights-infringing law, if the alleged purpose rests on a shaky or nonexistent factual footing, the entire law is called into question. Scholars have pointed out that when a law's invalidity infects the statute as a whole, facial (complete) invalidation is appropriate.[31] A law that infringes individual rights and that lacks a valid purpose concordantly should be struck down on its face.

In such circumstances, denying facial invalidation abets the legislature for no good reason. It is not clear how the Court will enhance its analysis of the alleged constitutional defect by demanding a case-specific challenge (whether pre- or post-enforcement). Facial challenges alleging violations of individual rights are usually making a broader claim about the law's invalidity.[32] Similarly, when a law rests upon a faulty factual premise, that flaw is not limited to a specific application or litigant. If courts look more skeptically at the factual bases for state-declared interests underlying rights-infringing laws, they will smoke out illegitimate purposes that infect an entire statute. At the same time, examining a law's factual underpinnings is a more objective and manageable enterprise than trying to pin down a legislature's actual purpose, a notoriously vexing inquiry.[33]

The concerns favoring facial invalidations are lessened when legislatures wield their power to expand individual rights. In fact, the concern may run the opposite way in such cases, demanding more judicial deference and thus a greater reluctance by the courts to facially invalidate

categorization of rights, and it has at times acknowledged the importance of rights not so classified and has treated them with commensurate gravity. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); *see also* Bhagwat, *supra* note 21, at 312–16; Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 10–11, 37.

29. *See generally* Borgmann, *Legislative Fact-Finding*, *supra* note 2; *see also* Neal Devins, *Essay: Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1182–87 (2001); Laycock, *supra* note 21, at 1172–77.

30. Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 35–46; Devins, *supra* note 29, at 1182–87; Laycock, *supra* note 21, at 1172–77.

31. Dorf, *supra* note 10, at 279–81 (discussing "purpose" tests); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359, 386–88, 425–43 (1998).

32. *See infra* Part III.B.

33. *See infra* Part IV.

such measures.[34] This is because the majority does not need the courts to protect it from itself. When the majority is acting to limit its own interests or to promote the interests of the disadvantaged or politically powerless, it has less incentive to engage in rash decision-making based on shoddy or pretextual fact-finding or specious factual assumptions. Accordingly, legislative policymaking prerogative is at its height and a firm judicial hand may well be unnecessary and inappropriate.[35]

This Article proceeds in four parts. Part I.A discusses the confusing terminology of "facial" and "as-applied" challenges and offers a different taxonomy to describe constitutional challenges to statutes. Part I.B describes the *Salerno* standard, by which the Court purports to assess facial challenges, as well as some scholarly interpretations of the *Salerno* standard. Part II summarizes several major Roberts Court rulings on facial challenges and considers the possible significance of these rulings. Part III surveys some of the problems with the Roberts Court's apparent hostility to facial challenges, including demands for a showing of actual harm and the false promise of later, as-applied challenges. Part III then discusses categories of cases for which as-applied challenges will not provide an adequate remedy. Finally, Part IV argues that facial challenges are an important tool by which the courts can reinforce constitutional norms by ensuring constitutional accountability among legislatures and protecting individual rights.

I. Facial and As-Applied Challenges

A. Categorizing Constitutional Challenges to Statutes

Much has been written about what the terms "facial" and "as-applied" mean in the context of constitutional challenges.[36] Michael Dorf has suggested that the "facial" and "as-applied" terminology is more confusing than helpful,[37] and there is indeed something to this claim. The Supreme Court has not helped matters by using a single term to refer to analytically distinct things. For example, the term "facial challenge" has often been used to refer to the pre-enforcement nature of a challenge.[38] Yet it is

34. *See* Borgmann, *Rethinking Judicial Deference*, *supra* note 2, at 38, 49–50; Borgmann, *Legislative Arrogance*, *supra* note 3, at 800–01.

35. *See infra* Part IV.

36. *See generally* Adler, *supra* note 12; Dorf, *supra* note 10; Fallon, *supra* note 11; Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359 (1998); Metzger, *supra* note 13; Note, *After* Ayotte, *supra* note 3.

37. Dorf, *supra* note 10, at 294.

38. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008).

possible for a person to bring a pre-enforcement challenge to a law solely as it applies to her. Thus, a plaintiff might challenge a voter ID requirement in advance of an election on the basis that it would be especially burdensome for her to obtain an ID because of her particular circumstances.[39] The term "facial challenge" is also often used to mean complete invalidation of a law, yet in the past the Supreme Court has contemplated a type of "facial" challenge that addressed only a subset of a statute's possible applications.[40] The term "as-applied" has been used to mean a challenge to a subset of applications as well as to mean the statute's application solely to the party before it.[41] Finally, courts and commentators also do not always clearly distinguish between facial or as-applied *challenges* and the *remedy* a court may grant upon finding a statute unconstitutional.[42]

Challenges asserting that a law is unconstitutional can be divided into the following categories:

(A) *pre-enforcement* challenges, including: (1) full pre-enforcement challenges in which a plaintiff seeks total invalidation of a law before it goes into effect;[43] (2) limited pre-enforcement challenges, in which a plaintiff claims that the law operates unconstitutionally as to a subset of applications or contexts, not linguistically distinguished on the face of the statute; (3) case-specific pre-enforcement challenges, in which a party claims the law is unconstitutional solely with reference to her own case;[44]

(B) *post-enforcement* challenges,[45] which similarly divide into: (1) full post-enforcement challenges; (2) limited post-enforcement challenges; (3) case-specific post-enforcement challenges.[46]

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39. *Cf.* Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) (upholding law for lack of demonstrated burden).

40. Metzger, *supra* note 13, at 881–82.

41. *See id.* at 880–82.

42. *See* Isserles, *supra* note 31, at 451–55; Note, After *Ayotte*, *supra* note 3, at 2553.

43. *See, e.g.*, Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007); *Wash. State Grange*, 128 S. Ct. 1184; Baze v. Rees, 128 S. Ct. 1520 (2008); *Crawford*, 128 S. Ct. 1610; Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

44. Such pre–enforcement challenges are not as common, perhaps reflecting the reality that pre–enforcement actions will most likely be brought by interest groups who represent a broader swath of potentially affected people, and who are aware of and have the resources to fight the law.

45. The term "post–enforcement" is admittedly ambiguous. It could mean after a statute has gone into effect and stands ready to be enforced at any time, although it has not yet specifically been enforced against the litigants. This sense of the term has resonance in the context of laws that impose a chilling effect, for allowing such a statute to take effect may be as or more effective in preventing the targeted conduct as actual prosecution. *See* Thornhill v. Alabama, 310 U.S. 88, 97 (1940). *See generally* Borgmann, *Legislative Arrogance*, *supra* note 3. Alternatively, "post–enforcement" may mean that the statute has actually been enforced against the litigant. *See, e.g.*,

Pre-enforcement challenges, including case-specific challenges, are all "facial" in the sense that the statute has not been applied to anyone. In the absence of specific facts regarding actual enforcement, the statute is therefore "measured by its text"[47] (or "on its face"). Moreover, even partial pre-enforcement challenges may be "facial" in the sense that the subset of applications they target may represent a "general rule . . . embodied in the statute."[48] *Remedies* granted in response to challenges alleging unconstitutionality can likewise be (1) total or full (invalidating the statute or provision in all its applications);[49] (2) partial (invalidating the statute only as applied to a certain set of applications);[50] or (3) case-specific (invalidated only as applied to the claimant).[51]

A challenge to a particular, linguistically separate provision of a law that does not claim unconstitutionality as to the remainder of the statute should be seen as no different than a challenge to an entire statute.[52] Linguistically distinct subrules of a statute should simply be treated as independent provisions or "laws" within that statute.[53] They, in turn, may be challenged or invalidated in whole, in part, or only as applied to a particular litigant.

Full and limited pre-enforcement challenges can take two different forms. Marc Isserles has described these as (1) overbreadth challenges (where a litigant asks a court to examine a law's application to persons or situations not before the court) and (2) valid rule facial challenges (where a litigant identifies a flaw "on the face" of the statute by "measuring the statutory terms against the applicable constitutional doctrine," so that the invalidity is not dependent upon the examination of particular applications of a statute).[54] In addition, the first category can be broken down into two

Baze, 128 S. Ct. 1520 (plaintiffs sentenced to death by lethal injection); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (organization forbidden to remove gay scoutmaster).

46. *See, e.g.*, *Dale*, 530 U.S. 640.

47. Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610, 1632 (2007).

48. Metzger, *supra* note 13, at 902.

49. *See, e.g.*, Stenberg v. Carhart (*Carhart I*), 530 U.S. 914 (2000).

50. *See, e.g.*, United States v. Raines, 362 U.S. 17, 26 (1960).

51. *See, e.g.*, *Dale*, 530 U.S. 640.

52. *See* Adler, *supra* note 12, at 1378, 1380.

53. *See id.* In such cases, severability principles may ultimately determine whether the provision's invalidity requires the statute's total invalidation or merely invalidation (and severance) of the offending provision. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006); Metzger, *supra* note 13, at 884–85.

54. Isserles, *supra* note 36, at 365–67; *see also* Henry P. Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3 (introducing concept of valid rule facial challenges). Isserles argues for a reconception of the *Salerno* doctrine as one that applies in the context of valid rule facial challenges.

further subcategories: cases in which a plaintiff alleges the statute is unconstitutional both as to her and in some subset of other circumstances[55] and cases in which a plaintiff does not allege the statute is unconstitutional as to her, but invokes unconstitutionality in other contexts in arguing for invalidation. The second represents the classic conception of overbreadth premised on third-party standing.[56]

B. The *Salerno* Test and Facial Challenges

The Supreme Court has famously wrestled with how it should handle requests to invalidate a statute completely. One view, best known for its description in *United States v. Salerno*, is that full invalidations should be exceedingly rare, and that the Court should grant them only where "the challenger . . . establish[es] that no set of circumstances exists under which the Act would be valid."[57] By referring to sets of circumstances in which statutes are valid or invalid, the Court in *Salerno* seemed to focus on a statute's range of potential applications and the relative sweep of its constitutional and unconstitutional applications. Most scholars have assumed that this is what the language in *Salerno* was intended to mean.[58] However, they have also pointed out that the Court has not consistently applied this standard to full pre-enforcement challenges because it has often fully invalidated statutes, even outside of the First Amendment context, that could operate constitutionally in some circumstances.

In particular, the standard seems at odds with the approach that the Court took to the facial challenge it confronted in *Planned Parenthood v. Casey*.[59] There, the Court asked whether an abortion restriction poses an undue burden to women in a "large fraction" of cases in which the rule is "relevant."[60] The "large fraction" test thus contemplates that a rule may be fully invalidated even where it operates constitutionally in some fraction of cases. That appears inconsistent with *Salerno*'s requirement that a law

55. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444 (1938); Stromberg v. California, 283 U.S. 359 (1931).

56. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 870–87 (1997); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 & nn. 6–7 (1982); Thornhill v. Alabama, 310 U.S. 88, 97 (1940). *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

57. United States v. Salerno, 481 U.S. 739, 745 (1987). The Court has recognized an exception to this rule in First Amendment overbreadth cases. *Id.*

58. *See, e.g.*, 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, 654 n.127 (2009) ("The *Salerno* rule contemplates that facial challenges are merely the sum of all of the parts of as-applied challenges.").

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

60. *Id.* at 895.

operate validly in "no set of circumstances" in order to qualify for full invalidation.[61]

Isserles has offered an alternative interpretation of the *Salerno* standard as one that refers to what he calls "valid rule facial challenges."[62] According to Isserles, what the *Salerno* Court meant to address (although its language does not consistently reflect this) are cases in which a flaw in the rule itself renders the rule totally invalid. In such a circumstance, any consideration of the rule's applications is beside the point. Because the constitutional flaw infects the entire rule, it cannot validly be applied to anyone. Under this view, the *Salerno* standard does not come into play where a statute can operate validly in some circumstances, because such a case by definition does not present a valid rule facial challenge. The apparent inconsistency between *Casey* and *Salerno* is resolved under Isserles's interpretation of *Salerno*. Because the Court in *Casey* asked whether the various abortion restrictions at issue there had the *effect* of posing an undue burden, the Court was considering different applications of the rule rather than contemplating whether the rule as a whole was invalid.[63]

II. The Roberts Court's Hostility to Facial Challenges

While in many respects the defining characteristics of the Roberts Court are still nascent, the Court's hostility to full, preinforcement challenges appears already in full bloom.[64] Two cases early in the Roberts Court's tenure seemed to suggest that the Court prefers to grant partial relief when presented with a constitutional challenge. In the first, an abortion case, the Court denied a full, pre-enforcement injunction and remanded for possible narrower relief.[65] In the second, the Court purported to grant case-specific relief in an as-applied constitutional challenge to the McCain-Feingold Act, a statute the Supreme Court had upheld in 2003 against a full pre-enforcement challenge.[66] More perniciously, in several prominent cases presenting full pre- or post-enforcement challenges, the

61. *See* Dorf, *supra* note 10, at 275–76.

62. Isserles, *supra* note 31, at 363–64. I will refer to the former understanding of *Salerno* as the "traditional" *Salerno* standard.

63. *Id.* at 451, 457–59. Isserles argues that the "purpose" prong of *Casey*, which looks at whether a law was enacted with the *purpose* of imposing an undue burden, would present a valid rule facial challenge. *See infra* Part IV; *see also generally* Note, *After* Ayotte, *supra* note 3 (arguing for refocus on "purpose" prong in abortion cases).

64. *See* David G. Savage, *About Face: A Tool of the Civil Rights Movement Is Increasingly Unwelcome in the High Court*, ABA JOURNAL (July 2008).

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

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

Court has simply denied relief, ruling that complete invalidation is inappropriate, without contemplating a possible narrower remedy.[67] Part II.A describes the two early Roberts Court cases that seemed to indicate a trend toward as-applied rulings.[68] Part II.B discusses cases in which the Roberts Court has denied facial challenges to statutes alleged to infringe individual constitutional rights.[69] Part II.C considers some of the implications of the Court's approach in the cases discussed in Parts II.A&B.

A. Decisions Considering or Granting "As-Applied" Relief

While the Roberts Court's general approach to full, preinforcement challenges has been simply to deny them outright, one of its early rulings signaled hostility to facial challenges without sending the plaintiffs home empty-handed. In *Ayotte v. Planned Parenthood of Northern New England*,[70] the Supreme Court addressed a full pre-enforcement challenge to a New Hampshire parental notification statute that lacked a health exception. The Court refused to grant full, pre-enforcement invalidation.[71] But rather than stopping at a denial of the facial challenge, the Court took a softer approach, remanding for the possibility of a more limited injunction (or even a full injunction, if the lower courts deemed appropriate).[72] In *Stenberg v. Carhart* ("*Carhart I*"), the Court had recently reaffirmed the requirement that all abortion regulations contain a health exception[73] and had struck down Nebraska's partial-birth abortion ban in its entirety for lack of a such an exception.[74] While in *Ayotte* the Court recognized that

67. *See generally* Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610, 1632 (2007); *Wash. State Grange*, 128 S. Ct. 1184; *Baze*, 128 S. Ct. 1520; *Crawford*, 128 S. Ct. 1610; *see also* David Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 704, 707, 715 (2009) (referring to such rulings as "facial adjudication in as–applied clothing"). *But see* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (the four liberal Justices joining Justice Kennedy in fully invalidating the death penalty for child rape in post–enforcement, case–specific challenge).

68. *See infra* Part II.A (discussing *Ayotte*, 546 U.S. 320, and *WRTL II*, 127 S. Ct. 2652).

69. *See infra* Part II.B (discussing Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007); *Wash. State Grange*, 128 S. Ct. 1184; *Baze*, 128 S. Ct. 1520; and Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008)).

70. *Ayotte*, 546 U.S. 320, 323–35.

71. *Id.* at 331.

72. *Id.* at 332.

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

74. Although the district court had issued only a limited injunction, Carhart v. Stenberg, 972 F. Supp. 507, 522–23 (D. Neb. 1997) (describing as–applied posture of case and noting that "a favorable ruling for Carhart will . . . only preclude enforcement of the Nebraska law against Carhart and his patients (and other similarly situated doctors and their patients)"), both the Eighth Circuit and the Supreme Court paid no attention to that aspect of the district court's decision and

the absence of a health exception in New Hampshire law rendered the law unconstitutional,[75] the Court went on to "address a question of remedy," namely whether to invalidate the statute entirely or whether to remand to the lower courts for possible "narrower declaratory and injunctive relief."[76]

In a unanimous decision, the Court opted to remand. Focusing on the scope of the injunction, rather than on the pre- or post-enforcement nature of plaintiff's challenge, the Court first emphasized that partial, rather than total, invalidations are the "normal rule."[77] At the same time, the Court recognized a second principle, namely that the courts should not rewrite statutes in an attempt to salvage them. Only where line-drawing is straightforward and supported by clear precedent could the Court craft a narrow remedy tailored to a specific application of a law.[78]

The Court determined that the district court chose "the most blunt remedy" in invalidating the New Hampshire law entirely.[79] Although it admitted that the Court itself had chosen this "blunt remedy" in *Carhart I*, it pinned the blame partly on the parties in that case for not having sought narrower relief.[80] In *Ayotte*, on the other hand, New Hampshire argued that the legislature had intentionally invited a limited injunction by including a severability clause in the statute. The Court concluded that the New Hampshire law need not have been invalidated "wholesale," since "only a few applications . . . would present a constitutional problem."[81] Accordingly, the Court remanded for the lower courts to consider whether a partial injunction would accord with legislative intent.[82]

While the Court's decision to remand suggested there was an open constitutional question that might have affected the legislature's decision whether to include a health exception, the lower courts' facial invalidation was entirely predictable and consistent with the Court's abortion precedents.[83] More likely the remand served to mask substantive

instead appeared to treat the suit as a facial challenge, *see* Carhart v. Stenberg, 192 F.3d 1142, 1144–45 (8th Cir. 1999); *Carhart I*, 530 U.S. at 923; *see also Carhart I*, 530 U.S. at 1018–19 (Thomas, J., dissenting) (remarking that "this case comes to us on a facial challenge").

75. *Ayotte*, 546 U.S. at 327–28.

76. *Id.* at 323.

77. *Id.* at 329 (internal quotation marks omitted).

78. *Id.* at 329–30.

79. *Id.* at 330.

80. *Id.* at 331.

81. *Id.*

82. *Id.*

83. *See, e.g.*, Stenberg v. Carhart (*Carhart I*), 530 U.S. 914, 930 (2000); *see also Ayotte*, 546 U.S. at 328 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion)); Thornburgh v. Am. Coll. Obstetricians and Gynecologists, 476 U.S. 747, 768–69

disagreements among the Justices, allowing the Court, so sharply divided on abortion, to issue a unanimous decision.[84] Centering the decision on the remedy, rather than on the nature of the challenge and what the plaintiff must prove to support it, permitted the Court to avoid the divisive question of whether it should apply the *Salerno* rule in this abortion case.[85]

The following year, the Court issued a decision that demonstrates the difficulties of fashioning meaningful "as-applied" relief in what would more naturally be litigated and decided as a full, pre-enforcement case. In *Federal Election Commission v. Wisconsin Right to Life* ("*WRTL II*"),[86] the Court considered a case-specific challenge brought by Wisconsin Right to Life ("WRTL") to a provision of the federal Bipartisan Campaign Reform Act of 2002 ("BCRA") barring "electioneering communications." The Court had upheld the provision in 2003 against a facial challenge.[87] WRTL had broadcast ads that amounted to illegal electioneering communications under the BCRA.[88] It sought declaratory and injunctive relief on the grounds that the BCRA was unconstitutional as applied to its ads.

In an earlier per curiam opinion, *Wisconsin Right to Life v. Federal Election Commission* ("*WRTL I*"), the Supreme Court had ruled that its decision in *McConnell v. Federal Election Commission* did not preclude as-applied challenges.[89] The Court now found that the "capable of repetition yet evading review" exception to Article III case or controversy requirements was relevant not just to facial challenges but to as-applied challenges as well. Therefore, the Court found that the case was not moot even though the 2004 election had passed.[90] As to the merits, while a majority could not agree on why the provision violated the First Amendment, a majority concluded that the barring of the WRTL ads was unconstitutional.[91]

(1986); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 482–86 (1983); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 79 (1976)).

84. *See* Note, After *Ayotte*, *supra* note 3, at 2557 n.33 (discussing commentator's observation that decision was designed to allow Justice O'Connor to write it). The peace was short–lived, as the divide soon erupted again when the Court decided *Carhart II*. *See infra* Part II.B.

85. *See infra* Part II.B.

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

87. McConnell v. FEC, 540 U.S. 93, 134 (2003). The provision in question makes it a federal crime for any corporation to broadcast, shortly before an election, any communication that is targeted to the electorate and names a federal candidate for elected office. *WRTL II*, 127 S. Ct. at 2659.

88. *WRTL II*, 127 S. Ct. at 2261.

89. Wis. Right to Life, Inc. v. FEC (*WRTL I*), 546 U.S. 410, 412 (2006) (per curiam).

90. *WRTL II*, 127 S. Ct. at 2662–63 (majority opinion).

91. *Id.* at 2658; *id.* at 2674 (Scalia, J., concurring in part and concurring in the judgment).

Yet the Court's explanation of how an "as-applied" ruling in a moot controversy would help in the future was muddled. The Court claimed that there was a benefit to rendering a decision even if WRTL was unlikely to produce identical advertisements in the future, so long as the group planned to run "materially similar" future ads.[92] The Court did suggest, however, that its ruling would benefit only WRTL specifically.[93]

B. Decisions Denying Facial Challenges

The Court's foray into as-applied remedies proved to be short-lived. In its first outright denial of a "facial" challenge, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart* ("*Carhart II*").[94] The decision was 5-4, with Justice Kennedy writing for the majority and Justices Ginsburg, Stevens, Souter, and Breyer dissenting. Three different sets of plaintiffs had brought successful full pre-enforcement challenges to the Act in three different federal district courts.[95] All three decisions were upheld in the respective Courts of Appeals.[96] In *Carhart II*, the Court considered decisions in two of those cases, from the Eighth and Ninth Circuits. The Eighth Circuit, in *Carhart v. Gonzales*,[97] had issued a partial injunction, invalidating the Act as applied only to non-viable fetuses. The Ninth Circuit, in *Planned Parenthood v. Gonzales*,[98] had invalidated the Act in its entirety.

In considering the ban, the Supreme Court first addressed plaintiffs' claim that the statute was unconstitutionally vague and overbroad, reaching too many procedures.[99] The Court found that the statute clearly prohibited a defined procedure and did not ban the most common manner of

92. *Id.* at 2663 (majority opinion).

93. *Id.* (holding "that there exists a reasonable expectation that the same controversy involving the same party will recur"); Justice Scalia, however, was skeptical of Chief Justice Roberts's "as-applied" rhetoric, remarking, "seven Justices of this Court . . . agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation." *Id.* at 2683 n.7 (Scalia, J., concurring).

94. *See* Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007). One year earlier, the Court had refused to grant facial invalidation in the first instance in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006). But the Court seemed to contemplate a possible complete invalidation on remand. *See id.*

95. *See* Carhart v. Ashcroft, 331 F. Supp. 2d 805 (2004), *aff'd*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007); Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957 (2004), *aff'd*, 435 F.3d 1163 (9th Cir. 2006), *rev'd*, 127 S. Ct. 1610 (2007); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (2004), *aff'd*, 437 F.3d 278 (2d Cir. 2006).

96. *See* cases cited *supra* note 95.

97. Carhart v. Ashcroft, 413 F.3d 791 (8th Cir. 2005).

98. Parenthood Fed'n of Am v. Ashcroft, 435 F.3d 1163 (9th Cir. 2006).

99. *Carhart II*, 127 S. Ct. at 1627.

performing abortions in the second trimester; it therefore denied the plaintiffs' vagueness challenge.[100] Next, the Court considered whether the statute impermissibly burdened access to abortion. While recognizing that the statute implicated both pre- and post-viability abortions, each of which are governed by distinct constitutional tests,[101] the Court treated the case as a full pre-enforcement challenge (which accorded with the relief plaintiffs sought),[102] and it applied the undue burden standard applicable to pre-viability abortions. The Court's vagueness conclusion aided the Court's undue burden analysis: The Court found that, because the statute did not prohibit safe and common methods of performing post-first-trimester abortions, it imposed only insignificant burdens on women.[103]

Interestingly, the Court separately examined whether the statute was enacted for a valid purpose, treating the "purpose" prong of the *Casey* undue burden test as a formal and independent requirement.[104] While the language of the *Casey* test appears to call for exactly that interpretation, many have observed that the Court seemed to have abandoned the purpose prong, or to have rendered it so toothless that any abortion challenge alleging an invalid purpose is doomed to fail.[105] Yet in *Carhart II* the Court suggested that legislative purpose was still potentially determinative, stating,

> Where it has a rational basis to act, *and* it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.[106]

100. *Id.* at 1629.

101. The case thus raised what Marc Isserles calls the *Grace* problem of multiple applicable doctrinal standards. *See* Isserles, *supra* note 31, at 437–38, 459 (discussing United States v. Grace, 461 U.S. 171 (1983)).

102. *See Carhart II*, 127 S. Ct. at 1638.

103. *Id.*

104. *Id.* at 1632–35; *see* B. Jessie Hill, *Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 321 (2007).

105. *See* Mazurek v. Armstrong, 520 U.S. 968, 971–72 (1997); Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675, 691 & n.107 (2004) [hereinafter Borgmann, *Abortion Rights*]; Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 892 (2007); Note, *After Ayotte*, *supra* note 3, at 2566.

106. *Carhart II*, 127 S. Ct. at 1633 (emphasis added).

Admittedly, the Court applied a very low threshold for a qualifying purpose, suggesting that the purpose need only be rational.[107] But it also implied that an *intention* to impose an undue burden on abortion access was not a legitimate interest and would alone invalidate a statute.[108]

The Court found that Congress's asserted objectives in passing the ban were legitimate. These justifications included "express[ing] respect for the dignity of human life,"[109] "protecting the integrity and ethics of the medical profession,"[110] and promoting a woman's informed decision-making about the moral aspects of abortion.[111] In evaluating these objectives, the Court showed great deference to Congress, refusing to examine closely or skeptically the factual premises upon which the justifications rested.[112] Indeed, the Court deferred to a factual justification that admittedly lacked scientific support and which the government itself had not pressed, namely that abortions cause women to suffer mental trauma.[113]

In applying the "effects" prong of the *Casey* standard, the Court also deferred to Congress, arriving at its finding of "medical disagreement" over the ban's health implications by according significant weight to Congress's medical assertions about the ban, including that certain abortion techniques could be banned without endangering women's health.[114] As part of its effects analysis, the Court considered whether Congress's failure to include a health exception rendered the Act unconstitutional by imposing unconstitutional medical risks on women seeking abortions. This marked "a clear reversal of [the Court's] prior approach to abortion cases,"[115]

107. *See* Hill, *supra* note 104, at 321.

108. *See id.*

109. *Carhart II*, 127 S. Ct. at 1633.

110. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997) (internal quotation marks omitted)).

111. *Id.* at 1634.

112. *See* Borgmann, *Judicial Deference*, *supra* note 2, at 15, 27–28, 45; Borgmann, *Judicial Evasion*, *supra* note 2, at 111–16.

113. *See Carhart II*, 127 S. Ct. at 1634 (admitting that "we find no reliable data to measure the phenomenon" of post-abortion emotional trauma); Borgmann, *Judicial Evasion*, *supra* note 2, at 113–14.

114. *See* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 60 (2008); Borgmann, *Judicial Deference*, *supra* note 2, at 112–13. *But see* Hill, *supra* note 104, at 321–22 (suggesting that in its analysis under the "effects" prong, although the Court took "a substantially more deferential approach . . . to Congress's findings than it had taken to Nebraska's view of medical facts in *Carhart I*," the Court left the door open to discrete, as-applied challenges that might entail closer scrutiny of the relevant medical facts).

115. Hill, *supra* note 104, at 319.

which had treated medical emergency exceptions as a sine qua non of all pre-viability abortion regulation.[116]

The Court showed great hostility to the full pre-enforcement nature of plaintiffs' challenge, admonishing that the lower courts should have never have "entertained" the challenges.[117] At the same time, although the Court concluded that what it deemed "medical uncertainty" over the banned methods' relative safety did not merit full pre-enforcement relief,[118] it implied that a later challenge might assert that such uncertainty rendered the Act unconstitutional in certain medical circumstances:

> The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. This is 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. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.[119]

While the Court still apparently contemplated pre-enforcement challenges, it did not explain how such a challenge would differ from the challenges that were in fact brought or what different evidence might emerge in such a challenge.[120] Indeed, plentiful evidence was introduced in the challenges to the Act concerning the medical conditions under which the ban might operate to harm women.[121] Nevertheless, the Court did not follow its approach in *Ayotte* and remand for an injunction tailored to such circumstances.

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116. *See id.*; Borgmann, *Abortion Rights*, *supra* note 105, at 706–13; *see also* Stenberg v. Carhart (*Carhart I*), 530 U.S. 914 (2000) (invalidating Nebraska partial–birth abortion ban in part because of its lack of a health exception).

117. *Carhart II*, 127 S. Ct. at 1638.

118. *Id.* at 1637–38 ("The Act is not invalid *on its face* where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." (emphasis added)); Hill, *supra* note 104, at 322. *But see Carhart II*, 127 S. Ct. at 1651–52 (Ginsburg, J., dissenting); *infra* Part III.B (discussing false promise of later as–applied challenges).

119. *Carhart II*, 127 S. Ct. at 1638–39.

120. *Id.* at 1651–52 (Ginsburg, J., dissenting); *infra* Part III.B; Hill, *supra* note 104, at 323–24.

121. *Carhart II*, 127 S. Ct. at 1651–52 (Ginsburg, J., dissenting); Hill, *supra* note 104, at 323–24.

The Court's decision a year later in *Washington State Grange v. Washington State Republican Party*[122] demonstrated similar hostility to facial challenges. There, the Supreme Court upheld Washington State's blanket primary system against a full, preinforcement challenge. The law provided that candidates for office would be identified on the primary ballot by their self-designated "party preference," and that the top two vote-getters, regardless of their party preference, would advance to the general election.[123] The Ninth Circuit Court of Appeals had fully invalidated the statute, holding that it severely burdened political parties' associational rights and finding that the offending party-preference designations on the ballot were not severable.[124] The Supreme Court's decision was 7-2, with Justice Thomas writing for the majority. Chief Justice Roberts issued a concurring opinion, and Justice Scalia, joined by Justice Kennedy, dissented.

Exemplifying the typical confusion among the various uses of the term "facial challenge," the majority seemed particularly concerned about the pre-enforcement nature of the challenge, emphasizing that the case was not brought "in the context of an actual election."[125] The Court stressed that, "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."[126] And the Court pointed out that Washington's state courts had not so far construed the law "in the context of actual disputes arising from the electoral context."[127] In stating the test for facial challenges, the Court set forth the *Salerno* standard, and its discussion vacillated between the two prevailing interpretations of *Salerno*. In accordance with the traditional view,[128] the Court characterized the *Salerno* test as focused on the constitutional versus unconstitutional sweep (or applications) of the statute.[129] Yet in emphasizing that the statute

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

123. *Id.* at 1187.

124. *Id.* at 1190 (summarizing Ninth Circuit's decision).

125. *Id.*; *see also id.* at 1194–95 ("Because respondents brought their suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused.").

126. *Id.* at 1190 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

127. *Id.* The Court also noted that the state courts had not had an opportunity to decide whether to accord the law a narrowing construction. *Id.*

128. *See supra* Part I.B.

129. *Wash. State Grange*, 128 S. Ct. at 1190. The Court noted that the "no set of circumstances" language in *Salerno* was controversial, but stated that "all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Id.* (Stevens, J., concurring in judgment) (quoting Washington v. Glucksberg, 521 U.S. 702, 739–40 & n.7

should be judged by its written terms, and not by reference to potential, hypothetical applications, it also seemed to support Isserles's interpretation of *Salerno* as referencing valid rule facial challenges.[130]

It is difficult to see how the Court's analysis could be squared with a valid rule facial challenge, however, since the test the Court employed necessarily depended upon an assessment of the extent of the statute's predicted burden on speech. The test the Court applied first asks whether the statute imposes a "severe burden on associational rights."[131] If it does, the statute is subjected to strict scrutiny. The Court found that the case ultimately came down to a factual question regarding the first prong of the test: whether the law would result in voter confusion and thereby severely burden political parties' associational rights.[132] Underscoring its apparent overriding concern with the case's pre-enforcement posture, the Court did not consider the possibility of more limited relief. The Court found there was nothing inherent in the law that burdened associational rights.[133] Rather, any such burden must be assessed in the context of an actual election, when the Court would have before it an evidentiary record against which to evaluate the extent of any voter confusion.[134] The Court seemed to acknowledge that certain ways of drafting a ballot might be clearer than others in dispelling the impression of party endorsement.[135] It then cited two cases in which the Court considered limiting constructions:[136] *Ayotte*[137] and *Ward v. Rock Against Racism*.[138] Yet here, the Court did not remand for the lower court to consider (or certify to the state's highest court to consider) such a possible limiting construction. Instead, it chose to uphold

(1997)). The Court then stated that "Washington's primary system survives under either standard." *Id.*

130. *Id.*; *see supra* Part I.B.

131. *Wash. State Grange*, 128 S. Ct. at 1191.

132. *Id.* at 1192.

133. *Id.*

134. *See id.* at 1193–94. When the Ninth Circuit held Washington's earlier system unconstitutional, it specifically held that the facial nature of the challenge meant that the plaintiffs need not produce evidence of actual harm:

> This is a facial challenge to a statute burdening the exercise of a First Amendment right .... In *Jones*, the Court read the state blanket primary statutes, determined that on their face they restrict free association, accordingly subjected them to strict scrutiny, and only then looked at the evidence to determine whether the State satisfied its burden of showing narrow tailoring toward a compelling state interest.

Democratic Party of Wash. v. Reed, 343 F.3d 1198, 1203 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004) (citing Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)).

135. *Wash. State Grange*, 128 S. Ct. at 1194.

136. *Id.*

137. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006).

138. Ward v. Rock Against Racism, 491 U.S. 781, 794–96 (1989).

the statute on its face and wait for a showing of actual harm.[139] Moreover it implied that the extent of the harm would have to be substantial, finding that "without the specter of *widespread* voter confusion, respondents' arguments about forced association and compelled speech fall flat."[140]

Having rejected plaintiffs' assertions of threatened harm and therefore the existence of any "severe burden" on their associational rights, the Court found the state's justificatory burden to be commensurately lower. Rather than assert a compelling interest, the state needed only to "assert" an interest in "providing voters with relevant information about the candidates."[141] The Court required no factual evidence whatsoever that such information would in any way in meaningfully inform and educate the public about the candidates, or even evidence as to whether the prior system had left voters insufficiently informed. Thus, while speculation about the facts was fatal to plaintiffs' claim, it was perfectly acceptable for the state.

Justice Scalia, on the other hand, would have found a severe burden without requiring any post-enforcement evidence. He argued that the plaintiffs were not obligated to produce evidence of distortion of their message, what he pronounced a "perhaps-impossible task," but rather the Court must "accept [claimants'] own assessments of the matter."[142] And he maintained that the state had not shown that this burden was narrowly tailored to meet a compelling interest. In fact, Scalia was suspicious of the government's stated motive of informing voters, claiming that there was "no mystery what is going on here," namely, "the Washington Legislature's dislike for bright-colors partisanship"[143] and its desire to "reduce the effectiveness of political parties."[144]

Scalia's conclusion seemed wholly at odds with the *Salerno* test as commonly understood. Scalia seemed to struggle to explain how the statute could impose a severe burden in every conceivable application. Thus, he simply asserted that the associational harms "will be present no matter how [the] law is implemented." Therefore, he concluded, there was "no good reason to wait" for an actual election.[145] This seems implausible;

139. *See Wash. State Grange*, 128 S. Ct. at 1195–96.

140. *Id.* at 1194 (footnotes omitted) (emphasis added).

141. *Id.* at 1195.

142. *Id.* at 1201 (Scalia, J., dissenting); *see also id.* at 1202 (noting that "[i]t does not take a study to establish" that the ballot requirement will affect voter perception).

143. *Id.* at 1202.

144. *Id.* at 1198.

145. *Id.* at 1200.

both the majority opinion[146] and Chief Justice Roberts's concurrence[147] found that ballots could be designed to avoid associational burdens. Moreover, it is possible that in some elections the candidates who qualified for the general election would be the parties' standard bearers and thus their endorsement would neither burden the parties' associational rights nor mislead the public. Despite his outward focus on the traditional *Salerno* test, aspects of Scalia's analysis evoked the valid rule interpretation of *Salerno* offered by Marc Isserles. It seems likely that Scalia, suspicious of the state's professed reasons for the law, saw the entire system as poisoned by the illegitimate purpose of burdening political parties' participation in elections.[148]

The Court's 2008 decision in *Baze v. Rees*[149] offers yet another example of the Roberts Court's favored approach to facial and as-applied challenges. In *Baze*, Plaintiffs sought full invalidation of the Kentucky Department of Corrections' written protocol implementing the state's statute requiring executions by lethal injection.[150] The protocol had been administered once before with "no reported problems," and the plaintiffs, death row inmates in Kentucky, awaited sentencing under the protocol.[151]

Chief Justice Roberts, writing for the plurality, did not directly address the "facial" nature of the case. The Court simply denied the requested relief, concluding that "petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment."[152] Like in *Washington State Grange*, the Court seemed troubled by the hypothetical nature of the alleged harm (risk of a painful execution). It noted that any hypothetical scenario would have to be egregious to justify invalidation.[153] Here, Chief Justice Roberts found, the risk of harm was speculative and insufficiently

146. *Id.* at 1194 (majority opinion).

147. *Id.* at 1197 (Roberts, C.J., concurring).

148. *See id.* at 1198, 1202 (Scalia, J., dissenting); *see also* Isserles, *supra* note 31, at 440.

149. Baze v. Rees, 128 S. Ct. 1520 (2008).

150. The Kentucky penal law mandates generally that every death sentence be executed by lethal injection. *Id.* at 1527–28 (plurality opinion) (citing KY. REV. STAT. ANN. § 431.220(1)(a) (West 2006)). The state Department of Corrections established a written protocol for how lethal injections are administered in Kentucky. *Id.* at 1528.

151. *Id.* at 1528–29.

152. *Id.* at 1526.

153. *Id.* at 1531 (noting that "'a hypothetical situation' involving 'a series of abortive attempts at electrocution' would present a different case," and that, "[i]n terms of our present Eighth Amendment analysis, such a situation—unlike an 'innocent misadventure,'—would demonstrate an 'objectively intolerable risk of harm' that officials may not ignore" (citations omitted)).

significant in magnitude.[154] Chief Justice Roberts concluded that plaintiffs had not met their burden of demonstrating an "objectively intolerable" risk that Kentucky's three-drug protocol would be maladministered, thereby causing "wanton infliction of pain under the Eighth Amendment."[155]

As skeptical as it was of the factual basis establishing risk of harm, the plurality did not question the state's purpose in adhering to the challenged protocol.[156] The Court found that scrutiny of the state's chosen method "would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures."[157] Instead, it was plaintiffs' burden to come forward with evidence that "the alternative procedure [is] feasible, readily implemented, and [would] in fact significantly reduce a substantial risk of severe pain."[158] Only at that point would the burden shift to the state to show "a legitimate penological justification for adhering to its current method of execution."[159]

Justice Stevens, on the other hand, disagreed that respect for legislative discretion warranted judicial deference to the state's chosen protocol. Indeed, in his concurring opinion, Stevens noted that neither legislative nor administrative processes were likely to produce unbiased findings about how best to ensure "humane" and painless executions:

> In the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions.
>
> Nor should the failure of other state legislatures, or of Congress, to outlaw the use of the drug on condemned prisoners be viewed as a nationwide endorsement of an unnecessarily dangerous practice. Even in those States where the legislature specifically approved the use of a paralytic agent, review of the decisions that led to the adoption of the three-drug protocol has persuaded me that they are the product of "'administrative convenience'" and a "stereotyped reaction" to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion. . . .

154. *See id.*; *see also infra* Part III.A (discussing Roberts Court's preference for showing of actual harm).

155. *Baze*, 128 S. Ct. at 1537–38.

156. *See id.* at 1530 (noting that "[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment").

157. *Id.* at 1531.

158. *Id.* at 1532.

159. *Id.*

> [I am] persuaded . . . that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.[160]

Nevertheless, Stevens concluded that under the Court's precedents the plaintiffs had not met their burden to prove that Kentucky's method of execution was "cruel and unusual."[161] Justice Ginsburg, however, "would not [have] dispose[d] of the case so swiftly given the character of the risk at stake."[162] Ginsburg would have vacated and remanded for consideration whether Kentucky's omission of certain safeguards posed "an untoward, readily avoidable risk of inflicting severe and unnecessary pain."[163]

Crawford v. Marion County Election Board,[164] also decided in 2008, was brought as a full, pre-enforcement challenge to an Indiana law that requires voters to show government-issued photo identification when voting in person.[165] The law's stated purpose was to prevent voter fraud,[166] improve and modernize election procedures, and safeguard voter confidence.[167] Again, the Roberts Court rebuffed the plaintiffs' "facial" challenge in part because of their failure to show actual harm. Although noting the "importance" of the case, the plurality was "persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute."[168]

160. *Id.* at 1545–46 (Stevens, J., concurring in judgment).

161. *Id.* at 1552.

162. *Id.* at 1567 (Ginsburg, J., dissenting).

163. *Id.*

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

165. *Id.*

166. *Id.* at 1617 (plurality opinion); *see also* Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 53–55 (discussing the Court's deference to legislative fact-finding in *Crawford* despite thin factual basis for law); Press Release, Indiana Secretary of State Todd Rokita, Rokita Applauds Passage of Photo Identification Bill and Absentee Ballot Reform, *available at* http://www.in.gov/sos/press/2005/04122005b.html (declaring that law was "aimed at preserving voter confidence and promoting integrity in elections"). At both the trial and appellate levels, the courts simply assumed that voter fraud among in-person voters was an actual problem in Indiana. *See* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'g* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *reh'g denied*, 484 F.3d 486 (7th Cir. 2007).

167. *Crawford*, 128 S. Ct. at 1617.

168. *Id.* at 1615.

The substantive standard the Court applied in *Crawford* was a balancing test that weighed "the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'"[169] Yet, as in previous facial challenge cases, the Court looked skeptically at plaintiffs' claims of burden while accepting uncritically the factual basis for the asserted state justifications. In fact, the Court admitted that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."[170]

Justice Souter, dissenting, recognized the importance of ascertaining a factual basis for the admittedly valid, but here abstract, state interest in preventing voter fraud.[171] He contended that Indiana's stated interest in preventing voter fraud must "be discounted for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history."[172] Souter agreed with the majority that courts should give some deference to legislative empirical judgments. "But," he cautioned, "the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it."[173] Given the lack of factual support for its voter fraud justification, Souter observed that the justification smacked of pretext for a law designed to burden a particular class of voters likely to vote Democratic: "[T]he onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise."[174]

Unlike in *Baze*, the Court in *Crawford* expressly addressed the facial nature of plaintiffs' challenge. Relying on *Washington State Grange*, the Court characterized plaintiffs' approach as one of overbreadth, seeking full invalidation without claiming that the statute will operate unconstitutionally in

169. *Id.* at 1616 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

170. *Id.* at 1619.

171. *See id.* at 1628, 1636 (Souter, J., dissenting) ("There is no denying the abstract importance, the compelling nature, of combating voter fraud. But it takes several steps to get beyond the level of abstraction here." (citations omitted)).

172. *Id.* at 1637.

173. *Id.* at 1639.

174. *Id.* at 1643; *see also id.* at 1639 n.32 ("On such flimsy evidence of fraud, it would also ignore the lessons of history to grant the State's interest more than modest weight, as the interest in combating voter fraud has too often served as a cover for unnecessarily restrictive electoral rules."); *id.* at 1624 & n.21 (noting that all Republican legislators voted for the law and all present Democratic legislators voted against it); Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

all its applications.[175] Yet, although it spoke in terms of "applications," the plurality did not apply the traditional *Salerno* standard. Instead, it stated that "[a] facial challenge must fail where the statute has a 'plainly legitimate sweep.'"[176] The plurality concluded that the alleged burdens were too hypothetical and applied only to "a small number of voters who may experience a special burden under the statute."[177] Despite the pre-enforcement nature of the challenge, the Court again expressed a preference for a showing of actual harm. It stated that, in the absence of "concrete evidence of the burden imposed on voters who currently lack photo identification," it could not conclude that the statute posed excessive burdens on voters.[178] Finally, in rejecting the plaintiffs' request for full invalidation, the Court cited *Ayotte*, stating that narrower remedies are preferred whenever possible. Yet the Court did not remand for consideration of more limited relief.

C. Significance of Roberts Court's Rulings on Facial Challenges

While the Roberts Court has already rebuffed several full pre-enforcement challenges to laws that threaten individual rights, it is not yet clear whether the Court is pursuing a purposeful, overarching strategy regarding facial and as-applied challenges. Several of the Court's opinions on facial invalidation have been either fractured or sharply divided,[179] and the remainder follow no obvious pattern in terms of authorship or Justices in the majority.[180] As scholars have observed, the Court has long lacked a coherent, principled approach to facial and as-applied challenges, instead appearing to reach outcome-driven decisions that mainly reflect the extent of the majority's sympathy either for the underlying legislation or the rights

175. *Crawford*, 128 S. Ct. at 1623 (plurality opinion); *see also supra* Part I.B (discussing "overbreadth" facial challenges).

176. *Crawford*, 128 S. Ct. at 1623 (quoting Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008)).

177. *Id.* at 1622.

178. *Id.* at 1622–23.

179. *See id.* at 1612 (Justice Stevens announced judgment and wrote plurality opinion; Justices Scalia, Alito, and Thomas concurred; Justices Souter, Ginsburg, and Breyer dissented); Baze v. Rees, 128 S. Ct. 1520 (2008) (Chief Justice Roberts wrote plurality; Justices Stevens, Scalia, Thomas, and Breyer each concurred; Justices Ginsburg and Souter dissented); Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007) (5-4 decision authored by Justice Kennedy, with Justices Ginsburg, Stevens, Souter, and Breyer dissenting).

180. Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008) (7-2 decision written by Justice Thomas; Chief Justice Roberts concurred; Justices Scalia and Kennedy dissented); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) (unanimous decision written by Justice O'Connor).

being infringed.[181] The Roberts Court may simply be continuing this muddled line of Supreme Court precedent on facial challenges.

Moreover, the Roberts Court has heralded a rightward ideological shift on the bench, from a split in which Justice O'Connor served as the swing vote and Justice Kennedy was counted in the conservative half, to one in which a solidly conservative four face off against the four more liberal Justices, with Justice Kennedy functioning as the swing vote. Decisions like *Carhart II* suggest less a principled opposition to facial challenges than a new permissiveness toward legislative restrictions on certain kinds of rights. And some of the rejections to facial challenges in which the liberal Justices have participated may simply represent those Justices' pragmatic attempts to cut their losses and head off a more extreme decision, by joining an opinion that denies full invalidation while leaving open the possibility of more limited relief in the future.[182] Moreover, in cases involving rights to which the conservative Justices are more sympathetic, the Roberts Court has not hesitated to issue straightforwardly "facial" relief.[183]

But if the Roberts Court's hostility to facial challenges is genuine, it is worth considering what might be fueling that hostility. At least two principles may drive the Court's rejection of facial invalidations: (1) A belief that complete invalidation is a drastic remedy that should not be granted absent a showing of actual harm, and (2) a belief in the importance of concrete facts in adjudication. As discussed in Part III, however, the Court has not demonstrated consistent, true commitment to either of these principles. More likely, the Court is unsympathetic to the underlying rights claimed in the cases. Requiring actual harm can be used to impose a barrier to litigation in such contexts. And where the Court is not sympathetic to the rights involved, risking infringement of those rights by denying pre-enforcement relief might not seem so troubling to the Court. Similarly, the Court's apparent interest in concrete facts is illusory. While the Court has looked skeptically at plaintiffs' evidence of harm, it has shown a willingness to defer to a legislature's view of the facts necessitating rights-infringing laws.

Part IV argues that the Roberts Court's priorities when addressing rights-infringing laws have been the reverse of what constitutional norms

181. *See* Metzger, *supra* note 13, at 879–80.

182. *See, e.g.*, *Crawford*, 128 S. Ct. 1610 (Justice Stevens wrote the controlling opinion, joined by Chief Justice Roberts and Justice Kennedy); *Ayotte*, 546 U.S. 320.

183. *See, e.g.*, Davis v. FEC, 128 S. Ct. 2759, 2770, 2775 (2008) (invalidating "Millionaire's Amendment" to BCRA in context of "facial challenge"); District of Columbia v. Heller, 128 S. Ct. 2783, 2818–19, 2821–22 (2008) (invalidating prohibition on handgun possession in the home and declining to issue more limited ruling).

demand. Since the courts have a duty to protect important controversial and minority constitutional rights from majoritarian control, they should look skeptically and independently at a legislature's proffered factual grounds for laws that infringe these rights. Where an adequate factual basis is lacking, the shortcoming infects the entire law in a way that makes full pre-enforcement invalidation appropriate.

III. Problems with the Preference for As-Applied Challenges

A. Actual Versus Threatened Harm

In several of its recent decisions, including *Washington State Grange*, *Crawford*, and *Baze*, the Roberts Court has denied facial invalidations in part because the pre-enforcement nature of the challenge meant that plaintiffs had produced no evidence of actual harm. Does this mean that the Court will now more regularly require such evidence before it will fully (or even partially) invalidate a statute?

In *Washington State Grange*, the Court stressed that a failure to show actual harm doomed the plaintiffs' case.[184] Yet the Court was unable to explain why it had previously accepted very similar predictions—rather than actual proof—of harm in First Amendment cases.[185] It had even done so in the context of case-specific, post-enforcement challenges, where proof of actual harm might more readily be expected. In *Boy Scouts of America v. Dale*,[186] New Jersey's public accommodations law had been applied to forbid the Boy Scouts of America ("BSA") to revoke a gay man's position as assistant scoutmaster. The Court held that this application of the law violated BSA's freedom of expressive association by threatening to distort its intended messages.[187] The *Washington State Grange* opinion attempted to distinguish *Dale* on the ground that in *Dale* the required "association" was actual, not merely an appearance of association.[188] Yet the *harm*, just as in *Washington State Grange*, was hypothetical. In *Dale*, the Court did not require BSA to submit any evidence that its message was affected by the application of New Jersey's public accommodations law against it. Instead, the Court deferred to plaintiffs' allegations of harm, noting, "As we give deference to an association's assertions regarding the nature of its expression, we must also

184. *Wash. State Grange*, 128 S. Ct. at 1195–96.

185. *Id.* at 1194 n.9 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Hurley v. Irish–Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)).

186. *Dale*, 530 U.S. 640.

187. *Id.* at 654–56.

188. *Wash. State Grange*, 128 S. Ct. at 1194 n.9.

give deference to an association's view of what would impair its expression."[189]

Chief Justice Roberts readily accepted the asserted threatened harm in *Dale* while finding the associational burden in *Washington State Grange* too speculative. In his concurring opinion in the latter case, he remarked that accepting a gay scoutmaster into the Boy Scouts "*would* lead outsiders to believe the Scouts endorsed homosexual conduct."[190] He was even satisfied with the notion, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[191] that requiring organizers of a St. Patrick's Day Parade to include a pro-gay-rights float "*might* create the impression that the organizers agreed with the float-sponsors' message."[192] Yet, when it came to the Washington state ballots, Chief Justice Roberts argued that the potential harm was too speculative, since "we have no idea what those ballots will look like."[193]

In *Crawford* and *Baze*, the Court again claimed that full invalidation was inappropriate in the absence of a showing of actual harm. In *Baze*, the Court seemed to deny the need to show actual harm in the death penalty context, but required something nearly indistinguishable from actual harm. The plurality wrote,

> Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently *imminent* dangers."[194]

189. *Dale*, 530 U.S. at 653; *see also id.* at 677–68 (Stevens, J., dissenting) (expressing skepticism about burden on Boy Scouts' expressive activities and noting organization's failure to establish how presence of gay members would affect those activities).

190. *Wash. State Grange*, 128 S. Ct. at 1196 (Roberts, C.J., concurring) (emphasis added) (citing *Dale*, 530 U.S. at 653).

191. Hurley v. Irish–Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 575–77 (1995).

192. *Wash. State Grange*, 128 S. Ct. at 1196 (Roberts, C.J., concurring); *see also Hurley*, 515 U.S. at 577 (concluding without supporting evidence that, "[w]ithout deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade . . . the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.").

193. *Wash. State Grange*, 128 S. Ct. at 1197 (Roberts, C.J., concurring).

194. Baze v. Rees, 128 S. Ct. 1520, 1530–31 (2008) (plurality opinion) (quoting Helling v. McKinney, 509 U.S. 25, 33, 34–35 (1993)).

Because there was no evidence of any botched executions in Kentucky,[195] the Court found that full invalidation of Kentucky's lethal injection protocol was unwarranted.[196] Likewise, in *Crawford*, the Court faulted the plaintiffs for producing no "concrete evidence" of cases in which voters who lacked the requisite identification would either be unable to procure it or could not take the steps necessary to vote by provisional ballot.[197]

Requiring evidence of actual harm in a challenge to a rights-infringing law defeats the very purpose of a pre-enforcement challenge; indeed, it arguably makes a pre-enforcement challenge impossible. While one can imagine circumstances in which the Court might accept evidence of harm from analogous contexts—for example, other jurisdictions that had implemented similar laws—the Roberts Court has seemed unwilling to entertain such evidence. In *Baze*, for example, the Court declined to consider other states' experiences in administering lethal injection as grounds for invalidating Kentucky's death penalty.[198]

Moreover, depending on the nature of the threatened harm, requiring actual harm is morally troubling. It is one thing to allow harm before considering a challenge in the context of an election, where for one election some individuals may lose their right to vote or political parties' associational rights may be burdened.[199] It is another to require harm in the context of abortion or the death penalty. In *Carhart II*, the Court claimed that "pre-enforcement, as-applied" challenges were still possible.[200] But it is not clear what the Court contemplated, especially since the Court had before it sufficient evidence of particular medical circumstances warranting the banned procedure.[201] Had the Court thought full invalidation was inappropriate because the relief was disproportionately broad, it could have granted more a limited injunction. Perhaps instead the Court envisioned a woman in extremis and contemplated her doctor bringing an emergency petition to allow use of the banned method. But this expectation is

195. The single execution to occur under the challenged protocol indicated no apparent problems. *Id.* at 1528.

196. *See id.* at 1528, 1532–34.

197. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621–22 (2008) (plurality opinion). *But see Heller*, 128 S. Ct. at 2818 (accepting at face value a preference for handguns over other weapons for purposes of home defense).

198. *See Baze*, 128 S. Ct. at 1528, 1530–31 (2008) (plurality opinion); *id.* at 1565 (Breyer, J., concurring).

199. Of course, if the interference with rights in such circumstances rises to the level of influencing the outcome of elections, the potential harm is much more significant, long-lasting, and widespread, and it is commensurately more troubling to require evidence of that harm before granting relief.

200. Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610, 1638–39 (2007).

201. *See id.* at 1652 (Ginsburg, J., dissenting).

intolerable and unworkable in a medical emergency situation. It is likewise difficult, not to mention morally disturbing, to imagine a more limited challenge to a death penalty protocol that would satisfy the Court. It seems the Court would require evidence of an actual execution gone awry, or a scientific and medical consensus of significant risk of botched executions (presumably based on evidence of problems arising in actual executions).

B. The False Promise of Later As-Applied Challenges

In its facial rulings, the Roberts Court has been quick to assure plaintiffs of the possibility of an as-applied challenge. In *Washington State Grange*, the Court said that a "factual determination [of voter confusion] must wait an as-applied challenge."[202] *Ayotte* seems to suggest that, when confronting a facial challenge, the Court should issue partial invalidations rather than full invalidations whenever possible. Yet, as it did in *Washington State Grange,* what the Roberts Court has more often done is simply deny the facial challenge completely. If the Court seems to recognize that the law may be invalid in some of its applications, it suggests that a future, as-applied challenge can be brought. This promise of future as-applied challenges has generally proven to be a hollow one, apparently serving more to help cobble together votes on the Court, or to allow the Court to avoid explicitly overturning a precedent, than to provide meaningful alternative relief to those affected by rights-infringing laws.

WRTL II suggests that later, as-applied challenges will either provide only exceedingly limited protections for individual rights or, perhaps more likely, serve as a disingenuous way of issuing a broader ruling. In *WRTL II*, the plaintiff won its claim that its ads were unconstitutionally barred in a 2004 election, but only after the election had already passed. The Court suggested its as-applied ruling reached only "materially similar ads" run by WRTL.[203] If that were true, it is not clear how a fractured decision to grant case-specific, post-enforcement relief would alleviate a chilling effect on other speakers whose ads the law prohibits. Justice Scalia acknowledged this problem, commenting, "*McConnell* was mistaken in its belief that as-applied challenges could eliminate the unconstitutional applications of section 203. They can do so only if a test is adopted which contradicts the holding of *McConnell*."[204]

In fact, the test by which Chief Justice Roberts measured the WRTL ads does seem to contradict *McConnell*. In a part of his opinion joined only

202. Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008); *see also Carhart II*, 126 S. Ct. 1610; *Crawford*, 128 S. Ct. 1610.

203. *WRTL II*, 127 S. Ct. at 2663 (majority opinion).

204. *Id.* at 2684 (Scalia, J., concurring in part and concurring in the judgment).

by Justice Alito, Chief Justice Roberts declared that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[205] As David Franklin notes, given that three other Justices stand prepared to strike the electioneering communications provision down in its entirety, "*WRTL II* renders *McConnell* a practical nullity by laying out a test under which every realistically conceivable as-applied challenge to section 203 will succeed, while at the same time purporting not to disturb the holding of *McConnell*."[206] Thus, Franklin observes, *WRTL II* effectively issued a "facial invalidation . . . in as-applied clothing."[207]

Even where the Court is prepared to issue more genuinely limited relief, it is not clear why the Court should prefer to wait for later, as-applied challenges in order to do so. Unless the Court is demanding evidence of actual harm, there is no reason why the Court should wait to issue a more limited ruling in many full, pre-enforcement challenges. The plaintiff is seeking prospective relief; making the plaintiff wait defeats the purpose of bringing the claim pre-enforcement. In *Ayotte*, had the Court simply denied the challenge on the ground that the full facial invalidation plaintiffs sought was inappropriate, the consequence would be that a future challenge could be brought only when a teenager was facing an emergency. Such a challenge would be both dangerous and impractical.[208] In fact, in most cases, the Court has all the facts it needs to issue a narrower remedy.[209] Should the Court wish to grant more limited pre-enforcement relief, the only question that must then be answered is the appropriateness of severing the statute.[210]

The Court's stated preference for as-applied challenges seems superficially to indicate a greater respect for an interest in facts.[211] Yet

205. *Id.* at 2667 (majority opinion).

206. Franklin, *supra* note 67, at 706.

207. *Id.* This interpretation of *WRTL II* is bolstered by the Court's facial invalidation of another provision of the BCRA. *See Davis*, 128 S. Ct. at 2775 (invalidating "Millionaire's Amendment" of BCRA). Indeed, after a recent oral argument in the Supreme Court addressing yet another application of the BCRA, some are speculating that an outright facial invalidation of the statute may be imminent. *See* Adam Liptak, *Justices Seem Skeptical of Scope of Campaign Law*, N.Y. TIMES, Mar. 25, 2009.

208. Brief of Respondents, *supra* note 23, at 30–32.

209. *See supra* Part III.A.

210. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2008).

211. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 768 (1982) ("By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face 'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.'" (footnotes omitted)).

there are reasons to doubt this. First, the Court has given no direction on what it wants when it suggests future, "as-applied" challenges. In *Washington State Grange*, the Court indicated that voter confusion must be widespread in order to meet the applicable legal standard,[212] yet it otherwise provided no guidance on this issue. Chief Justice Roberts, in his concurrence, would not require that the parties "produce studies regarding voter perceptions," but he wanted to "see what the ballot says before deciding whether it is unconstitutional."[213] Seeing an actual ballot might lend more concreteness to a case in that particular context, but evidence of *harm* would still be hypothetical, a notion to which the Roberts Court generally seems hostile.

More importantly, far from demonstrating a real interest in facts, the Court has often shown an active *disinterest* in facts and sound fact-finding. Rather, its demand for facts is uneven and seemingly outcome-driven. The Court appears to use a demand for facts as a hurdle to throw up when the Court disfavors, or is unsympathetic to, the rights at issue. In *Washington State Grange*, the majority sought concrete evidence of a burden on associational rights through the actual design of a ballot and conduct of an election, while Justice Scalia was conspicuously uninterested in evidence of voter confusion or other burdens on plaintiffs' associational rights.[214] The majority seemed more sympathetic to the rights asserted in *Dale*, agreeing with that decision[215] although the plaintiff had produced no facts demonstrating that its expressive activity was harmed.[216]

On the flip side, the Court has been notably solicitous of factual conclusions relied on by legislatures. In *Crawford*, the legislature purported to respond to a concern about voter fraud but produced no evidence of voter fraud in the state.[217] In *Washington State Grange*, the Court required no evidence of a need for voter information that would justify the particular primary system the legislation had established.[218] And in *Carhart II*, the Court credited dubious fact-finding by Congress in order

212. *Wash. State Grange*, 128 S. Ct. at 1194.

213. *Id.* at 1197 (Roberts, C.J., concurring).

214. *Id.* at 1201 (Scalia, J., dissenting).

215. *Id.* at 1194 n.9 (majority opinion).

216. *See supra* text accompanying notes 185–89 (discussing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

217. *See supra* text accompanying notes 170–69 (discussing Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008)).

218. *See supra* text accompanying note 141 (discussing *Wash. State Grange*, 128 S. Ct. 1184 (2008)).

to reach a finding of medical disagreement about the banned procedures.[219] As discussed in Part IV, a greater focus on legislative fact-finding in these cases is especially important since the stated purposes for the laws often seem pretextual.[220] The Court's recent stated preference for as-applied challenges thus does not ensure that, where a facial challenge fails, future case-specific litigation will provide meaningful alternative relief while ensuring serious judicial examination of the relevant facts.

Moreover, the Court's preferred litigation posture is inconsistent with how civil and constitutional rights have been litigated in the past and with how the Court has decided such cases. The legal standards themselves generally call for a broader examination of social facts. As such, once it has satisfied itself that standing requirements are met, the Court has generally not focused at all on the individual litigants before the Court.[221] In *Kennedy v. Louisiana*,[222] for example, the Court addressed a challenge to the imposition of the death penalty in cases of child rape. While the Court recounted the case's horrific facts in detail,[223] it then issued a general ruling fully invalidating the statute,[224] considering and relying on a wide range of social facts without ever again revisiting the particular facts of the case before it.[225] And this is appropriate, since such challenges generally are aimed at remedying a broader social problem a rights-infringing law creates, not simply at obtaining relief in an individual case.[226] *Washington State Grange*, for example, seems less about actual voter confusion that might be caused by a particular ballot than about the principle of forced association and the extent of the Court's sympathy for the importance of insuring meaningful participation by political parties in elections.

C. Problematic Cases for As-Applied Challenges

Part IV considers why constitutional norms weigh in favor of full pre-enforcement invalidations in certain cases involving rights-infringing laws. But there are also more pragmatic considerations that militate against

219. *See supra* text accompanying note 106 (discussing Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007)).

220. *See supra* Part II.B (discussing likelihood of pretextual motives in *Carhart II*, *Wash. State Grange*, and *Crawford*).

221. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); *see generally* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004).

222. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

223. *Id.* at 2645–48.

224. *See id.* at 2646.

225. *Id.* at 2649–65.

226. *See* Savage, *supra* note 64 (quoting ACLU Legal Director Steve Shapiro).

requiring as-applied challenges, or awarding only as-applied remedies, when laws infringe on individual constitutional rights. Cases in which the existence of a statute imposes a chilling effect—for example, where a statute imposes criminal penalties and/or vaguely defines the boundaries of permissible and prohibited behavior—are particularly ill-suited to as-applied challenges. Accordingly, scholars as well as the Court have acknowledged the special importance of full, pre-enforcement challenges in certain individual rights contexts, such as vagueness and First Amendment overbreadth.[227] While a particular individual may bring a case-specific, pre-enforcement challenge in such a case, a remedy limited to that claimant will leave the statute in force, and the chilling effect will remain as to other claimants.[228] This concern has typically been cited in the context of overbreadth challenges,[229] but Marc Isserles argues that the concern is even more acute in valid rule facial challenges:

> Whereas the concern in overbreadth doctrine is that a broad statute threatens to suppress third parties' speech in a substantial number of applications (even though it is constitutionally valid in the case at hand), the concern in a valid rule facial challenge is that, in any individual application (including the one against the party before the court), the constitutional flaw in the statute itself creates such a likelihood of suppression that the statute must be deemed invalid in every application.[230]

Cases in which confidentiality or other concerns are likely to prevent concrete cases from coming before the courts, because individual, harmed plaintiffs are reluctant to appear in court, also benefit from the availability of facial challenges. Finally, fact patterns capable of repetition, yet evading review, are classic cases that are ill-suited to case-specific challenges, since it is impractical or even impossible to produce or maintain a live, concrete case in such circumstances.

Abortion cases exemplify all of these characteristics, so it is no surprise that historically litigation in these cases has proceeded through full

227. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 55 (1999) (vagueness); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (First Amendment overbreadth).

228. *See* Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court.").

229. *See id.*; *cf.* Dorf, *supra* note 10, at 277–78 (arguing that overbreadth doctrine is constitutionally mandated to avoid chilling effect); Fallon, *supra* note 11, at 873 (same).

230. Isserles, *supra* note 31, at 393 n.156.

pre-enforcement challenges. The acute need for confidentiality as well as the fleeting nature of pregnancy pose practical barriers to partial or case-specific pre-enforcement challenges by individual litigants. And success in such challenges would do nothing to alleviate likely chilling effects and the burdens imposed on other women and abortion providers subject to the laws. Abortion cases concern laws that have a broad social impact that will continue as long as the laws are in effect. It is a highly inefficient use of judicial resources to require such laws to be addressed through piecemeal litigation. If the Court wants to extricate itself from deciding abortion cases,[231] this is not the way to go about it. Moreover, piecemeal litigation reduces the precedential value of Supreme Court decisions regarding laws that infringe important rights, even where the Court rules favorably in a given case.[232] By insisting on case-specific challenges, the Court seems to put the public on notice that each case is different and must be assessed separately.[233] This excuses the Court from providing predictability and guidance as to the scope and contours of individual rights. Those affected by rights-infringing laws lose the ability to exercise their constitutional rights with confidence.[234]

IV. The Importance of Facial Challenges in Ensuring Legislative Constitutional Accountability

While partial or case-specific pre- or post-enforcement challenges may be appropriate in certain contexts, the Supreme Court should not force litigants to rely solely on such challenges when laws threaten to infringe important individual rights. Rather, the Court should stand ready to invalidate laws completely where legislatures either ignore clear constitutional rulings protecting individual rights or where they—whether deliberately or recklessly—base statutes on a questionable factual foundation. In doing so, the Court will fulfill its crucial role in protecting basic individual rights, especially minority and unpopular rights, from majoritarian power.[235]

231. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

232. *See* Faigman, *supra* note 58, at 646 ("In *Casey* and *Carhart I*, the national approach served the strong jurisprudential value of ensuring consistent constitutional outcomes from state to state.").

233. *See id.* at 637 (stating that "perhaps most importantly, resolutions of adjudicative facts have limited import, since they typically bear upon only individual cases").

234. *See Casey*, 505 U.S. at 843 (joint opinion) ("Liberty finds no refuge in a jurisprudence of doubt.").

235. *See supra* note 20 and accompanying text.

In *Washington State Grange*, the Court stated that facial invalidations contravene the democratic process because they "prevent laws embodying the will of the people from being implemented in a manner consistent with the Constitution."[236] Similarly, in *Ayotte*, the Court asserted that a facial invalidation "frustrates the intent of the elected representatives of the people."[237] Yet this is not so if the statute represents legislative defiance of clearly established constitutional precedent. It is not at all implausible that a legislature might disagree with the Court's substantive interpretation of the Constitution and want to make a point to the Court by flouting a requirement such as a medical emergency requirement or health exception in an abortion restriction. Anti-abortion-rights politicians, for example, have often criticized the Supreme Court's requirement of a health exception in abortion restrictions as an unmanageable loophole.[238] Legislatures have periodically shown their disdain for the requirement by proposing, and sometimes passing, legislation that lacks such an exception. For instance, after the Supreme Court decided *Carhart I*, state legislatures and Congress knew that a "partial-birth abortion" ban should contain a health exception in order to pass constitutional muster.[239] Yet, after the decision, bans lacking such an exception continued to be passed at both the state and federal levels. While the state bans as well as the federal ban were facially invalidated at the Court of Appeals level consistent with *Carhart I*,[240] the Supreme Court ultimately rewarded Congress's defiance

236. Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1191 (2008).

237. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)).

238. In the final 2008 presidential debate, Senator John McCain stated: "Again . . . just again, [an] example of the eloquence of Senator Obama. He's health [indicates scare quotes] for the mother. You know, that's been stretched by the pro–abortion movement in America to mean almost anything. That's the extreme pro–abortion position, quote, 'health.'" Transcript of the Third McCain–Obama Presidential Debate, October 15, 2008 (Commission on Presidential Debates), *available at* http://www.debates.org/pages/trans2008d.html; *see also* Jason Linkins, *McCain Mockingly Suggests That Concerns for a Mother's Health Are Extreme*, HUFFINGTON POST (Oct. 15, 2008), http://www.huffingtonpost.com/2008/10/15/mccain–mockingly–suggests_n_135072.html.

239. *See, e.g.*, Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1185 (9th Cir. 2006) ("Congress did not inadvertently omit a health exception from the Act. It was not only fully aware of *Stenberg*'s holding that a statute regulating 'partial–birth abortion' requires a health exception, but it adopted the Act in a deliberate effort to persuade the Court to reverse that part of its decision."), *rev'd* Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007); Borgmann, *Abortion Rights*, *supra* note 105, at 706–13 (discussing how Stenberg v. Carhart (*Carhart I*), 530 U.S. 914 (2000), reaffirmed that health exception in abortion legislation was an independent requirement under the U.S. Constitution).

240. *See, e.g.*, Family Planning Clinic, Inc. v. Cox, 394 F. Supp. 2d 978 (E.D. Mich. 2005) (Michigan ban), *aff'd*, 487 F.3d 323 (6th Cir. 2007); Richmond Med. Ctr. for Women v. Hicks,

by upholding the federal ban in *Carhart II* in spite of this clear constitutional flaw.[241] Moreover, the Court did so without openly overturning the health exception requirement. Instead, it put the burden of trimming the law to appropriate constitutional limits on hypothetical plaintiffs in hypothetical, future "as-applied" challenges.[242]

Legislatures have motivations besides outright defiance for passing unconstitutional laws. Some legislation is based on hostility to a minority group or to controversial rights,[243] hostility so strong that it may overcome regard for constitutional precedent. Sometimes legislatures pass clearly unconstitutional legislation not to defy the Court so much as to bow to constituent or lobbyists' concerns. They may reason that they can do so without risk since the statute can always be challenged if unconstitutional.[244] But whatever the motivation for such laws, if courts stand ready to repair any constitutional defects in a statute, they in essence reward legislatures for their disregard of constitutional requirements. As the Court itself has repeatedly recognized, "[W]e are wary of legislatures who would rely on our intervention, for '[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied."[245] By being overly deferential to the legislative process in these cases, the Court has struck the balance in the wrong way, allowing legislatures to risk harming individuals by freely curbing their rights.

In contrast, "facial challenges" offer a way of encouraging legislative constitutional accountability.[246] A legislature that disagrees with or disdains the Court's interpretation of the Constitution may express its disagreement by enacting a law that blatantly disregards the Court's

301 F. Supp. 2d 499 (E.D. Va. 2004) (Virginia ban), *aff'd*, 409 F.3d 619 (4th Cir. 2005), *petition for reh'g denied*, 422 F.3d 160 (4th Cir. 2005); cases cited *supra* note 95 (federal ban).

241. *Carhart II*, 127 S. Ct. at 1633, 1635–38.

242. *Id.* at 1638–39.

243. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); *see also* Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 21–35 (providing case studies of such laws in the contexts of "partial-birth abortion," sexual orientation and parenting, and "indecency" on the internet); Isserles, *supra* note 36, at 441 & n.371 (discussing *Romer* and other cases).

244. *See* Digital Media Wire Daily, *supra* note 27.

245. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (quoting United States v. Reese, 92 U.S. 214, 221 (1876)).

246. *See* Note, *After* Ayotte, *supra* note 3, at 2562; *see generally* Borgmann, *Legislative Fact-Finding*, *supra* note 2; Borgmann, *Legislative Arrogance*, *supra* note 3; John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law: The Courts Versus Congress in Social Fact-Finding*, CONST. COMMENTARY 69, 111–12 nn.182–85 (2008), *available at* SSRN: http://ssrn.com/abstract= 1061502.

rulings.[247] Of course, the legislature then runs the likely risk that its law will be only a symbolic gesture and will be quickly invalidated. On the other hand, it may reach the Court at the right historical juncture to result in a substantive legal change. There is nothing inherently troubling about—indeed, there may well be value in—this kind of constitutional dialogue between the legislative and judicial branches. But if the Court is not ready to overrule a past precedent outright, it should not hesitate to rebuff the legislature's attempt with full invalidation. Failure to do so encourages legislatures to challenge Supreme Court constitutional precedent in more disingenuous and insidious ways.

A recent Eighth Circuit en banc decision exemplifies how a court's rejection of a facial challenge may sanction disingenuous legislative "fact-finding" and abet legislative encroachments on individual rights. In *Planned Parenthood v. Rounds*, the plaintiffs challenged a South Dakota law that requires physicians to deliver a government homily to patients seeking an abortion. This written statement must include the following assertions:

> That the abortion will terminate the life of a whole, separate, unique, living human being; . . . [t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota; . . . [and] [t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.[248]

The law was premised upon the findings of a task force established by the South Dakota legislature to help support efforts to restrict and even ban abortion.[249] The composition and methods of the task force were highly controversial, outcome-driven, and politically motivated.[250]

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247. *See, e.g.*, Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1185 n.26 ("We are here because the Supreme Court defended the indefensible [in *Stenberg*] . . . . We have responded to the Supreme Court. I hope the Justices read this Record because I am talking to you. . . . [T]here is no reason for a health exception." (quoting 149 CONG. REC. S3486 (daily ed. Mar. 11, 2003) (statement of Sen. Santorum))).

248. S.D. CODIFIED LAWS § 34–23A–10.1(1)(b)–(d) (2005). The statute further requires that, if a patient seeks an explanation of any of the required disclosures, "or asks any other question about a matter of significance to her," the physician must provide her a written answer which "shall be made part of the permanent medical record of the patient." *Id.* § 34–23A–10.1(1)(g).

249. *See* Borgmann, *Judicial Evasion*, *supra* note 2, at 115, 123–29; Robert Post, *David C. Baum Memorial Lecture: Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 966–67; Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 101, 103–04, 111–16 (2008).

The district court preliminarily enjoined the statute on the grounds that the plaintiffs were likely to prevail on their claim that the requirement violated the First Amendment rights of physicians to be free from compulsion to speak.[251] A panel for the Eighth Circuit affirmed.[252] On reconsideration by the en banc court, the Eighth Circuit reversed, relying in part on the standard for a preliminary injunction as grounds for according significant deference to the South Dakota legislature:

> Only in a case such as this one, where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute, must district courts make a threshold finding that a party is likely to prevail on the merits. By re-emphasizing this more rigorous standard for demonstrating a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis.[253]

Applying this deferential approach, the court discounted plaintiffs' evidence regarding the provision's predicted unconstitutional effects, noting, "Planned Parenthood's evidence and argument rely on the supposition that, in practice, the patient will not receive or understand the narrow, species-based definition of 'human being' in § 8(4) of the Act, but we are not persuaded that this is so."[254] The court quoted the Supreme Court's admonition in *Washington State Grange* that courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."[255]

At the same time, taking its cue from the Supreme Court, the court was more than ready to defer to the legislature's assertion that the required statements consisted of scientific fact, not moral judgment, which women needed in order to make a well-informed decision about abortion.[256] This

250. *See* Borgmann, *Judicial Evasion*, *supra* note 2, at 123–29; Post, *supra* note 249, at 966–68; Siegel, *supra* note 249, at 111–16.

251. Planned Parenthood Minn. v. Rounds, 375 F. Supp. 2d 881 (D.S.D. 2005).

252. Planned Parenthood Minn. v. Rounds, 467 F.3d 716 (8th Cir. 2006).

253. Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 732–33 (8th Cir. 2008) (en banc) (footnote omitted).

254. *Id.* at 735.

255. *Id.* (quoting Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008)).

256. *See id.* at 728, 735. The court also found support in the Supreme Court's opinion in Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007), where the Court concluded that women must suffer psychological harm following an abortion although the Court admitted it could "find no reliable data" to support the proposition. *See Planned Parenthood Minn.*, 530 F.3d at 734–35; *see also Carhart II*, 127 S. Ct. 1610, 1634 (2007).

general posture of deference echoes the Supreme Court's approach in cases like *Crawford*, where the Court deferred completely to the legislature's asserted purpose in passing the law, even where that purpose rested upon a dubious factual foundation. Moreover, in *Carhart II*, the Court had specifically credited an alleged link between abortion and mental health, even though the government did not rely on this claim and despite the Court's own acknowledgement that the assertion has no basis in science.[257] Indeed, it appears the Court in *Carhart II* was implicitly inviting lower courts to defer to this claim when confronting abortion "informed consent" laws (to which, unlike the abortion procedure ban at issue in *Carhart II*, the assertion is far more relevant).

The Eighth Circuit's deference to the South Dakota legislature's fact-finding in *Rounds* precluded it from facially invalidating the statute. Had the Court taken the approach of Justice Scalia's dissent in *Washington State Grange*, it would have credited the plaintiffs' claim of harm.[258] More importantly, it would have viewed with skepticism the government's professed motivation of informing women about scientific facts regarding pregnancy. Instead, the court's decision ensured that the case would continue, perhaps even, as one of the law's supporters put it, to "a trial on the humanity of the child."[259] Yet the South Dakota ban was motivated not by solid evidence of a link between abortion and mental trauma, nor by a desire to impart scientific information to women, but as part of a broader agenda to ban abortion.[260] The information requirement was designed as a step on the path to overturning *Roe v. Wade* incrementally through lesser restrictions.[261] Women and their doctors are now saddled with intrusive, non-medical interference in the doctor-patient dialogue based on pretextual, scientifically dubious asserted state purposes. And, rather than being nipped in the bud through facial invalidation, the trend was encouraged by the Supreme Court's deferential approach.[262]

257. *See supra* Part II.B (discussing *Carhart II*).

258. *See supra* text accompanying notes 142–48 (discussing Justice Scalia's dissent in Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1197–1203 (2008) (Scalia, J., dissenting)).

259. Letter from Samuel B. Casey & Harold J. Cassidy to Members of the South Dakota Pro–Life Leadership Coalition at 7–8, 13 (Oct. 10, 2007) (on file with author).

260. *See id.*

261. *See id.*; Borgmann, *Judicial Evasion*, *supra* note 2, at 120–21; Siegel, *supra* note 249, at 1644–47.

262. *See* Borgmann, *Judicial Evasion*, *supra* note 2, at 114.

Scholars have generally agreed that an improper purpose pervades an entire law and makes full invalidation appropriate.[263] Isserles has suggested that the "purpose" prong of *Casey*'s undue burden standard might allow full invalidations of some abortion laws under the valid rule interpretation of *Salerno*:

> The purpose prong of this doctrinal test provides the basis for successful valid rule facial challenges under *Salerno* and the analysis provided above. If a facial challenger can demonstrate that a particular statute was enacted with the purpose of placing a substantial obstacle in the path of a woman seeking an abortion, the constitutional infirmity will be unrelated to any defect arising from particular statutory applications, and a court may properly conclude that "no set of circumstances" exists in which the statute may be constitutionally applied. All other things being equal, Casey's purpose prong should support successful valid rule facial challenges in a manner similar to purpose tests in other constitutional contexts.[264]

Identifying improper purposes in other contexts might help to justify facial invalidations in those contexts as well. But while a greater focus on the legislative purposes underlying rights-infringing laws is a good idea, how to go about achieving this focus is a harder question. There are several difficulties with simply strengthening a purpose requirement. First, it is not clear how a court can determine legislative intent.[265] How does one establish legislative intent when a statute represents the vote of many

263. *See, e.g.*, Dorf, *supra* note 10, at 279; Fallon, *supra* note 11, at 1338, 1345; Isserles, *supra* note 31, at 549. *But see* Metzger, *supra* note 13, at 917–19 & n.210 (noting that the Court does not fully invalidate districting schemes, despite finding of unconstitutional purpose, in racial redistricting cases).

264. Isserles, *supra* note 31, at 459 (footnotes omitted); *see also* Note, *After* Ayotte, *supra* note 3, at 2573 (arguing for a revived use of the undue burden standard's purpose prong to help "restore the legislative incentive to be a good faith partner in articulating abortion rights").

265. *See* Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting [a] statute is . . . almost always an impossible task. The number of possible motivations . . . is not . . . even finite . . . . To look for the *sole purpose* of even a single legislator is probably to look for something that does not exist."); *see also* Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (declining to invalidate abortion statute under *Casey*'s "purpose" prong in absence of evidence that legislature's "predominant motive" was to create "substantial obstacle" to abortion); Richard H. Fallon, *The Supreme Court 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 71–73 (1997) (describing difficulties in judicial implementation of purpose tests); *see generally* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989). *But see* Bhagwat, *supra* note 21, at 322–23 (arguing that "it is not particularly difficult to make reasonable judgments about the motivations behind legislation in most cases").

individuals? Even assuming a detailed legislative history exists,[266] what evidence suffices to establish legislative intent: The assertions of a bill's sponsors during floor debate? The assertions of other legislators? The testimony of witnesses in legislative committee hearings? A committee's report?

The partial-birth abortion context demonstrates the difficulty of pinpointing a legislature's purpose in enacting a law. The ban was originally conceived (by an anti-abortion-rights activist and a Congressman) as a political tool to help win "hearts and minds" on the issue of abortion.[267] The model ban's authors believed that, by forcing pro-choice advocates to talk about the abortion procedure, the bans would open the public's eyes to the gruesomeness of abortion.[268] Thus, partial-birth abortion, in the drafters' eyes, would pave the way for an ultimate outright ban on abortion.[269] Yet it is quite possible, and even likely, that many legislators who considered the bans were not fully aware of this hidden agenda. In fact, the public relations campaign surrounding partial-birth abortion was so successful that the term—which has no medical meaning—became common usage in the national political dialogue. Even many ordinarily pro-choice legislators voted for the bans[270] because they believed the rhetoric that the bans addressed a rogue, especially grisly, unnecessary, and even dangerous procedure.

Moreover, assuming legislative purpose could be clearly ascertained, simply demanding a legitimate purpose, without more, will make it too easy for a legislature to defend a rights-infringing law by presenting a pretextual purpose.[271] As the Supreme Court has observed,

266. Many state legislatures do not keep such detailed records.

267. *See* Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything To Lose*, HARPER'S MAG., Nov. 1, 2004, at 33; Nadine Strossen & Caitlin Borgmann, *The Carefully Orchestrated Campaign*, 3 NEXUS 3, 5–6 (1998); *see also* Brief for NARAL Foundation, et al. as Amici Curiae Supporting Respondents, Stenberg v. Carhart (*Carhart I*), 530 U.S. 914 (2000) (No. 99–830) (discussing role of National Right to Life Committee in crafting ban).

268. *See* Gorney, *supra* note 267, at 6–7, 10–11.

269. *See id.*

270. *See* Robert D. Novak, *Partial Pro–Life Democrats*, Creators.com (2007), http://www.creators.com/opinion/robert-novak/partial-pro-life-democrats.html ("[Seventeen] Democratic senators voted for the Partial Birth Abortion Ban Act (as it passed, 64 to 34). Their ranks included Sen. Patrick Leahy, the current Judiciary Committee chairman, and Sen. Joseph Biden, a former chairman—both rated 100 percent for 2006 voting by NARAL Pro–Choice America.").

271. *See* Ortiz, *supra* note 265, at 1115–16; *see also* Palmer v. Thompson, 403 U.S. 217, 225 (1971).

> There is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason . . . it would presumably be valid as soon as the legislature . . . repassed it for different reasons.[272]

In *Rounds*, the Eighth Circuit readily accepted South Dakota's claims that the purposes of the statute were to inform women about their pregnancies and to prevent mental trauma caused by abortion. Likewise, in *Crawford*, the Court deferred to Indiana's claim that the voter ID requirement was meant to address voter fraud.

Despite these concerns, it makes sense for courts to be concerned about legislative purpose when faced with a law alleged to infringe important individual rights. At some level, the Supreme Court at least implicitly applies a purpose test to every case alleging that a statute infringes constitutional rights.[273] Every law that treads on constitutional rights must be supported by at least a rational basis. And this implicit purpose test is usually not dependent upon particular facts presented by one or more litigants or by hypothetical claimants. Instead, the test "focuses on the overall weight of the government's interest in enacting a statute . . . the determination of which is independent of, and unaltered by, the particularities of individual statutory applications."[274] If a law has no legitimate purpose, therefore, its effects are irrelevant, since the law is not a valid rule at all.[275]

Greater judicial scrutiny of legislative purpose can be employed in several different ways. One possible approach is a more searching evaluation of legislative purposes to determine whether a given justification is a valid one. Ashutosh Bhagwat has argued that the Court has too readily accepted asserted legislative purposes and has been too reluctant to scrutinize the "strength and validity" of those purposes.[276] Another approach is to focus on the factual nexus between a statute's purposes and the means chosen to effectuate it. David Faigman has faulted the Court for

272. *Palmer*, 403 U.S. at 225.

273. *But see* Bhagwat, *supra* note 21, at 304 (asserting that while the constitutional tiers of scrutiny "appear to include standards for the examination of government purposes," until recently the Court "never got around to its promised analysis of the purposes").

274. Isserles, *supra* note 31, at 443.

275. *Id.* I do not here address how the Court should determine whether a given asserted government interest qualifies as valid. Rather, my focus is on whether and how the Court should determine that an admittedly legitimate stated purpose for a law is pretextual or lacks a factual justification. *Cf.* Bhagwat, *supra* note 21, at 325–56 (proposing framework for judicial determination of illegitimate and proper government purposes advanced to justify burdens on core individual rights).

276. Bhagwat, *supra* note 21, at 312.

sometimes subsuming its purposes inquiry into the very definition of the right at issue, thereby skirting an empirical examination of the "connection between the government's purposes and the complained-of action."[277] A third approach considers whether, given a concededly legitimate purpose, that purpose either is pretextual or lacks a grounding in fact. Where a court has reason to doubt a stated purpose, it has an independent basis to invalidate the law in its entirety.

An example illustrates the distinctions among these three approaches. Suppose a legislature bans an abortion procedure on the grounds that the procedure harms women. Bhagwat's approach would ask whether protecting women's health qualifies as a valid purpose that could outweigh women's right to the procedure. Assuming it is, Faigman's analysis would ask whether the law adequately addresses that concern. For example, a court might consider doctors' testimony regarding whether the statute reaches only that procedure or imperils other important procedures. My approach takes a step back from these two and asks whether the legislature even had reason to believe that the procedure endangered women's health. If it did not, then it should not matter how important or legitimate the purpose is in the abstract, or how well tailored the law is to meet that purpose. The entire law should be invalidated in its entirety.

The question remains how a court can best smoke out a pretextual or factually unsubstantiated purpose.[278] One possibility is to look at whether a legislative enactment has violated clearly established constitutional precedent.[279] This may be a useful proxy for legislative purpose in contexts like abortion, where a body of cases has established models for what valid and invalid legislation looks like.[280] In *Ayotte*, for example, there was ample precedent (including *Casey*) demonstrating that a medical emergency exception was constitutionally required.[281] It seems fair to

277. David Faigman, *Reconciling Individual Rights and Government Interests*, 78 VA. L. REV. 1521, 1531–32 (1992) ("The Court must review the nexus between the action and the government's reasons for acting.").

278. *See* David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV 41, 97 (2006) ("[T]he use of non–purpose–based doctrine [in First Amendment context] to ferret out illicit purposes [] is useful because a candidly purpose–based doctrine would confront the twin problems of false negatives and false positives: on the one hand, impermissible governmental motives are notoriously difficult for litigants to prove, and on the other hand, permissible ones are notoriously easy for legislatures to feign.").

279. *See* Note, *After* Ayotte, *supra* note 3, at 2569–70 (proposing that "purpose" prong of *Casey* undue burden standard be deemed violated where statute is "inconsistent with clearly established law").

280. *See generally* Devins, *supra* note 29.

281. The Court in *Ayotte* noted that, out of forty–four states with parental involvement laws, only four (including New Hampshire's) lacked any kind of exception for medical emergencies).

conclude that the New Hampshire legislature either overtly intended to defy the law, or was at least reckless concerning whether its law violated constitutional rights.

The clear constitutional precedent proxy will not work across the board to identify illegitimate purposes for rights-infringing laws, however. In cases in which the law is more unsettled or evolving, legislatures will be at liberty to enact laws for doubtful reasons, knowing full invalidation is unlikely. In such circumstances, courts can still ensure that laws are not enacted purely due to animus or hostility by independently examining any fact-based motives for rights-infringing laws. In essence, such independent judicial scrutiny functions like a purpose test. A statute enacted for an illegitimate purpose will often lack such a foundation, since the stated purpose is pretextual.[282] If a fact-based justification falls apart when examined carefully and impartially, it is appropriate for the courts to strike down the law in its entirety. Indeed, the Supreme Court has recognized that a mistaken or false factual premise for a law vitiates all of the law's applications and warrants complete invalidation.[283]

There are many examples of rights-infringing laws for which legislatures, likely having acted out of hostility toward the right in question, have asserted a neutral-sounding, fact-based justification. For example, states that have enacted laws infringing on the rights of gay and lesbian persons to marry or to adopt children have typically claimed a desire to protect children from harm or to provide them with the optimal parenting arrangement. Courts that have refused to examine independently the factual assertion that children raised by gay parents will be harmed have typically upheld such laws.[284] In stark contrast, courts that have conducted independent factual examinations of this asserted justification have invalidated the same kinds of laws.[285]

Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 326 n.1 (2006). *Gonzales v. Carhart* (*Carhart II*) has now called into question whether and when abortion restrictions require a health or medical emergency exception. *See* Hill, *supra* note 104, at 322, 343.

282. *See* Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 21–35 (presenting case studies).

283. *See* Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 966 (1984) ("The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that *in all its applications it operates on a fundamentally mistaken premise* that high solicitation costs are an accurate measure of fraud." (emphasis added)); *see also id.* at 961 (discussing statute's mistaken factual premise).

284. *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 826 (11th Cir. 2004) (agreeing with trial court's decision to defer to legislature), *aff'g* Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

285. Varnum v. Brien, No. 07–1499, slip op. at 54–59, 69 (Iowa April 3, 2009); Dep't of Human Servs. v. Howard, 238 S.W.3d 1 (Ark. 2006); *In re* Adoption of John Doe and James Doe,

Some will object that close judicial scrutiny of legislative purposes violates rather than honors constitutional norms. They will claim that courts conducting such an inquiry overstep the proper bounds of their authority by interfering with democratic processes. But such scrutiny need not and should not be unmoored from constitutional norms. Rather, "any searching, judicial review of legislative purposes must be meaningfully constrained by and grounded in the Constitution itself—the one source of authority that properly trumps the decisions of democratically elected bodies."[286] Nevertheless, if the requirement of at least a "legitimate purpose" in order to infringe important individual rights is to have any meaning, the courts cannot simply accept a stated purpose unquestioningly.

The constitutional norms that call for decisive judicial action in the face of laws that unconstitutionally infringe important individual rights may warrant a different approach in the context of laws that are rights-protective. When the majority acts altruistically, that is, against its own interests or in order to *protect* rights, the courts' duty to protect individuals from majoritarian power is at its low ebb. The legislature is by definition not motivated by bias or hostility toward such rights, and there is little danger that a pretextual purpose will be offered to disguise animosity or prejudice toward an unpopular group. This may be true, for example, when Congress attempts to protect vulnerable or powerless individuals from state oppression. In *United States v. Raines*, the Court addressed a challenge to the 1957 Civil Rights Act, through which Congress attempted to provide relief from race-based interference with voting rights.[287] In *Raines*, it seems appropriate for the Court to have saved the statute rather than to invalidate it on its face.[288] In contrast, courts wrongly enable defiant legislatures when they refuse to invalidate in their entirety laws that infringe important individual rights, especially where a legislature has disregarded clear constitutional precedent or where an independent judicial examination reveals no solid factual basis for the law.

Conclusion

Facial challenges have played a vital role in giving meaning to constitutionally protected individual rights. The majoritarian process is predisposed to produce laws from time to time that infringe core individual

slip op. at 51–52 (Fla. Cir. Ct. Nov. 25, 2008) (case number redacted); Baehr v. Miike, CIV. No. 91–1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

286. Bhagwat, *supra* note 21, at 325.

287. United States v. Raines, 362 U.S. 17 (1960).

288. *Cf.* Metzger, *supra* note 13, at 901–02 (offering different analysis for why Court's decision in *Raines* was correct).

rights. While sometimes those laws will curb rights out of necessity, in order to accommodate a valid and commensurately weighty purpose, bias and hostility will often—perhaps more often—infect the process. Courts faced with challenges to rights-infringing laws can acknowledge this head-on and independently examine stated legislative purposes, or they can turn a blind eye and defer to the legislature's assertions. The latter approach will encourage legislatures to thumb their nose at the U.S. Constitution, knowing that they can infringe rights with impunity. The former approach, when enforced through total invalidations, will promote constitutional accountability among legislatures. It will also ensure that the courts fulfill their crucial responsibility to protect individual rights from majoritarian oppression.

The legislative process is an adversarial one that is not conducive to neutral fact-finding, especially when controversial or minority rights are at issue.[289] The courts, on the other hand, are much better designed for that purpose. In important cases, serious judicial examination of fact-based legislative purposes has proven decisive when courts have undertaken it.[290] The Supreme Court should recognize how crucial such an inquiry is in the context of rights-infringing laws and more systematically scrutinize the legislative purposes the government presents their defense. Unfortunately, the Roberts Court has so far taken the opposite tack. Under the guise of preferring as-applied challenges, the Court has placed unrealistic and troubling evidentiary burdens on plaintiffs in such cases, while accepting uncritically legislatures' fact-based justifications for curbing individual rights.[291]

Laws that infringe individual rights out of open defiance of clear constitutional precedents, or because of inattention to the facts, are fundamentally flawed and thus prime candidates for total invalidation. Only the threat of complete invalidation in appropriate cases will motivate Congress and state legislatures to make good on their obligation to uphold the U.S. Constitution. And the Court will not make good on its own obligation to protect individual rights unless it once again embraces facial challenges.

289. *See* sources cited *supra* note 21.

290. *See* Borgmann, *Legislative Fact-Finding*, *supra* note 2, at 21–35 (presenting case studies comparing outcomes when courts do and do not defer to legislative fact-finding).

291. *Cf.* Faigman, *supra* note 58, at 654, 655–58 (analyzing costs of Supreme Court's shifting frame of reference in constitutional cases from level of "reviewable facts" to individual cases).