

ESSAYS

FACIAL AND AS-APPLIED CHALLENGES TO THE INDIVIDUAL MANDATE OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Edward A. Hartnett *

I. THROUGH A GLASS, DARKLY

For a time, the law governing facial, as opposed to as-applied, constitutional challenges was, it seemed, simple to state. There was a general rule and a First Amendment exception. The general rule was that facial challenges were rare, disfavored, and could succeed only if the challenger convinced the court that there were no circumstances under which the challenged statute could be constitutionally applied. As the Supreme Court put it in *United States v. Salerno*, it had “not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment,” and that in all other contexts, a facial challenge could succeed only by showing that “no set of circumstances exists under which the Act would be valid.”¹ The exception, the First Amendment overbreadth doctrine, enabled a challenger to show that, although his own conduct was *not* constitutionally protected, the statute was sufficiently broad that it also applied to others whose conduct *was* constitutionally protected, and therefore could not constitutional

* Richard J. Hughes Professor for Constitutional and Public Law and Service, Seton Hall University School of Law. J.D., 1985, New York University School of Law; A.B., 1982, Harvard College. Thanks to John Jacobi and Frank Pasquale for helpful comments.

1. 481 U.S. 739, 745 (1987).

ly be applied to anyone. This overbreadth doctrine was designed to avoid the chilling of free speech.²

Outside of the First Amendment, unless a litigant could meet the stringent test for a facial challenge, he could only mount an as-applied challenge, one that would be successful only if the statute was unconstitutional as applied to him, and one whose impact would be similarly limited. If all he could show is that the statute would be unconstitutional as applied to some hypothetical other, his challenge would fail, the statute would be enforced against him, and the possibility that some hypothetical other might have a legitimate constitutional claim would be left for another day.³

This seemingly neat doctrine began to give way under analytic pressure. Perhaps not surprisingly, the first pressure point on the Supreme Court involved abortion. Justice Scalia, who found no warrant in the Constitution for abortion rights in the first place, called for subjecting challenges to statutes regulating abortion to *Salerno's* stringent test for facial challenges.⁴ Justice Stevens, who defended abortion rights, labeled the *Salerno* statement a “rhetorical flourish” rather than an accurate statement of the law.⁵ Although not deciding whether *Salerno's* test applies in the abortion area, the Court in a later abortion case stated that a court “confronting a constitutional flaw in a statute” should generally “try to limit the solution to the problem,” preferring “to enjoin only the unconstitutional applications of a statute while leaving the other applications in force.”⁶ It acted on this statement in *Gonzales v. Carhart*, rejecting a facial challenge to the federal statute banning partial-birth abortion, leaving to later litigation the possibility that it might be unconstitutional as applied to some situations.⁷

2. See *Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940).

3. See *Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912).

4. See *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1178 (1996) (Scalia, J., dissenting) *denying cert. to* *Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995).

5. *Id.* at 1175 (Stevens, J., respecting the denial of certiorari).

6. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328–29 (2006).

7. 550 U.S. 124, 168 (2007). Whether for strategic reasons or lack of any instances where the prohibited procedure was necessary, it appears that no such litigation was ever brought. *Cf. Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009) (en banc) (rejecting an attempt to characterize a case filed before the *Carhart* decision as an

With the spotlight turned on the issue of facial challenges, it became more and more clear that the simple statement of a general rule with a First Amendment exception was deceptively-simple, if not downright wrong. The Rehnquist Court decisions holding federal statutes unconstitutional for exceeding Congressional power under the Commerce Clause were decisions of facial invalidity.⁸ So, too, were a number of decisions finding federal statutes unconstitutional for exceeding Congressional power under Section 5 of the Fourteenth Amendment.⁹ (On the other hand, there were also decisions concluding that a statute, challenged as exceeding Congressional power under Section Five, was constitutional as applied to the case before the Court, even though it might have unconstitutional applications.)¹⁰ The *Booker* decision held the federal sentencing statute facially unconstitutional for violating the Sixth Amendment right to a jury trial.¹¹

In recent years, the Court has frequently (but certainly not always) been quite self-conscious about the growing recognition that facial challenges are more broadly accepted than the simple rule suggests. This self-consciousness was perhaps most visible in *Sabri v. United States*, where the Court rejected a facial challenge to a federal statute under the Spending Clause and appended an afterword to its opinion discouraging facial attacks alleging overbreadth, while listing free speech, the right to travel, abortion, and Section 5 of the Fourteenth Amendment as among the “relatively few settings” in which such facial attacks have been recognized.¹²

Scholars have demonstrated that facial challenges are more common and more successful than the Court has acknowledged, such as in cases involving the Equal Protection Clause and the Establishment Clause.¹³ In an article published this summer, Pro-

appropriate as-applied challenge).

8. See *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995).

9. See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

10. See *United States v. Georgia*, 546 U.S. 151, 158–59 (2006); *Tennessee v. Lane*, 541 U.S. 509, 530–31 (2004).

11. See *United States v. Booker*, 543 U.S. 220, 248 (2005).

12. 541 U.S. 600, 602, 608–10 (2004).

13. See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238–39 (1994); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 361 (1998).

fessor Richard Fallon makes a powerful case that even these scholarly critics have understated the point.¹⁴ By his count, based on a study of six Supreme Court Terms between 1984 and 2009, facial challenges are not only more common than as-applied challenges but also have a higher success rate.¹⁵ Apart from the numbers, he argues that a survey of leading cases across a “broad range of constitutional provisions” show that the Court “has held statutes wholly invalid under nearly every provision of the Constitution under which it has adjudicated challenges to statutes.”¹⁶ In addition to cases under the Equal Protection and Establishment Clauses, he points to cases arising under the Qualifications Clause, the Presentment Clause, the Suspension Clause, the Contracts Clause, the Import-Export Clause, the dormant Commerce Clause, and the Eighth Amendment, as well as cases involving presidential power under Article II, judicial power under Article III, and structural assumptions of federalism.¹⁷ Indeed, for Fallon, the “conventional wisdom regarding facial challenges” is, “[n]early across the board . . . more wrong than right.”¹⁸

II. THESE THREE REMAIN

Despite the confusion inherent in a situation where there is such divergence between the oft-stated rule and the actual practice, three things are nevertheless clear about facial versus as-applied challenges. The first is that the actual impact of a decision depends more on the law of preclusion and precedent than on the labels given to the challenges. Second, the distinction between facial and as-applied constitutional decisions is not so much a dichotomy between two separate categories but more a range with in-between gradations. Third, whether a statute is held unconstitutional on its face or as-applied turns, to a considerable extent, on the substantive constitutional doctrine brought to bear in a given area of the law.

Regardless of whether a judge in a particular case describes his holding as facial or as-applied, the actual impact will depend

14. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 917 (2011).

15. *Id.* at 917–18.

16. *Id.* at 935.

17. *Id.* at 935–38.

18. *Id.* at 917.

more on the permissible scope of any injunction, the law of preclusion, and the law of precedent.¹⁹ Imagine a district judge dismissing a federal indictment on the grounds that the statute relied upon is unconstitutional on its face. That decision by itself, apart from any appeal, prevents the government from prosecuting that defendant under that statute, but has no power, under the law of preclusion, to prevent the government from prosecuting a different defendant.²⁰ Nor does it, under the law of precedent, bind any judge in higher courts, other district courts, or even judges in that same district.²¹ The judge may describe the ruling as one of facial invalidity, but the statute lives on—not only in the statute books, as statutes do until repealed, regardless of what judges say about them—but also in actual operation. On the other hand, imagine a decision by the Supreme Court of the United States holding a statute unconstitutional as applied, but based on reasons that apply to all (or virtually all) actual applications of that statute. The Court might not describe its holding as one of facial invalidity, but the law of precedent will mean that it has that effect (or nearly so).²²

As the parenthetical qualifiers in the last sentence suggest, the distinction between facial and as-applied decisions represents a range rather than dichotomous separate categories. The Supreme Court's decision in *City of Boerne v. Flores* presents a classic example.²³ In that case, the Court held that the Religious Freedom Restoration Act ("RFRA") exceeded Congressional power under Section 5 of the Fourteenth Amendment.²⁴ Its decision was not particularly tied to the facts of the case; it hardly mattered that the case involved a claim that application of local land use law to bar a planned expansion of a church violated RFRA, as opposed to a claim that application of a state drug law to bar the consumption of peyote violated RFRA.²⁵ That is, it seems like a decision

19. See *id.* at 923 n.31. Indeed, Professor Fallon goes so far as to suggest that "we would do better to drop the term 'facial challenge' entirely when talking about lower court rulings," because the term "tends to obscure issues involving the precedential and preclusive effects of lower court judgments and the appropriate scope of judicial injunctions." *Id.* at 924 n.31.

20. See *United States v. Mendoza*, 464 U.S. 154, 155 (1984).

21. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824 (1994).

22. See Fallon, *supra* note 14, at 950.

23. 521 U.S. 507 (1997).

24. *Id.* at 512.

25. See *id.* at 532; *cf.* *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 874

that RFRA is unconstitutional on its face, rather than as applied. And to a very large extent it is: under *Boerne*, RFRA cannot constitutionally be applied to state (and local) government action.²⁶ But nothing in the reasoning of *Boerne* calls into doubt its validity as applied to national action; as to that, Congress need not rely on the Fourteenth Amendment.²⁷

This leads to the third point that is clear in this area: whether a statute is held unconstitutional on its face or as-applied turns, to a considerable extent, on the substantive constitutional doctrine brought to bear in a given area of the law. Consider the Establishment Clause: to the extent that the Court relies on the *Lemon* test and determines that a statute lacks a secular purpose, the statute is unconstitutional on its face.²⁸ The particular application of the statute does not matter. Consider on the other extreme, the limits imposed by the Due Process Clause on state court jurisdiction: the minimum contacts and reasonableness tests of *International Shoe* and its progeny look to the particulars of the individual case.²⁹

I argue that this third point should lead to another: instead of treating substantive doctrine as given, whatever its impact on producing determinations of facial or as-applied validity or invalidity, courts should shape substantive constitutional doctrine with an awareness of the extent to which that doctrine will tend to produce judicial decisions that decide the constitutionality of a statute on its face.³⁰ Because I believe that courts are, in general, better suited to adjudicating on an as-applied basis, I think that courts should, in general, shape constitutional doctrine in a way that tends to produce as-applied judicial decisions.³¹ Concededly, this may seem a rather abstract point, and once some doctrine is

(1990).

26. See *Boerne*, 521 U.S. at 532.

27. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 438–39 (2006).

28. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

29. *J. McIntyre Mach. v. Nicastro*, 564 U.S. ___, ___, 131 S. Ct. 2780, 2787 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

30. See Edward Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1753 (2006).

31. See *id.*

in place in a substantive area of the law there may be considerable reluctance to refashion it in this direction, given the general path dependency of a legal system with a doctrine of precedent.³²

III. HOPE AGAINST HOPE

What does any of this have to do with challenges to the Patient Protection and Affordable Care Act? The central issue on the merits is whether the individual mandate is within Congressional power under the Commerce Clause. In keeping with the premise of this symposium, I am not going to discuss the merits themselves, but rather the extent to which the merits might be approached on an as-applied, as opposed to a facial, basis.

Existing Commerce Clause doctrine is hardly hospitable to as-applied adjudication. The modern cases finding violations of the Commerce Clause, *Lopez* and *Morrison*, were determinations of facial unconstitutionality.³³ The aggregation principle of *Wickard v. Filburn*, which calls for the impact of individuals' behavior to be added together in order to find a substantial effect on interstate commerce,³⁴ pulls strongly away from as-applied challenges. The Court has repeatedly stated, most recently in *Gonzales v. Raich*, that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."³⁵ And *Raich* upheld the federal prohibition on marijuana, rejecting the argument, accepted by Justice Thomas in dissent, that the statute was unconstitutional as applied to medical marijuana patients largely outside the interstate drug market.³⁶ In these circumstances, it is hardly surprising that some think that there can

32. Cf. Fallon, *supra* note 14 at 948 ("Given a rule of decision, the Justices will apply it, with no further preference for narrow, as-applied analysis.")

33. See *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995).

34. 317 U.S. 111, 124–25 (1942).

35. 545 U.S. 1, 23 (2005) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)). The same passage appears in several other cases. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 15, 194 n.15 (2001); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 308 (1981); see also *Maryland v. Wirtz*, 392 U.S. 183, 192–93 (1968) ("The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest.")

36. *Gonzales v. Raich*, 545 U.S. 1, 14 (2005); *id.* at 57–58 (Thomas, J., dissenting).

be no such thing as a (successful) as-applied challenge based on the Commerce Clause.³⁷

In light of all this, odds are that the Supreme Court will either find the individual mandate constitutional on its face, following cases like *Wickard* and *Raich*, and foreclosing the possibility of as-applied challenges, or unconstitutional on its face, following cases like *Lopez* and *Morrison*, and foreclosing the possibility that it could be constitutionally applied in some instances.

But not necessarily.

The Court is being called upon to make new law, whatever it decides.³⁸ Sure, each side believes that its view is in better accord with and better accounts for the precedents, but all must admit that the Supreme Court has never adjudicated a Commerce Clause challenge to a statute that requires individuals to buy a product in a private market in which they are not otherwise participating. From the perspective of the challengers, the defenders of the statute are asking the Court to endorse a dangerous new principle, that Congress may force individuals who are not engaged in economic activity in a given market to enter that market against their will. From the perspective of the defenders, the challengers are asking the Court to impose a new, heretofore unheard of, limitation on Congressional power. The novelty of whatever it does puts the Court in a better position, should it so choose, to formulate the new doctrine in a way that takes into account how that doctrine affects the availability of facial and as-applied challenges.

Moreover, Judge Sutton has put the issue on the table, showing how it can be done.³⁹ This is of greater importance than might appear at first blush, because the Court has admitted that it some-

37. See Fallon, *supra* note 14 at 936 (noting that *Raich* “can be read as rejecting the possibility of successful as-applied challenges to assertions of legislative power under the Commerce Clause and thus as establishing that all attacks must be facial if they are to have any chance at success”) (citations omitted); see also Transcript of Oral Argument at 15, *Gonzales v. Raich*, 545 U.S. 1 (2004) (No. 03-1454) (providing that Solicitor General Clement stated that the statute could never have an unconstitutional application because, although “an as-applied challenge can be brought . . . the legal test that’s applied in the as-applied challenge is one that considers the constitutionality of the statute as a whole.”).

38. “The mandate, it should be recognized, is indeed somewhat novel, but so too, for all its elegance, is appellants’ argument.” *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011).

39. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 565–66 (6th Cir. 2011) (Sutton, J., concurring).

times overlooks the possibility of insisting on an as-applied determination, if the parties seek all-or-nothing facial determinations.⁴⁰ His concurring opinion in *Thomas More Law Center v. Obama* concludes that the individual mandate of the Affordable Care Act is constitutional on its face, while holding open the possibility that as-applied challenges might succeed.⁴¹ He explains that there are at least four settings in which the individual mandate can constitutionally be applied, and that this is enough to preserve the statute from facial invalidity. In particular, he points:

- (1) to individuals who already have purchased insurance voluntarily and who want to maintain coverage, but who will be required to obtain more insurance in order to comply with the minimum-essential-coverage requirement;
- (2) to individuals who voluntarily obtained coverage but do not wish to be forced (at some intermediate point in the future) to maintain it;
- (3) to individuals who live in states that already require them to obtain insurance and who may have to obtain more coverage to comply with the mandate or abide by other requirements of the Affordable Care Act; and
- (4) to individuals under 30, no matter where they live and no matter whether they have purchased health care before, who may satisfy the law by obtaining only catastrophic-care coverage.⁴²

Judge Sutton acknowledges that “[s]ome theories of invalidity necessarily apply to all applications of a law,” and therefore do not lend themselves to as-applied evaluation.⁴³ But he contends that other theories—particularly the proposed action/inaction limitation on congressional power—do lend themselves to as-applied evaluation.⁴⁴ As he sees it, if a court were to accept some variant of the idea that Congress may not regulate inactivity under the Commerce Clause, that new doctrine could be utilized on an as-applied basis. He explains that nothing in his view of the case

precludes individuals from bringing as-applied challenges to the mandate as the relevant agencies implement it, and as the “lessons taught by the particular” prove (or disprove) that Congress crossed a constitutional line in imposing this unprecedented requirement. Just

40. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 331 (2006) (noting that “the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn”).

41. *Thomas More Law Center*, 651 F.3d at 565–66.

42. *Id.* at 565.

43. *Id.* at 556.

44. *Id.*

as courts should refrain from needlessly pre-judging the *invalidity* of a law's many applications, they should refrain from doing the same with respect to their *validity*.⁴⁵

IV. RUBIN VASES

I think that Judge Sutton is right that at least some of the challengers' theories lend themselves to as-applied adjudication,⁴⁶ although I also think there is more ambiguity to the point than his opinion suggests. Indeed, reflecting on his opinion leads me to believe that it is not only that substantive constitutional doctrine affects the availability of facial versus as-applied challenges, but that the very same substantive constitutional doctrinal limitation can sometimes be conceptualized and articulated either in a way that leads to facial evaluation or in a way that leads to as-applied evaluation—and that courts should be self-conscious about the decision to articulate it one way or another. That is, although some doctrines lend themselves readily to facial determinations of constitutionality (e.g., doctrines that look for legislative purpose), while others lend themselves readily to as-applied determinations of constitutionality (e.g., doctrines that look to particular adjudicative facts), sometimes the same basic principle can be conceptualized and stated in two different ways, one that lends itself to facial determinations and one that lends itself to as-applied determinations.

This principle may initially appear surprising, and then obvious.⁴⁷ It can be seen in widely divergent constitutional areas, including the Eighth Amendment's ban on cruel and unusual punishment,⁴⁸ the Due Process Clause's limitation on abortion regula-

45. *Id.* at 566 (citation omitted).

46. The challengers in the D.C. Circuit, "unlike the plaintiffs before the Sixth Circuit, . . . were careful to avoid conceding there were any valid applications of the law," and pursued a "theory of the Commerce Clause [that] would invalidate virtually all conceivable applications of the mandate." *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011). But to do so, they painted themselves into a corner, arguing that even if Congress could require individuals to buy insurance when they sought medical care, it lacked the authority to oblige them to keep it. The price of attempting to avoid the facial challenge objection was to render the argument "rather unpersuasive on the merits," because "Congress . . . would . . . clearly have the power to impose insurance purchase conditions on persons who appeared at a hospital for medical services." *Id.* at 18.

47. *Cf.* Fallon, *supra* note 14, at 950 (noting that the "path to a better understanding" in this area "starts with two banalities" that "deserve reemphasis").

48. *See* U.S. CONST. amend VIII.

tions,⁴⁹ and the Due Process Clause's limitation on personal jurisdiction.⁵⁰ And it can be seen in the proposed Commerce Clause limitation on regulating inaction.

My point is not that all constitutional principles can be conceptualized and stated in two different ways, one that lends itself to facial determinations and one that lends itself to as-applied determinations. For example, the Eighth Amendment has been interpreted to require "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁵¹ That principle plainly lends itself to facial determinations: a given statute (at least as judicially interpreted)⁵² either suitably constrains the sentencer's discretion or it does not. Under that principle, if the statute does not suitably constrain discretion, the statute cannot constitutionally be applied to anyone; the statute has to be fixed if capital punishment is going to be implemented. And that, of course, is precisely what happened in the wake of *Furman*.⁵³ It is difficult to see how that principle could be conceptualized and articulated in a way that would avoid facial determinations and favor as-applied challenges.

But the Eighth Amendment has also been interpreted to bar the execution of those who were minors at the time of the offense.⁵⁴ That principle could be conceptualized and articulated in two different ways, one that would lend itself to facial determinations and one that would lend itself to as-applied determinations. One could think of the principle as one that requires a capital punishment statute to contain an exception for those who were minors at the time of the offense. So understood, a capital punishment statute that lacked such an exception would be facially unconstitutional, just as a statute that failed to provide adequate constraint on a sentencer's discretion is facially unconstitutional. The statute would have to be fixed to implement capital punish-

49. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973).

50. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–73 (1985).

51. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (describing the holding of the fractured Court in *Furman v. Georgia*, 408 U.S. 238 (1972)).

52. *Walton v. Arizona*, 497 U.S. 639, 653–54 (1990).

53. *Id.* at 657, 659–60.

54. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

ment. Alternatively, one could think of the principle as requiring that a capital punishment statute not be used against someone who was a minor at the time of the offense. Understood this way, the principle lends itself readily toward as-applied adjudication: If a death penalty statute makes no provision regarding the defendant's age, it is nonetheless facially constitutional; it simply cannot be constitutionally applied to someone who was a minor at the time of the offense. The statute need not be amended to make it effective. Its reach is simply limited.

This is one way to understand the decision in *Carhart II*.⁵⁵ The majority was willing to accept, at least for purposes of the case, the constitutional principle that the Due Process Clause gives a woman a right to abortion when her health so requires.⁵⁶ But it conceptualized and articulated that principle as one that limited the permissible reach of the statute, producing a conclusion that the statute was facially constitutional but could be challenged as-applied to a mother whose health required the kind of abortion forbidden by the statute.⁵⁷ The dissenters, on the other hand, conceived of the same principle as one that required a statute prohibiting a form of abortion to include an exception for the health of the mother.⁵⁸ Since such an exception was not included in the text of the statute, the statute was facially unconstitutional.⁵⁹

The minimum contacts test for personal jurisdiction is readily understood as lending itself to as-applied constitutional determinations. A given statute or rule authorizing the exercise of personal jurisdiction is unconstitutional as applied to a defendant who lacks the requisite minimum contacts, without calling into doubt the validity of the statute or rule in general. But even here, the constitutional principle can be conceptualized as a requirement that a statute authorizing personal jurisdiction be written so as to exclude those who lack the requisite contacts. As odd as that way of conceptualizing and articulating the minimum contacts standard may seem, given the enormous number of cases using the test on an as-applied basis, it is one way of understanding the *Schaffer v. Heitner* decision.⁶⁰ There, the Supreme Court

55. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

56. *Id.* at 167–68.

57. *Id.*

58. *Id.* at 171, 191 (Ginsburg, J., dissenting).

59. *Id.* at 191.

60. 433 U.S. 186 (1977).

found facially unconstitutional a Delaware statute authorizing personal jurisdiction based on ownership of shares in a Delaware corporation, even though the defendants in that case—officers of the corporation—almost certainly had minimum contacts with the state and the claim concerned their conduct as officers of that Delaware corporation.⁶¹

Again, the point is not that all substantive constitutional principles have this Rubin-vase characteristic, but that some do. And the proposed principle that, under the Commerce Clause, Congress cannot regulate inaction, or force people to enter a market, is a substantive constitutional principle that does. Such a principle could be conceptualized and articulated as requiring that any federal statute purporting to regulate commerce, in order to be constitutional, must not regulate inaction or force people to enter a market. If understood this way, the principle would call for a conclusion of facial invalidity of the individual mandate of the Affordable Care Act. But such a principle could be conceptualized and articulated as prohibiting the national government from using its commerce regulations against those who have not engaged in relevant action or who have not entered the relevant market. If understood this way, the principle would call for a conclusion that the individual mandate of the Affordable Care Act is unconstitutional as applied to such individuals, but is nevertheless constitutional as applied to others.

V. PUT AWAY YOUR SWORD

If we are dealing with a principle that can be understood in both ways, how might a court decide between them? One method that seems to be in play, at least at an intuitive or unarticulated level, may be a sense of how great a proportion of total likely applications of the statute are unconstitutional.⁶² Of all the death penalty cases under a particular statute, those involving defend-

61. *Id.* at 189–90, 213–14.

62. That is, even when the Court is not explicitly using an overbreadth analysis it may be doing something similar. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (requiring, even in the First Amendment area, that any overbreadth be “substantial . . . in relation to the statute’s plainly legitimate sweep”); *cf.* Fallon, *supra* note 14, at 943, 945 (arguing that in “any linguistically natural sense of the term . . . overbreadth facial challenges are actually quite common,” in part because “the Court must sometimes consider a statute’s potential application to parties whose cases differ significantly from that of the party before it”).

ants who were minors at the time of the offense seem to be a small proportion. Of all the cases using a typical long-arm statute, those in which the defendants lacked minimum contacts sufficiently related to the claim would also seem to be a fairly small proportion. By contrast, of all the cases in which jurisdiction might be premised on ownership of shares of stock in a Delaware corporation, those in which the claim sought to be adjudicated had no relationship at all to those shares may seem a goodly proportion. And in *Carhart II*, some Justices seemed to disagree on precisely how frequently there was any health need for the banned procedure.⁶³

But is there any other basis for choosing, beyond this sense of proportion? I see three, two that I have noted before and one that builds upon the insights of Richmond's own Professor Kevin Walsh.

Professor Walsh has challenged the near-universal view that the doctrine of severability is the only way to understand decisions holding that a statute can be validly applied to some cases despite the existence (or possible existence) of unconstitutional applications of that same statute.⁶⁴ He argues that a better metaphor than severance—which suggests judges getting out a knife and removing or subtracting invalid aspects of statutes—is the metaphor of displacement—which, he contends, suggests judges taking all relevant laws into account, adding them together, and superimposing the displacing law where necessary over the displaced law.⁶⁵ He contends that this is the way constitutional adjudication was conceptualized for the first several decades after the founding.⁶⁶

There is considerable power in Professor Walsh's account, particularly the way that it fits with the classic (and to my mind, correct) view of the nature of constitutional adjudication as no different in kind from all other adjudication in which two conflicting laws purport to govern a case and the court "must decide on the operation of each," and "determine which of the conflicting rules

63. *Gonzales v. Carhart*, 550 U.S. 124, 188–89 (2007) (Ginsburg, J., dissenting).

64. Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 739–40, 742 (2010).

65. *Id.* at 747, 778.

66. *Id.* at 755–66.

governs the case.”⁶⁷ Whether those two laws are two statutes from the same sovereign, a statute and a regulation from the same sovereign, a statute and a common law doctrine from the same sovereign, a federal statute and a state statute, a federal constitutional provision and a state statute, a federal constitutional provision and a federal statute, a federal statute and a federal treaty, or some other combination, a court—in order to decide who wins the case—must invoke some rule of priority. Where two statutes from the same sovereign are involved, or a federal statute and a treaty, the rule of priority is that the later in time prevails over the former; where a statute and a regulation, or a statute and a common law doctrine from the same sovereign are involved, the rule of priority is that the statute prevails; where a federal statute or constitutional provision and some state law are involved, the Supremacy Clause supplies the rule of priority that federal law prevails; where a federal statute and a federal constitutional provision are involved, the rule of priority is that the constitutional provision prevails.⁶⁸ If we think of constitutional adjudication this way, rather than as something unique, we are more likely to see the layers of law—state and federal; administrative, legislative and judicial; statutory and constitutional—as forming a unified, overlapping whole,⁶⁹ rather than see constitutional adjudication as cutting away, whether with an ex-acto knife or meat cleaver, other laws. And if we see the whole body of law this way, it will tend to pull us away from insisting that an inferior law recite and include the provisions of higher law, as opposed to simply giving way to the extent higher law itself governs.⁷⁰

67. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

68. There may be important differences in these areas as to how readily the rule of priority should be triggered, as opposed to attempting to reconcile the competing sources of law. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231–32 (2000) (arguing that the Supremacy Clause, by including a *non obstante* clause, indicates that courts should not try to reconcile conflicting state and federal law, as traditional practice called for attempting to reconcile conflicting statutes if the later-enacted statute lacked a *non obstante* clause); see also *PLIVA, Inc. v. Mensing*, ___ U.S. ___, ___, 131 S. Ct. 2567, 2579–80 (2011) (Thomas, J., for four Justices) (citing Nelson, *supra*, at 234–53).

69. See *Clafin v. Houseman*, 93 U.S. 130, 136–37 (1876); see also *Tafflin v. Levitt*, 493 U.S. 455, 469–70 (1990) (Scalia, J., concurring).

70. Professor Fallon, operating within the severance metaphor, contends that the Court assumes severability only when the lines on which a future cut can be made, if necessary, are reasonably clear. Fallon, *supra* note 14, at 956. From the perspective offered by Professor Walsh, it would seem that any necessary clarity would need to come from the constitutional doctrine itself. See Walsh, *supra* note 64, at 779. And if the Court cannot

Second, I have argued that because legislators voting on bills, and presidents deciding whether to sign or veto bills, must act on the entire bundle presented to them, including provisions that may have unconstitutional applications that they may not foresee, while courts can adjudicate individual applications of individual provisions of statutes, courts have a comparative competence in as-applied constitutional adjudication.⁷¹ Accordingly, courts should shape doctrine to take advantage of this comparative competence.⁷²

Professor Fallon contends that this view depends on an embrace of Thayerism—the view that courts should defer to legislatures unless the constitutional error of the legislature is clear.⁷³ For him, stripped of its Thayerian premises, there is no reason to discourage facial constitutional adjudication.⁷⁴ And since almost no one—and certainly no current Justice—is an across-the-board Thayerian, there should be no general rule of preference for as-applied challenges.⁷⁵

I think Professor Fallon overstates the case. One need not be a thorough-going Thayerian to hold that courts should be deferential to legislatures unless there is some good reason not to be.⁷⁶ And if one treats Thayerism as the default rule, subject to a less deferential approach if there is some good reason to be less deferential, then one can properly believe that there should be a general rule, subject to exceptions, preferring as-applied challenges.⁷⁷

construct passably clear constitutional doctrine, it is not clear on what basis it properly concludes that a statute is unconstitutional. *See Vieth v. Jubelirer*, 541 U.S. 267, 283–84, 301–06 (2004).

71. *See Hartnett, supra* note 30, at 1745–46.

72. *See id.* at 1748.

73. Fallon, *supra* note 14, at 964–65 (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893)).

74. *Id.* at 965.

75. *See id.*

76. *See Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011) (“We are obliged—and this might well be our most important consideration—to presume that acts of Congress are constitutional. Appellants have not made a clear showing to the contrary.”) (citation omitted).

77. Professor Fallon also too readily equates doctrine that results in as-applied adjudication as providing insufficient guidance to lower courts. *See Fallon, supra* note 14, 947–48, 951. Doctrine that turns on the adjudicative facts of particular cases can provide plenty of guidance to lower courts, as the vast number of cases decided under *International Shoe*’s minimum contacts test reveals. This is not to say that the Court could not be doing a better job in providing guidance in that area, but its failure in both *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987) and *J. McIntyre Mach. v. Nicaastro*, 564 U.S. ___, 131

There is a final reason why, all else being equal, it is better to craft doctrine in a way that avoids up-or-down, winner-take-all, facial determinations. Such doctrine is not necessarily a method of more vigorously enforcing a constitutional limitation; it may have the opposite effect. Instead, crafting doctrine in a way that leads to up-or-down, winner-take-all, facial determinations increases the stakes, while crafting doctrine in a way that leads to as-applied determinations lowers the stakes.⁷⁸ Particularly in our hyper-polarized political environment, raising the stakes strikes me as unwise.

More than that, such an approach might even be destabilizing. One of the functions that judicial review serves is to encourage people who are deeply unhappy with the existing regime to seek change within the legal system rather than take to the streets. I do not claim that Justices consciously seek to co-opt potentially destabilizing political movements, but judicial review tends to serve that function. Giving one side—either side—of a grand battle a complete win undermines that function. Holding that a statute has some valid applications and some invalid applications makes it more likely that both sides will feel heard and understood, rather than relegated to the streets.

CONCLUSION

There are many reasons to think that the Supreme Court will provide an up-or-down determination regarding the constitutional validity of the individual mandate: existing Commerce Clause doctrine is shaped in a way that discourages as-applied challenges, prior successful challenges under the Commerce Clause have been facial challenges, and the as-applied challenge in *Raich* was soundly rejected. But because the Court is being asked to articulate a principle for the first time, it is freer to capitalize on its comparative competence, and, by following the path illuminated by Judge Sutton, render a decision that lowers the stakes rather than raises them.

S. Ct. 2780 (2011) to produce a majority opinion is not due to something inherent in as-applied adjudication. If, for example, the Court were to embrace Justice Brennan's view of the stream of commerce, the resulting doctrine would be reasonably clear, govern an enormous number of cases, give plenty of guidance to lower courts, and still produce as-applied constitutional adjudication. See *Asahi*, 480 U.S. at 116–22 (Brennan, J., concurring in part and concurring in judgment).

78. See Hartnett, *supra* note 30 at 1754–56.