# Federalism and Separation of Powers

## Respecting the Democratic Process: The Roberts Court and Limits on Facial Challenges

*By William E. Thro**

Judicial review—the ability of the courts to invalidate a law because it is contrary to the state and/or federal Constitutions—is the power to nullify the results of the democratic process.[1] "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[2] If, as Tocqueville suggested, every political question becomes a judicial one,[3] there is a real possibility that judges will become a "bevy of platonic guardians."[4] Instead of focusing on "the provisions of our laws rather than the principal concerns of our legislators,"[5] courts may attempt to give substance to individual desires or aspirations.[6] Rather than invalidating statutes only when contrary to the text or structure of the Constitution, judges may strike down laws simply because the policy choices expressed are "uncommonly silly."[7] Embracing "a myth of the legal profession's omnicompetence that was exploded long ago," the judiciary micro-manages government departments.[8]

One way to diminish the possibility of undemocratic platonic guardians is to limit the scope of judicial review.[9] It is one thing for a court to declare that a statute is unconstitutional as applied to a particular narrow circumstance.[10] After all, "judicial power includes the duty 'to say what the law is.'"[11] It is quite another to say a statute is facially unconstitutional—it is "invalid *in toto*" and, thus, "incapable of any valid application."[12] Because passing on the constitutionality of legislation is "the gravest and most delicate duty that [the judiciary] is called upon to perform,"[13] "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program."[14] Indeed, facial challenges "are fundamentally at odds with the function of the… courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision."[15] As Justice Scalia explained, it is

> fundamentally incompatible with [the constitutional] system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion—which a federal court should never issue at all, and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non* advisory opinions. I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?[16]

A jurist who respects the democratic process will not invalidate a statute in all of its applications—except where there is no possible valid application.

Since John Roberts became Chief Justice in 2005,[17] the Court has shown new respect for the democratic process.[18] While the Roberts Court[19] recognizes that the Constitution is distrustful[20] of "any entity exercising power"[21] and will check the exercise of power,[22] it increasingly has refused to "frustrate the expressed will of Congress or that of the state legislatures"[23] by passing on the constitutionality of "hypothetical cases thus imagined."[24] The Court "has rejected broad challenges to new laws while at the same time leaving open the door to a more targeted attack on some of the laws' provisions."[25] The net effect is to require litigants actually to prove that statutes are unconstitutional in their operation rather than hypothesizing about situations that may not exist. Instead of forcing legislatures to craft narrow statutes conforming to broad judicial rules, the Court crafts narrow judicial rules to limit otherwise broad statutes.

### I. OVERVIEW OF FACIAL CHALLENGES

In order to understand the significance of the Roberts Court's new limits on facial challenges, it is first necessary to understand the nature of facial challenges.

There are three ways to challenge the constitutionality of a statute in federal court. First, a litigant may bring an as-applied challenge alleging that the statute is unconstitutional in the specific circumstances before the court.[26] As-applied challenges ultimately respect the democratic process.[27] If "judicial power includes the duty 'to say what the law is,'"[28] then it surely includes the duty to assess the constitutionality of a statute as applied to the circumstances before the Court. Indeed, as-applied challenges arguably are the only type of constitutional challenge contemplated by our constitutional system.[29]

Second, a litigant may bring a standard facial challenge[30] by alleging "that no set of circumstances exists under which the Act would be valid"[31] or that the statute lacks "a plainly legitimate sweep."[32] Like all facial challenges, a standard facial challenge requires the Court to address circumstances that are not specifically before the Court and, if successful, to render a broad decision. In this respect, standard facial challenges disrespect the democratic process. However, because there is "a heavy burden of persuasion" and because courts must

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"give appropriate weight to the magnitude of that burden,"[33] standard facial challenges alleging no set of circumstances pose fewer problems for the democratic process. The most recent example of a successful standard facial challenge is the District of Columbia gun case.[34]

Third and most significantly, in some limited contexts, litigants may bring a facial challenge alleging overbreadth.[35] In a facial challenge alleging overbreadth, the law is invalidated in *all* applications because it is invalid in *many* applications.[36] In an overbreadth challenge:

> The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[37]

Facial challenges alleging overbreadth not only "invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand."[38] Like all facial challenges, a facial challenge alleging overbreadth requires the court to address circumstances that are not specifically before the court and, if successful, to render a broad decision. However, unlike a standard facial challenge, a facial challenge alleging overbreadth does not require a showing that the statute is always unconstitutional. It simply requires a showing that the statute is unconstitutional in many applications. Because a statute is invalidated in all applications simply because it is unconstitutional in some applications, facial challenges alleging overbreadth show the greatest disrespect for the democratic process.

Because of the enormous jurisprudential costs, the Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, only on the strength of a specific reason[ ]… weighty enough to overcome the Court's well-founded reticence."[39] In the last years of the twentieth century, the Supreme Court entertained overbreadth challenges in the free speech,[40] right to travel,[41] abortion,[42] and congressional enforcement of the Fourteenth Amendment contexts.[43] "Outside these limited settings, and absent a good reason," the Court has refused to entertain facial challenges alleging overbreadth.[44]

## II. NEW LIMITS ON FACIAL CHALLENGES

The decision to entertain a facial challenge—whether based on no set of circumstances or overbreadth—has enormous consequences for the judicial craft. As the Court recently explained:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"[45]

If the Court allows a facial challenge, there are implications for the burden of proof, the remedy that may be employed, and the scope of the judicial rule that will result. Recognizing these consequences, the Roberts Court has imposed both implicit and explicit limits on facial challenges—particularly facial challenges alleging overbreadth.

First, the Supreme Court has cast serious doubt on the viability of facial challenges alleging overbreadth in the abortion context. Previously, the Court had indicated that it would invalidate an abortion statute in all applications simply because the statute was unconstitutional in a "large fraction" of applications.[46] However, in upholding the federal partial birth abortion statute, the Court expressed disapproval of facial challenges alleging overbreadth in the abortion context.[47] As the Court explained:

> [T]hese 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 pre-enforcement, 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.*
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> *The latitude given facial challenges in the First Amendment context is inapplicable here*.... It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication."* [48]

In the abortion context, the principles of judicial restraint require federal courts to adjudicate the constitutionality of abortion statutes on a case-by-case basis, not to make broad pronouncements regarding litigants and circumstances not before the Court.

To be sure, the Court did not explicitly reject facial challenges alleging overbreadth in the abortion context. Instead, it noted that facial challenges of any sort "impose 'a heavy burden' upon the parties maintaining the suit. What that burden consists of in the specific context of abortion statutes has been a subject of some question. We need not resolve that debate."[49] Nevertheless, by expressing disapproval of facial challenges alleging overbreadth in the abortion context and by refusing to entertain such a challenge in *Gonzale*s, the Court sent a clear signal regarding the use of such challenges in the future.

If the Court were to reject explicitly facial challenges alleging overbreadth, it would revolutionize abortion jurisprudence. Any statute imposing significant restrictions

on abortion may be applied in an unconstitutional manner. Because facial challenges alleging overbreadth generally have been available in the abortion context, abortion rights advocates used the possibility of *some* unconstitutional applications to invalidate the statute in *all* applications. Thus, the States' ability to regulate abortion in a significant manner has been limited, if not effectively abolished. However, if facial challenges alleging overbreadth are not permitted in the abortion context, the possibility of some unconstitutional applications will not prevent the enforcement of the statute. All abortion litigation will be narrow as-applied challenges rather than sweeping overbreadth challenges. While abortion statutes may be invalidated in some applications, the statutes will be enforceable in other applications.

Second, by restricting the remedial powers of federal courts, the Roberts Court has imposed implicit limits on facial challenges alleging overbreadth. Articulating the scope of federal court remedial powers, the Court observed:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may... be declared invalid to the extent that it reaches too far, but otherwise left intact."
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> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements" even as we strive to salvage it. Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. In *United States v. Grace,* for example, we crafted a narrow remedy much like the one we contemplate today, striking down a statute banning expressive displays only as it applied to public sidewalks near the Supreme Court but not as it applied to the Supreme Court Building itself. We later explained that the remedy in *Grace* was a "relatively simple matter" because we had previously distinguished between sidewalks and buildings in our First Amendment jurisprudence. But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake.
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> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we 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... "This would, to some extent, substitute the judicial for the legislative department of the government."[50]

Where "[o]nly a few applications of [a statute] would present a constitutional problem," federal courts should not choose "the most blunt remedy" of invalidating a statute in its entirety.[51] Instead, the federal courts are limited to issuing "a declaratory judgment and an injunction prohibiting the statute's unconstitutional application."[52]

Because a federal court's remedial power is limited to enjoining only the unconstitutional applications of a statute, it is difficult to see how the overbreadth doctrine could apply outside of the First Amendment free speech context. By its very terms, the overbreadth doctrine invalidates a statute in *all* applications simply because it is unconstitutional in *some* applications. Indeed, by holding that lower federal courts should not have entertained such a challenge to a federal abortion statute,[53] the Court reinforced the implicit message of *Ayotte*—facial challenges alleging overbreadth are not permitted outside of the First Amendment free speech context.

Third, the Court seems to be limiting facial challenges alleging overbreadth to the First Amendment free speech context. In 2004, the Court indicated in *Sabri* that it allowed facial challenges alleging overbreadth in many contexts including abortion.[54] Since 2004, the Court has never allowed a facial challenge alleging overbreadth outside of the First Amendment context. Moreover, its discussions of facial challenges alleging overbreadth have referred only to the First Amendment.[55] Admittedly, these references are dicta not binding in a future case.[56] However, the *Sabri* language arguably is also dicta.

Of course, despite its apparent rejection of facial challenges alleging overbreadth in other contexts, the Court has reaffirmed the viability of the doctrine in the First Amendment free speech context.[57] However, the Court has refined the overbreadth doctrine so that it is more difficult for litigants to prevail. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[58] In determining the reach of the statute, "'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[59] The Court must "interpret statutes, if possible, in such fashion as to avoid grave constitutional questions."[60] If "an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."[61] If courts narrowly construe the statute, it is far less likely that it will be facially invalidated on overbreadth grounds.[62] Moreover, even in the First Amendment context, the "'strong medicine' of the overbreadth doctrine" may not be available when the targets of the statute "are sufficiently capable of defending their own interests in court that they will not be significantly 'chilled.'"[63] Furthermore, as the Court emphasized, "the 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'"[64]

Fourth, a more subtle, but equally significant shift has occurred in the Court's sovereign immunity jurisprudence.[65] Prior to 2004, the Supreme Court's decisions invalidating or upholding Congress' attempts to diminish the States' sovereign immunity were facial holdings. [66] *Garrett, Kimel, Alden, Florida Prepaid,* and *Seminole Tribe* rejected abrogation for all applications of the statute at issue.[67] Similarly, *Hibbs* upheld abrogation for all applications of the statute at issue.[68] In sharp contrast, recent decisions invalidating or upholding Congress' efforts to diminish the States' sovereign immunity

are as-applied, rather than facial, holdings.[69] For example, in *Georgia*, the Court did not find abrogation for all ADA Title II claims in the prison context, but only for those claims that actually involve a violation of the Fourteenth Amendment.[70] Similarly, in *Lane*, the Court did not find abrogation for all ADA Title II claims in all contexts, but only for claims involving the fundamental right of access to the courts.[71] This new emphasis on as-applied rather than facial holdings casts serious doubt on the continued validity of the facial aspect of the pre-2004 holdings.[72] For example, if Congress may abrogate sovereign immunity for statutory claims involving an actual constitutional violation,[73] then that portion of *Garrett* holding that Congress may not abrogate sovereign immunity for ADA Title I a claim involving constitutional violations is suspect.[74] Similarly, if Congress may abrogate sovereign immunity for statutory claims involving an actual constitutional violation,[75] then that portion of *Florida Prepaid* holding that Congress may not abrogate sovereign immunity for intellectual property claims that allege an unconstitutional taking of property is suspect.

## III. THE JURISPRUDENTIAL IMPLICATIONS

As the title of this essay suggests, these new limits on facial challenges result in a greater respect for the democratic process. This greater respect has significant jurisprudential implications for: (1) the burden of proof for litigants who wish to pursue a facial challenge; (2) the remedial powers of the judiciary when confronted with an unconstitutional application of a statute; and (3) the scope of the Court's rulings. The discussion below details all three implications.

First, these new limitations impose a greater burden of proof on litigants who wish to pursue a facial challenge. Respect for the democratic process requires the judiciary to refrain from "speculation" and the "premature interpretation of statutes on the basis of factually barebones records."[76] "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks."[77] As the Court explained:

> In 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. The State has had no opportunity to implement I-872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions. Exercising judicial restraint in a facial challenge "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy."[78]

Thus, the focus of any facial constitutional challenge will be on actual evidence, not conjecture.

Some of the election cases from the October 2007 term demonstrate the point. In *Crawford*—a facial challenge to Indian's voter identification statute—the Court refused

> to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified rejected a facial challenge to Indiana's voter identification requirement.[79]

Similarly, in *Washington State Grange*—a facial challenge to the Washington's primary system—the Court rejected the plaintiff's argument about voter confusion:

> Of course, it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion. 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. *Indeed, because I-872 has never been implemented, we do not even have ballots indicating how party preference will be displayed.*[80]

In rejecting both facial challenges, the Court left open the possibility that some future plaintiff might demonstrate that the statute was unconstitutional as applied to them.[81] However, such a challenge will require facts, not fantasy.

Second, these new limitations on facial challenges restrict the remedial powers of the judiciary. Respect for the democratic process requires that laws "embodying the will of the people" be "implemented in a manner consistent with the Constitution."[82] Even if a statute is unconstitutional in the circumstances of the case, the statute can still be enforced in other circumstances not involved in the case. Legislatures are not required to rewrite existing laws simply because the laws are unconstitutional in some applications. Nor are legislatures required to draft their new statutes as narrowly as possible. If the democratic process results in a broad law that is unconstitutional in many instances, but constitutional in some instances, the statute remains on the books and enforceable in some limited circumstances.

To illustrate, consider Virginia's sodomy statute, which prohibits oral and anal sex between *all* persons in *all* circumstances.[83] Since *Lawrence* held that States generally may not prosecute private sexual conduct between consenting adults, the statute is unconstitutional in many applications.[84] Yet, Virginia's sodomy statute has some constitutional applications.[85] "Despite its use of seemingly sweeping language, the holding in *Lawrence* is actually" a narrow as-applied holding.[86] *Lawrence* forbids any governmental "intrusion upon a person's liberty interest when that interest is exercised in the form of *private*, consensual sexual conduct between *adults*."[87] While *Lawrence* established "a greater respect than previously existed in the law for the right of consenting *adults* to engage in private sexual conduct,"[88] it has *no impact* on the ability of the States to prosecute sexual conduct between an adult and a minor[89] or sexual conduct that occurs in public. Thus, Virginia's sodomy statute is constitutional as applied to conduct involving a minor[90] or conduct that occurs in public.[91]

Third, the new limitations preclude broad judicial holdings. Respect for the democratic process requires "that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise

facts to which it is to be applied.'"[92] There is no duty "to resolve questions of constitutionality with respect to each potential situation that might develop."[93] "As-applied challenges are the basic building blocks of constitutional adjudication."[94] Yet, a commitment to narrow decisions is not a rejection of clear bright-line rules. Nor is it an embrace of vague and amorphous judicial balancing tests. Rather, a commitment to narrow decisions simply means that the court will adopt narrow precise bright-line rules rather than broad bright-line rules.

The Court's recent sovereign immunity jurisprudence demonstrates the point. In 2005, I suggested in these pages that the Court's sovereign immunity jurisprudence should be simplified.[95] I proposed a bright-line rule—Congress may diminish sovereign immunity for statutory claims that involve a constitutional violation, but Congress may not diminish sovereign immunity for statutory claims that do not involve a constitutional violation. In 2006, *Georgia* adopted the first half of the proposed rule—Congress may always diminish sovereign immunity for statutory claims involving a constitutional violation,[96] but expressly reserved the second half of the proposed rule—whether Congress may diminish sovereign immunity for statutory claims that do not involve a constitutional violation.[97] Since *Georgia*, the lower courts have held that Congress may not diminish sovereign immunity for non-constitutional claims involving disabled parking permits,[98] but may diminish sovereign immunity for non-constitutional claims involving disability discrimination in higher education.[99] While the decisions conflict with respect to the broad question—whether Congress may diminish sovereign immunity for non-constitutional claims, the decisions are consistent on a narrow precise question—whether Congress may diminish sovereign immunity for non-constitutional claims in either the parking or higher education contexts. The broader issue may never be fully resolved by the Court, and the narrower issues must await a conflict regarding the same context.

## CONCLUSION

If the democratic process is limited by a written constitution and if the ultimate meaning of the written constitution is determined by the courts, the potential power of the judiciary is unlimited. If the courts are to be mere umpires rather than serious players, then the judiciary must respect the democratic process. The Roberts Court's new limitations on facial challenges "signal a basic shift in litigating constitutional claims."[100] While the Court certainly will vindicate the fundamental values of the Constitution, it will not indulge in speculation, invalidate constitutional applications of statutes, or render broad decisions. In sum, the Court's role will play a reduced role in American life.

### Endnotes

1 *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 4 (1982).

2 Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (White, J., joined by Rehnquist, C.J. & O'Connor, J., announcing the judgment of the Court).

3 Alexis de Tocqueville, Democracy In America 310 (Arthur Goldhammer, trans., The Library of America ed. 2004) (1835).

4 *See* Griswold v. Connecticut, 381 U.S. 479, 526 (1965) (Black, J., dissenting) (quoting Learned Hand, The Bill of Rights 70 (1958)).

5 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

6 *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (1997).

7 *See* Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting).

8 People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997).

9 Unlike the federal judiciary, the People generally can express their dissatisfaction with the state judiciary. In many States, judges are directly elected in partisan or non-partisan races. In other States, the People are allowed to determine whether an individual judge will be retained in office. Although these measures do provide a degree of accountability to the electorate, they are far short of the guarantees of direct election and equal representation that characterize the legislative and executive branches.

10 *See* County Court v. Allen, 442 U.S. 140, 154-55 (1979).

11 Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006). Full disclosure—I argued the case on behalf of the Virginia respondents.

12 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982).

13 Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

14 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). Traditionally, the Supreme Court has been hesitant to invalidate a statute on its face until "state courts [have] the opportunity to construe [the statute] to avoid constitutional infirmities." New York v. Ferber, 458 U.S. 747, 768 (1982).

15 Younger v. Harris, 401 U.S. 37, 52 (1971).

16 City of Chicago v. Morales, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting) (citations omitted) (emphasis original).

17 For a comprehensive discussion of the process that led to the selection of both Chief Justice Roberts and Justice Alito, see Jan Crawford Greenburg, Supreme Conflict: The Struggle for the Supreme Court (2007).

18 For a review of the early years of the Roberts Court and its significance for education law, see William E. Thro, *The Roberts Court At Dawn: Clarity, Humility, and the Future of Education Law*, 222 Education Law Reporter 491 (2007).

19 To be sure, not all members of the Roberts Court share this view of the Constitution. For example, Justice Breyer has articulated a vision of the Constitution that is much more trusting of the exercise of power through the democratic process. *See* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005). For a critique of Justice Breyer's constitutional vision, see William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 Journal of College & University Law 491 (2006).

20 This distrust of humans exercising power is firmly rooted in the prevailing theology of the Framing era. As Professor Hamilton explained:

> One of the dominating themes of Calvin's theology is the fundamental distrust of human motives, beliefs, and actions. On Calvin's terms, there is never a moment in human history when that which is human can be trusted blindly as a force for good. Humans may try to achieve good, but there are no tricks, no imaginative role-playing, and no social organizations that can guarantee the generation of good …. Thus, Calvinism counsels in favor of diligent surveillance of one's own and other's actions, and it also presupposes the value of the law (both biblical and secular) to guide human behavior away from its propensity to do wrong.

Marci Hamilton, "The Calvinist Paradox of Distrust and Hope at the Constitutional Convention," *in* Christian Perspectives on Legal Thought 293, 295 (Michael W. McConnell, Robert F. Corchran, Jr., & Angela C. Carmella, eds. 2001).

21 *Id.* at 293.

22 Although such a perspective is firmly rooted in the Protestant theology of Calvin, it is also consistent with the Roman Catholic notion of subsidiarity, first expressed by Pope Leo XII. *See* Robert F. Cochran, Jr., "Tort Law and

Intermediate Communities: Calvinist and Catholic Insights" *in* Christian Perspectives on Legal Thought 486, 488-89 (Michael W. McConnell, Robert F. Corchran, Jr., & Angela C. Carmella, eds. 2001).

23 Barrows v. Jackson, 346 U.S. 249, 256-57 (1953).

24 United States v. Raines, 362 U.S. 17, 22 (1960).

25 David Savage, *About Face*, ABA Journal, July 2008.

26 Ulster County Court v. Allen, 442 U.S. 140, 154-55 (1979)

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

28 *Sanchez-Llamas*, 126 S. Ct. at 2684.

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

30 There is some uncertainty regarding the criteria for a standard facial challenge. As the Court explained:

Under *United States v. Salerno*, a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.*, that the law is unconstitutional in all of its applications. While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a "'plainly legitimate sweep.'"

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (citations omitted). The difference between "no set of circumstances" and "plainly legitimate sweep" is more theoretical than substantive. It is the difference between always unconstitutional and almost always unconstitutional. As a practical matter, this is a distinction without a difference.

31 United States v. Salerno, 481 U.S. 739, 745 (1987).

32 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623 (2008) (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court).

33 *Crawford*, 128 S. Ct. at 1621-22 (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court).

34 District of Columbia v. Heller, 128 S. Ct. 2783, 2821-22 (2008).

35 Sabri v. United States, 541 U.S. 600, 609-10 (2004)

36 *See* Virginia v. Black, 538 U.S. 343, 375 (2003) (Scalia, J., joined by Thomas, J., dissenting). Full disclosure—I was on brief for Virginia.

37 Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (citations omitted). Full disclosure—I was on brief for Virginia.

38 *Sabri*, 541 U.S. at 609.

39 *Id.* at 609-610.

40 Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973).

41 Aptheker v. Secretary of State, 378 U.S. 500, 505-14 (1964).

42 Stenberg v. Carhart, 530 U.S. 914, 938-46 (2000). *See also* Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 895 (1992). Prior to *Casey*, the Court has explicitly applied the *Salerno* "no set of circumstances" test in the abortion context. Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 514 (1990) (statute requiring parental notification). *See also* Webster v. Reproductive Health Servs., 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring) (statute prohibiting use of public facilities for performing abortions).

43 City of Boerne v. Flores, 521 U.S. 507, 532-35 (1997).

44 *Sabri*, 541 U.S. at 610.

45 *Washington State Grange*, 128 S. Ct. at 1191 (citations omitted).

46 *Stenberg*, 530 U.S. at 938-946. *See also Casey*, 505 U.S. at 895. However, there is a conflict among the Circuits on the question of whether the federal courts may allow facial challenges alleging overbreadth to abortion statutes. The Fifth Circuit has held that such challenges are not permitted. *See* Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (per curiam).*See also* Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1102-03 (5th Cir. 1997) (declining to reverse *Barnes*). However, other Circuits have concluded that facial challenges alleging overbreadth are permitted in the abortion context. *See* Planned Parenthood v. Heed, 390 F.3d 53, 58 (1st Cir. 2004), *rev'd on other grounds sub nom*. Ayotte v. Planned Parenthood, 546 U.S. 320 (2006); Planned Parenthood v. Farmer, 220 F.3d 127, 142-43 (3rd Cir. 2000); Planned Parenthood. v. Lawall, 180 F.3d 1022, 1025-26 (9th Cir. 1999), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 193-96 (6th Cir. 1997); Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996); Planned Parenthood v. Miller, 63 F.3d 1452, 1456-58 (8th Cir. 1995). *Cf.* A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002) (treating the *Salerno* standard as merely a "suggestion" in the abortion context). The Fourth Circuit has taken a contradictory approach. Early decisions—that have never been overruled—apply *Salerno*. *See* Greenville Women's Clinic v. Commissioner, 317 F.3d 357, 362 (4th Cir. 2002) (Greenville Women's Clinic II); Greenville Women's Clinic v. Bryant, 222 F.3d 157, 165 (4th Cir. 2000) (Greenville Women's Clinic I); Manning v. Hunt, 119 F.3d 254, 268-69 (4th Cir. 1997). More recent decisions—including a post-*Gonzales* decision—allow facial challenges alleging overbreadth. *See* Richmond Med. Center for Women v. Hicks, 409 F.3d 619 (4th Cir.), *reh'g denied*, 422 F.3d 160 (4th Cir. 2005), *cert. granted, judgment vacated, and remanded sub nom.* Herring v. Richmond Med. Center for Women, 127 S. Ct. 2094 (2007), *on remand*, 527 F.3d 128 (4th Cir. 2008), *pet. for reh'g filed* (4th Cir. June 2, 2008). Full disclosure—I argued the case on behalf of the Virginia prosecutors.

47 Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (2007).

48 *Id*. at 1638-39 (emphasis added, citations omitted).

49 *Id.* at 1639 (citations omitted).

50 *Ayotte*, 546 U.S. at 329-30 (2006) (citations omitted).

51 *Id.* at 330-31.

52 *Id.* at 331.

53 *Gonzales*, 127 S. Ct. at 1638.

54 *Sabri*, 541 U.S. at 609-10.

55 *See Washington State Grange,* 128 S. Ct. at 1191 n.6 ("Our cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad."); *Gonzales*, 127 S. Ct. at 1639 ("The latitude given facial challenges in the First Amendment context is inapplicable here.").

56 Central Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006). Full Disclosure—I argued the case.

57 United States v. Williams, 128 S. Ct. 1830, 1838 (2008). As the Court explained:

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional-particularly a law directed at conduct so antisocial that it has been made criminal-has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is '"strong medicine"' that is not to be 'casually employed.'

*Id.* (citations omitted).

58 *Williams*, 128 S. Ct. at 1838.

59 *Gonzales*, 127 S. Ct. at 1631 (citation omitted).

60 Federal Election Comm'n v. Akins, 524 U.S. 11, 32 (1998).

61 INS v. St. Cyr, 533 U.S. 289, 300 (2001).

62 *Williams*, 128 S. Ct. at 1847 (Stevens, J., joined by Breyer, J., concurring).

63 Davenport v. Washington Educ. Ass'n, 127 S. Ct. 2372, 2383 n.5 (2007).

64 *Williams*, 128 S. Ct at 1844. *See also* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

65 There are two ways for Congress to diminish the sovereign immunity of the States. First, Congress, using the Fourteenth Amendment Enforcement Clause, U.S. Const. amend. XIV, § 5, may abrogate sovereign immunity. *See*

United States v. Georgia, 546 U.S. 151, 158-59 (2006). Second, Congress may use either the Spending Clause, U.S. Const. art. I, § 8, cl.1 or the Compact Clause, U.S. Const. art. I, § 10, cl. 3 to exact waivers of sovereign immunity. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999). While Congress always may abrogate sovereign immunity for statutory claims involving a constitutional violation, *Georgia*, 546 U.S. 151, 158-59; Tennessee v. Lane, 541 U.S. 509, 518 (2004), it generally may not abrogate sovereign immunity when the statutory claims do not involve a constitutional violation. *See* Board of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 364 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 78 (2000); Alden v. Maine, 527 U.S. 706, 748 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank, 527 U.S. 627, 636 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996) (all holding that the States were immune from statutory claims that did not involve constitutional violations). *But see* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (holding that Congress can abrogate sovereign immunity for statutory claims that do not involve a constitutional violation, but do involve gender discrimination); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Congress may abrogate sovereign immunity for general discrimination claim that may well have been a constitutional violation.).

66 *See* Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 121 (2007 Supplement). Professor Meltzer expanded on this point during his address to the 2008 State Solicitors General and Appellate Chiefs Conference in Providence, Rhode Island. I am grateful for his insights and assistance.

67 *See Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 78; *Alden*, 527 U.S. at 748; *Florida Prepaid*, 527 U.S. at 636; *Seminole Tribe*, 517 U.S. at 72-73 (all holding that the States were immune from statutory claims that did not involve constitutional violations)

68 *Hibbs*, 538 U.S. at 740.

69 Fallon, Meltzer, & Shapiro, *supra* note 66, ¶ 121-22. Moreover, decisions concerning the scope of the States' surrender of sovereign immunity in the Plan of Convention are similarly limited. *Katz* did not hold that the States surrendered sovereign immunity for all bankruptcy claims, but only for bankruptcy claims "necessary to effectuate the in rem jurisdiction of the bankruptcy court." *Katz*, 546 U.S. at 378.

70 *Georgia*, 546 U.S. at 158-59.

71 *Lane*, 541 U.S. at 531.

72 *See* Fallon, Meltzer, & Shapiro, *supra* note 66, ¶ 121. However, *Georgia* does not cast doubt on the continued validity of the as-applied aspects of these cases.

73 *Georgia*, 546 U.S. at 158-59.

74 *Garrett*, 531 U.S. at 364.

75 *Georgia*, 546 U.S. at 158-59.

76 *Washington State Grange*, 128 S. Ct. at 1190.

77 *Sabri*, 541 U.S. at 608-09.

78 *Washington State Grange*, 128 S. Ct. at 1190-91 (citations omitted).

79 *Crawford*, 128 S. Ct. at 1622 (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court).

80 *Washington State Grange*, 128 S. Ct at 1193-94 (citations omitted).

81 *Id.* at 1195.

82 *Id.* at 1191.

83 *Virginia Code* § 18.2-361.

84 McDonald v. Virginia, 274 Va. 249, 257, 645 S.E.2d 918, 922 (2007). Full Disclosure—I argued the case in the Supreme Court of Virginia.

85 In *McDonald*, the defendant attempted to bring a facial challenge alleging overbreadth to a statute regulating sexual conduct. Ultimately, the Supreme Court of Virginia found that the defendant had failed to preserve his overbreadth challenge.

86 *See* Utah v. Holm, 137 P.3d 736, 742-43 (Utah 2006) (citations omitted).

87 *See* Martin v. Ziherl, 269 Va. 35, 42, 607 S.E.2d 367, 370 (2005) (emphasis added).

In particular, *Lawrence* "explained that the liberty interest at issue was not a fundamental right to engage in certain conduct but was the right to enter and maintain a personal relationship without governmental interference." *Id.* at 40, 607 S.E.2d at 369 (emphasis added) (citation omitted). Full Disclosure—I co-authored Virginia's amicus brief in *Martin*.

88 Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 815-16 (11th Cir. 2004) (emphasis added). *See also Holm*, 137 P.3d at 742-43 ("Specifically, the Court takes pains to limit the opinion's reach to decriminalizing private and intimate acts engaged in by consenting adult gays and lesbians.").

89 *See* United States v. Bach, 400 F.3d 622, 628-29 (8th Cir.) *cert. denied*, 126 S. Ct. 243 (2005); *Holm*, 137 P.3d at 744. Indeed, the United States Supreme Court explicitly distinguished between sexual acts between consenting adults and sexual acts involving minors when it observed:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

*Lawrence*, 539 U.S. at 578 (emphasis added).

90 *McDonald*, 274 Va. at 260, 645 S.E.2d at 924.

91 Singson v. Commonwealth, 46 Va. App. 724, 621 S.E.2d 682 (2005), *appeal denied*, Record No. 052529 (Va. 2006); Tjan v. Commonwealth, 46 Va. App. 698, 621 S.E.2d 669 (2005), *appeal dismissed*, Record No. 052535 (Va. 2006) (both holding that the Commonwealth may criminalize sexual conduct that occurs in public). Full Disclosure—I argued both cases in the Court of Appeals of Virginia.

92 *Washington State Grange*, 128 S. Ct. at 1190-91.

93 *Gonzales*, 127 S. Ct. at 1639.

94 *Id.*

95 William E. Thro, *Toward A Simpler Standard for Abrogating Sovereign Immunity*, 6 Engage: The Journal of the Federalist Society's Practice Groups 65 (October 2005).

96 *Georgia*, 546 U.S. at 158. To be sure, the Court was addressing only Congress' ability to abrogate and was not addressing Congress' ability to exact a waiver. However, although the power to abrogate and the power to exact a waiver depend upon different constitutional provisions, the Court has suggested that the powers are subject to the same limitations. *College Savings*, 527 U.S. at 683-84.

97 *Georgia*, 546 U.S. at 159.

98 *See* Klingler v. Director, Dep't of Revenue, 455 F.3d 888, 894 (8th Cir. 2006); Keef v. Nebraska Dep't of Motor Vehicles, 716 N.W.2d 58, 65-66 (Neb. 2006).

99 Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 555-56 (3d Cir. 2007) Toledo v. Sanchez, 454 F.3d 24, 40 (1st Cir. 2006).

100 Savage, *supra* note 25.