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MODEST HOPE FOR A MODEST ROBERTS COURT: DEFERENCE, FACIAL CHALLENGES, AND THE COMPARATIVE COMPETENCE OF COURTS

*Edward A. Hartnett**

WHILE some seem to believe that “ever since *Marbury*,”¹ constitutional interpretation has been solely the prerogative of the judiciary, that notion is wholly untenable. Scholars from across the political spectrum have brought renewed attention to nonjudicial constitutional interpretation and criticized the Supreme Court for failing to pay sufficient respect to those interpretations.²

Meanwhile, the Supreme Court has found itself in an ever-expanding morass, trying to sort out the appropriateness of facial, as opposed to as-applied, constitutional challenges. What at one time seemed to be a clear, general rule, with a narrow First Amendment exception, has devolved into confusion bordering on incoherence across a wide range of constitutional provisions.

This essay considers these two developments together. It argues that an exploration of the comparative competence of courts regarding constitutional interpretation should inform the judiciary’s approach to facial, as opposed to as-applied, constitutional challenges. That exploration suggests a modest role for the judiciary and a strong preference for as-applied rather than facial approaches to constitutional adjudication. Moreover, several early decisions from the Roberts Court suggest that the Court may be moving toward the more modest role articulated by Chief Justice John Roberts and associated with as-applied challenges, while the addition of Justice Samuel Alito to the Court may contribute to this movement.

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1. See *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (claiming that “ever since *Marbury*, this Court has remained the ultimate expositor of the constitutional text”).

2. Sometimes, however, these scholars “have chosen simply to ignore those holding similar positions but from different political perspectives, but wishing won’t make it so, and it is important to recognize that contemporary defenders as well as critics of judicial supremacy exist across the political and ideological spectrum.” Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1051 (2004).

I. NONJUDICIAL CONSTITUTIONAL INTERPRETATION AND DEFERENCE

In a detailed series of books, David Currie has demonstrated that the original understanding of the Constitution was forged in the legislative and executive branches, and that subsequent litigation seldom involves new arguments, but rather is usually a rehash of the arguments that first played out in those branches.³ Louis Fisher and Neal Devins have similarly shown the important role that Congress and the President have had in interpreting the Constitution.⁴ Those who point to the gaps and ambiguities in the Constitution emphasize the important role of nonjudicial actors in what Keith Whittington calls “construction” and Richard Fallon calls “implementing” the Constitution.⁵ When asked if he believes in executive constitutional interpretation, John Harrison alludes to baptism by total immersion: “Believe in it? I’ve seen it done!”⁶ Even the Supreme Court’s widely criticized judicial supremacist decision in *City of Boerne v. Flores* acknowledges the power and responsibility of Congress in constitutional interpretation.⁷

Others go further. Michael Paulsen endorses executive review of judgments, that is, the power of the President to refuse to enforce a judgment that he believes to be based on an incorrect interpretation of the Constitution.⁸ Mark Tushnet suggests taking the Constitution away from the

3. See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* (2001); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1999).

4. LOUIS FISHER & NEAL DEVINS, *THE DEMOCRATIC CONSTITUTION* vii (2004); LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* v (3d ed. 2001).

5. RICHARD H. FALLON, *IMPLEMENTING THE CONSTITUTION* ix (2001); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1 (1999).

6. John Harrison, *The Constitution Outside the Supreme Court*, 4 VA. J. 9, 16 subtext (2001) (noting that once someone has seen “some very dedicated and sophisticated people” in the executive branch “engaged in trying to figure out what the law requires,” it is “very hard to go back to the easy assumption that the rule of law is just the rule of courts”).

7. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (“When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own considered judgment on the meaning and force of the Constitution Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.”). The “ever since *Marbury*” statement quoted above was itself preceded by an acknowledgment that there is “[n]o doubt the political branches have a role in interpreting and applying the Constitution.” *United States v. Morrison*, 529 U.S. 598, 616 n.7. A leading academic defender of judiciary supremacy in constitutional interpretation similarly notes that “the Supreme Court (sometimes) defers to the factual, legal, and even constitutional determinations of Congress.” Frederick Schauer, *Deferring*, 103 MICH. L. REV. 1567, 1567 (2005).

8. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 287 (1994). See also Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258 (2004) (arguing that the Presidential oath clause “either creates or recognizes a constitutional law of necessity and appears to charge the President with the primary duty of applying it and judging the degree of necessity in the press of circumstances”).

courts.⁹ Larry Kramer calls for a renewal of popular constitutionalism.¹⁰

Moreover, ever since *McCulloch v. Maryland*,¹¹ it has been clear that judges not only recognize legislative and executive branch interpretation of the Constitution but also that judges sometimes defer to that constitutional interpretation. The central question in constitutional adjudication is the degree of deference, if any, that courts give to constitutional interpretation by other governmental actors.¹²

Complete judicial deference to constitutional interpretation by nonjudicial actors would be the equivalent of eliminating judicial review. Moreover, to conclude that courts should always work with a strong presumption of constitutionality and always give a large measure of deference to the constitutional interpretation of others, as Thayer argued at the end of the nineteenth century was the correct and historically rooted approach,¹³ would render judicial review a faint echo of contemporary practice. This approach would not be the end of judicial review, but it would be the end of judicial review as we have come to know it, particularly in the last half-century.¹⁴ Of how many constitutional decisions can it be said that the law that the judges found unconstitutional was “so obviously repugnant to the Constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy?”¹⁵

On the other hand, to conclude that courts should never defer to the constitutional interpretation of others would empower judges—at least in a constitutional world with textually open provisions such as “necessary and proper,” “privileges or immunities,” “due process,” and “equal protection”—to simply run the country as they choose. This would seem to

9. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). See also Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 677 (2004) (noting that Tushnet “hedges on his proposal for eliminating all judicial review”).

10. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004). See also JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) (arguing that “judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society”).

11. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411-13 (1819).

12. One aspect of this question, not addressed in this essay, is the deference that judges should give to constitutional interpretation by other judges, in other words, the law of precedent.

13. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893).

14. See, e.g., Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 n.11 (1996) (“If democracy is the norm, the view of the legislature, correctable by the people, should prevail over the view of the judiciary when the issue is in doubt.”). For an argument in favor of an explicitly neo-Thayerian approach to constitutional adjudication, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

15. Thayer, *supra* note 13, at 142. See, e.g., Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 53-54 (2005) (“Think of all the landmark Supreme Court decisions of the past one hundred years, thus including even *Lochner* There probably isn't a single one that would not have been decided differently but equally plausibly had the Court been differently but no less ably manned.”).

be where Randy Barnett, with his presumption of liberty, would take us.¹⁶ This presumption of liberty is a euphemistic equivalent to a presumption of unconstitutionality. Before any law regulating private actors could be enforced, Barnett would require that judges be convinced that the law simply regularized rightful behavior or prohibited wrongful behavior—leaving it to judges to “distinguish rightful from wrongful behavior.”¹⁷

Short of calling for the end of judicial review as we know it or for empowering judges to run the country as they choose, the question becomes one of sorting. That is, unless one is prepared to endorse either across-the-board deference or across-the-board nondeference, it is crucial to ask when, in what areas, and in what circumstances, courts should defer and when they should not defer?

Marbury and *McCulloch* frame the question from the outset. In *Marbury*, the Court gave no deference at all to the decision of the First Congress to confer original mandamus jurisdiction on the Supreme Court.¹⁸ In *McCulloch*, by contrast, the Court deferred to the legislative and executive decision to create a national bank, explaining that the power of Congress to incorporate a bank “can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it.”¹⁹

In modern constitutional adjudication, this sorting plays out most prominently in standards of review under equal protection and due process. Rational basis review is basically equivalent to Thayerian deference to all but clear errors.²⁰ Strict scrutiny refuses nearly all deference.²¹ Intermediate scrutiny gives little deference.²² And it is hard to know just

16. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

17. *Id.* at 263-65.

18. See, e.g., James M. O’Fallon, *Marbury*, 44 STAN. L. REV. 219, 256 (1992).

19. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819). The Court continued:

The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

Id. It added, “These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.” *Id.* at 402.

20. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

21. See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Marshall, J., concurring in the judgment) (describing strict scrutiny as “strict in theory, but fatal in fact”).

22. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994).

how much deference the undue burden test gives, short of putting the particular question to Justice O'Connor, an option no longer available in adjudication.²³

But the sorting can be seen in other areas as well. For example, the determination of political questions receive complete deference.²⁴ Exercise of congressional power under the Commerce Clause, aided by the Necessary and Proper Clause, is viewed with considerable deference, albeit with less than in the period prior to the 1990s,²⁵ while exercise of congressional power under the little Necessary and Proper Clause of Section Five of the Fourteenth Amendment is viewed skeptically.²⁶ Indeed, perhaps the most perverse aspect of the Supreme Court's current Section Five jurisprudence has been to confuse the standard of review with the Constitution itself and thereby impose on Congress what had been a rule of judicial deference.²⁷

The post-New Deal sorting mechanism, canonically represented by *United States v. Carolene Products* and its Footnote Four,²⁸ can hardly be viewed as continuing to govern. Not only do judges give little or no deference regarding various rights beyond the scope of Footnote Four,²⁹ but they also (generally) give little or no deference to laws that burden racial majorities in the interest of racial minorities.³⁰ The three (or is it now four? five?) tiers of review are crumbling.³¹ *Grutter v. Bollinger* purports to use strict scrutiny yet defers to the views of university administrators.³² *Romer v. Evans* purports to use rational basis scrutiny, but it is hard to see much deference there.³³ *Lawrence v. Texas* simply ignores the standard of review.³⁴ First Amendment limitations on regulating political contributions and expenditures get their own level of scrutiny, "*Buckley*

23. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

24. *Nixon v. United States*, 506 U.S. 224, 228 (1993).

25. Compare *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) with *United States v. Lopez*, 514 U.S. 549, 567 (1995).

26. *City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997).

27. See Robert C. Post & Reva B. Seigel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 41 (2003); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1653-54, 1707-12 (2005) (describing the error of equating a standard of review with the constitution itself).

28. *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938).

29. See BARNETT, *supra* note 16, at 232 ("Under what we might call Footnote Four-Plus, some judicially favored unenumerated rights could also be used to shift the burden to the government to justify its restrictions on liberty.")

30. See generally *Adarand Constr. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

31. See generally Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

32. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

33. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

34. See *Lawrence v. Texas*, 539 U.S. 558 (2003); see also Laurence Tribe, *Lawrence v. Texas, The "Fundamental Right" That Dares Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004).

scrutiny.”³⁵ And who knows what the undue burden test will mean now that Justice O’Connor has retired?³⁶

It is commonplace to array the justices of the Supreme Court on a single axis from left to right—liberal, moderate, conservative. Portrayed in a single (obviously oversimplified) dimension, the Rehnquist Court looked something like this:³⁷

Stevens, Ginsburg, Breyer, Souter	Kennedy, O’Connor	Rehnquist, Scalia, Thomas
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Yet if we think about the Rehnquist Court in terms of deference and allow ourselves two dimensions rather than one, we see something a bit different. Of course, even two dimensions is a rather crude oversimplification, but two is better than one.

Stevens Ginsburg Breyer Souter	Kennedy O’Connor
	Rehnquist Scalia Thomas

In one corner is a group of justices (Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer), who tend to defer regarding one set of controversial constitutional issues (such as the scope of federal power under the Commerce Clause and Section Five of the Fourteenth Amendment and the permissibility of affirmative action) while not deferring on another set of such issues (such as government power to regulate sexuality and reproduction challenged under the Due Process Clause). In the opposite corner is a second group (the late Chief Justice Rehnquist, Justice Thomas, Justice Scalia) who tend to do exactly the opposite, deferring on those issues that the first group does not defer but not deferring on the issues where the first group does defer. Members of the two groups often sound remarkably just like the other, albeit with regard to different issues.

A third group (Justice O’Connor and Justice Kennedy) tends not to defer on either set of issues. These justices are frequently called the

35. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 126 (2004). See also *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

36. See *Nat’l Abortion Fed’n v. Gonzales*, 437 F.3d 1278, 1292 (2d Cir. 2006) (Walker, C.J., concurring) (noting that “lower courts can only guess as to how the Casey standard should be applied”).

37. For a slightly different order, see Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, CONST. COMMENT. (forthcoming) (Stevens, Ginsburg, Souter, Breyer, Kennedy, O’Connor, Scalia, Rehnquist, Thomas).

moderates, but there is an important sense in which they are not moderate at all, but instead tend to be the least deferential, the most activist or aggressive.³⁸ By joining with each of the other groups in some cases, these two produced a remarkably nondeferential court.³⁹

One might logically expect a fourth group that tends to defer across the broad range of controversial constitutional issues. Recall, for example, Justice Byron White or Justice John Harlan. But this was an empty set (or an empty seat) for more than a decade on the Rehnquist Court. There is, however, some reason to hope that Chief Justice Roberts and Justice Samuel Alito might fill this hole on the Supreme Court.

In sorting between those circumstances in which judges should defer to nonjudicial constitutional interpretation and those in which they should not, the focus should be on the comparative competence of courts as opposed to other government institutions.⁴⁰

Some, such as Professor John Hart Ely, view the courts as comparatively competent at protecting discrete and insular minorities from prejudice, and some seem to think of them as comparatively competent at protecting the poor, the weak, and the powerless in general.⁴¹ But while Ely and Footnote Four have led us to associate “discrete and insular” with the poor, the politically weak, and especially with African-Americans, Bruce Ackerman pointed out more than twenty years ago that “[o]ther things being equal, ‘discreteness and insularity’ will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics.”⁴² He explained:

[F]or all our *Carolene* talk about the powerlessness of insular groups, we are perfectly aware of the enormous power such voting blocs have in American politics. The story of the protective tariff is, I suppose, the classic illustration of insularity’s power in American history. Over the past half-century, we have been treated to an enormous number of welfare-state variations on the theme of insu-

38. See Posner, *supra* note 15, at 54 n.74 (explaining his use of the term “aggressive judge” because “judicial activism” has become a “term of abuse for a decision that the abuser does not like, rather than a description of decisions that expand the judicial role relative to that of other branches of government”). It is hardly surprising that Professor Barnett has been particularly enamored of Justice Kennedy. See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 21. See also Posner, *supra* note 15, at 84 (describing Justice Kennedy as the “leading moral vanguardist on the Supreme Court” whose slogan could be “Make the Constitution All It Can Be”).

39. See, e.g., Posner, *supra* note 15, at 56 (“Judicial modesty is not the order of the day in the Supreme Court.”). As the controlling voters on the Court, Justice Kennedy and Justice O’Connor largely shaped its overall character; it is difficult to see how one can simultaneously believe both that the Rehnquist Court was quite nondeferential and that these Justices were anything other than nondeferential.

40. See generally Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994).

41. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

42. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985).

larity by the farm bloc, the steel lobby, the auto lobby, and others too numerous to mention. In this standard scenario of pluralistic politics, it is precisely the diffuse character of the majority forced to pay the bill for tariffs, agricultural subsidies, and the like, that allows strategically located Congressmen to deliver the goods to their well-organized local constituents. Given these familiar stories, it is really quite remarkable to hear lawyers profess concern that insular interests have too little influence in Congress. Instead, the American system typically deprives *diffuse* groups of their rightful say over the course of legislative policy.⁴³

Thus the real work in the formulation focused on prejudice against discrete and insular minorities is done by the concept of prejudice.⁴⁴ Yet it is far from clear that courts are better than other institutions at distinguishing prejudice (or *prejudgment*) from any other judgment.⁴⁵ Indeed, the long-term track record tends to show that Congress is better at seeking justice for the weak and powerless, with courts siding with the rich and powerful.⁴⁶

We should hardly be surprised. If designing an institution to protect the poor and powerless, who would create one staffed by lawyers chosen by the President and confirmed by the Senate? To the contrary, if we were looking to design an institution to protect existing distributions of wealth and power, what better way to do it than with life-tenured elites chosen this way? As Professor Ely himself has observed, the federal judiciary functions as the institutional embodiment of today's aristocracy.⁴⁷ Moreover, as scholars such as Michael Klarman and Scot Powe have

43. *Id.* at 728.

44. *Id.* at 731 ("By detailing all the ways discrete and insular minorities gain political advantage over diffuse and anonymous groups, I have meant to emphasize how heavy a burden the idea of prejudice must carry in the overall argument for *Carolene Products*.").

45. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 784 (1991):

By far the more controversial aspect of Ely's theory is his attempt to devise a nonsubstantive theory of prejudice—that is, a formula by which courts can, without making substantive value choices, invalidate a legislative cost-benefit determination because of insufficient consideration of the interests of a particular *fully enfranchised* group. Indeed I believe that Ely's critics have demonstrated that this task is impossible; there can be no nonsubstantive theory of prejudice.

Cf. Ackerman, *supra* note 42, at 737 ("One person's 'prejudice' is, notoriously, another's 'principle.'"); *id.* at 740 ("The difference between the things we call 'prejudice' and the things we call 'principle' is in the end a substantive moral difference.").

46. Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes*, 73 FORDHAM L. REV. 1415, 1438 (2005) (noting that "history suggests that Congress may be more reliable in bringing about the 'justice-seeking account' of constitutional practice than the Supreme Court"). *Cf.* WALDRON, *supra* note 10, at 302 (noting that "it is an open question whether judicial review has made the United States . . . more just than it would have been without that practice"). See generally JOHN J. DINAN, *KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS* (1998) (tracing the reliance on judges to the middle of the twentieth century and describing earlier reliance on legislation or the broader public as the guardians of rights).

47. See John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 289 (1999) (noting that the federal judiciary is "comparatively old, well-educated, isolated, thoughtful, and wise").

shown, courts tend to protect minorities—not when they are most powerless—but rather when they achieve a fair degree of political power and support either as part of a governing coalition or as otherwise important to national elites.⁴⁸

Ely and his followers also call for less deference to self-serving constitutional interpretations, that is, interpretations that bolster the interpreter's own hold on power.⁴⁹ At least where it is possible to clearly identify this kind of bias, it is hard to argue with this position. However, there is some danger that, unless cabined, this principle would call for skepticism whenever any branch exercises any power. To avoid this danger, it is important to limit it to situations where the interpreter is not merely justifying its own exercise of power but also is attempting to entrench that exercise of power.⁵⁰

While this principle is generally articulated as a basis for judges to decline to defer to the decisions of politicians, notice that it also suggests that politicians should give less deference to constitutional interpretation by judges that benefits the judges' own hold on power. Thus not only should judges be less deferential to legislative action that protects incumbent legislators from displacement, but Congress and the President should also be less deferential to judicial action that protects incumbent judges from displacement or that entrenches judicial interpretations.⁵¹ As a matter of institutional design, this is simply "ambition counteracting ambition" in action.⁵²

Others, such as Alexander Bickel, view the courts as comparatively competent at discovering, protecting, and advancing our deepest national values.⁵³ For him and his followers, judges can be scholars of principle, if

48. See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); LUCAS A. (SCOT) POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

49. See, e.g., Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997).

50. Cf. WALDRON, *supra* note 10, at 304 (arguing that "we should resist the temptation to say" that "democratic politics is just an unholy scramble for personal advantage" "simply because we find ourselves contradicted or outvoted on some matter of principle. . . . If we ascribe someone's political difference with us to the influence of self-interest, that must be justified as a special explanation, over and above the normal explanation of human disagreement about complex questions.").

51. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992).

52. See THE FEDERALIST NO. 51, at 398 (Alexander Hamilton) (John C. Hamilton ed., 1880). Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2365-68 (2006) (arguing that the ability of Congress and the President to constrain the Judiciary varies depending on whether or not one party controls both Houses of Congress and the Presidency).

53. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). See, e.g., Posner, *supra* note 15, at 81 (describing Bickel as "cast[ing] the Court in the role of a secular Moses that would lead the American people out of their moral wilderness").

not genuine prophets, in contrast to the merchants of expediency who govern in other branches. On this view, when judges see threats to those deepest values, or openings to advance those values, they should not be deferential to the unprincipled politicians worried only about expediency.⁵⁴

As a matter of institutional design, if one were looking for those most attuned to our deepest values, it is again hard to see why we would turn to lawyers—particularly those lawyers who are known and favored by presidents and senators.⁵⁵ Nor to my mind has anyone answered Judge Learned Hand's lament that it would be most "irksome to be ruled by a bevy of Platonic Guardians," even if one did know how to choose them.⁵⁶ If ever judges had the time and inclination to follow the ways of the scholar, it is scarcely true today with burgeoning caseloads and managerial judges.⁵⁷ As a matter of history, judges do not lead prophetic movements: at worst they suppress those movements, at best they aid those social movements that have already made substantial gains among national elites.⁵⁸

For still others, such as Justice Scalia, judges are comparatively good at textual and historical analysis.⁵⁹ The judicial track record on historical analysis is questionable; if the key is getting the history right, certainly

54. Cf. WALDRON, *supra* note 10, at 1384 (noting that "it is striking how rich the reasoning is in legislative debates on important issues of rights in countries without judicial review"). See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1990).

55. Posner, *supra* note 15, at 77 (Supreme Court Justices are "privileged, sheltered, and, most of them, quite wealthy." Further, "in a democratic society . . . it is difficult to justify giving a committee of lawyer-aristocrats the power not just to find or apply the law and make up enough law to fill in the many gaps in the law that is given to them, but also to create law" in the form of constitutional interpretation that "makes mistakes exceedingly difficult to correct . . . even when those mistakes are usurpative . . .").

56. LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958). See also WALDRON, *supra* note 10, at 264 (noting that "Aristotle would call 'aristocracy'" a system that leaves it to judges to decide those questions on which people disagree); *id.* at 297 (noting that "often our scholarly talk about when 'the people' or 'the majority' may be entrusted (by us?) with decisions about rights has something of the haughty air of a John Stuart Mill talking *de haut en bas* about native self-government in India"); Waldron, *supra* note 10, at 1375 (noting the "sense of principle that is at stake when someone asks indignantly, 'How dare they exclude *my* say—disenfranchise *me*—from this decision, which affects me and to which I am subject?"); *id.* at 1353 ("By privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.").

57. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376 (1982). And it would be hard to argue that the recent reduction in the Supreme Court's caseload has made them more scholarly and better philosophers, although it may lead them to think so. See Posner, *supra* note 15, at 64-75 (discussing the reduction in caseload, the lack of deliberation, and poor use of scholarship); *id.* at 77 ("Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring exaggerated opinions of their ability and character.")

58. See generally AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); Klarman, *supra* note 45; Powe, *supra* note 48.

59. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). This is not to say that Justice Scalia finds that courts are particularly good at history; rather, he finds originalism, with its dependence on history,

Congress is institutionally better situated to draw on leading historians than are judges aided by recent law review editors.⁶⁰ While legally trained judges may well be better at textual analysis than other government officials, few constitutional questions that actually get litigated can be answered by sophisticated textual analysis alone.⁶¹ In such few instances, there would seem to be good reason for judges to be less deferential.

So far, then, we have two standing reasons to prefer constitutional interpretation by judges over constitutional interpretation by other branches. Courts should be less deferential when the other interpreter is attempting to lock in his or her own power and in those relatively rare litigated cases where pure textual analysis provides a clear answer. Is there any other reason?

I think so. Proposed legislation typically involves multiple provisions bundled together in a single bill. As has been recognized since Aristotle, legislation almost invariably will apply to multiple situations, including some that even the most prescient legislator cannot foresee.⁶² Faced with a proposed bill that contains provisions that the legislator believes constitutional bundled with provisions that the legislator believes unconstitutional, a conscientious legislator may decide nevertheless to vote for the bill. Particularly in the House of Representatives, the legislator may have little opportunity to amend the bill, and even in the Senate, the legislator may not succeed in doing so. Similarly, a conscientious President presented with a bill that contains provisions that the President believes constitutional, bundled with provisions that the President believes unconstitutional, may nevertheless decide to sign the bill.⁶³

the lesser evil than nonoriginalism. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989).

60. See generally Martin S. Flaherty, *History "Lie" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Alfred Kelly, *Clio and the Court*, 1965 SUP. CT. REV. 119. The kinds of historical questions relevant to constitutional interpretation are legislative facts rather than adjudicative facts; they are not the sort of factual determinations that are made by trial courts based on the evidence presented and to which appellate judges must defer. Amicus briefs can certainly help judges (including appellate judges) understand history, but the legislative process makes it possible for Congress to ask historians questions, both formally and informally. Moreover, Congress can explore such historical questions with a wide range of historians over a period of years before reaching a conclusion.

61. Cf. Posner, *supra* note 15, at 52-53.

I do not even mean to deny that some constitutional cases can be decided as conventional legal cases by lining up the facts alongside the constitutional text. Those tend, however, to be hypothetical cases But cases that clear arise very infrequently, and when they do they rarely reach the Supreme Court.

62. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 10 (D.P. Chase ed., Dover Publications 1998).

63. See Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 917 (1989-90); Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357-58 (1953). But see Michael Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 736, 773 (1992) (arguing that legislators and presidents must not vote for or sign bills with unconstitutional provisions). Even the American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers, which recommended

In addition, both the legislator and the President may well support a bill that has numerous constitutional applications, even if they can imagine unconstitutional applications, and surely may support a bill even though they acknowledge that it might have as-yet-unimagined unconstitutional applications. The likelihood of support in either situation depends on how central the provision thought to be unconstitutional is to the entire bill, how important enactment of the entire bill is even with the provision thought to be unconstitutional, and the relative frequency and importance of constitutional versus unconstitutional applications of the bill one envisions.

While legislators and presidents have limited ability to unbundle legislation,⁶⁴ courts, in contrast, specialize in unbundling. It is precisely where their comparative competence lies. They do not vote on, sign, or veto a bill as a whole, but rather enter judgments resolving individual cases. This specialization in resolving individual cases leads to unbundling in both senses. First, an individual case may well involve only one particular provision of a complex bill. Second, an individual case may well involve only a single application of a bill, not the entire range of possible applications.

The comparative competence of courts in unbundling leads us to another way to sort levels of deference in litigated cases. If the case involves a provision that was central to the bill, and an application that was readily foreseen, there is reason to defer. If, on the other hand, the case involves a provision that was not central to the bill, or an application that was not among the core foreseen applications of the bill, there is less reason to defer.

that the President veto any bill "if he believes that all or part of [it] is unconstitutional," Recommendation of the American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers, acknowledged that sometimes "practical exigencies militate against a veto." ABA, TASK FORCE ON THE PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, REPORT 23 (2006). Among the many flaws in that startlingly simplistic report are its casual assumption of judicial supremacy and its conflation of a power (perhaps a duty) not to enforce unconstitutional statutes with a general dispensing power. Cf. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861, *supra* note 4, at 175-76 (noting that while the view that the "President was bound to disregard unconstitutional provisions even after signing a law" has "not received universal approval," as

Attorneys General and their lawyers have frequently maintained, it is at least arguable that the logic of Jackson's Bank veto message equally demonstrates that the Constitution does not require the President to enforce unconstitutional laws. For as we know from *Marbury v. Madison* an unconstitutional statute is no law at all, and the Constitution itself is one of the laws the President has sworn to enforce. Like Jackson's veto and Jefferson's pardon, [Attorney General] Black's assertion of the President's obligation not to execute unconstitutional laws offers us an additional check to ensure that the Constitution is respected; it does nothing to impair the alternative safeguard of judicial review. James Wilson, second only to Madison as sculptor and initial expositor of the Constitution, had prefigured Black's interpretation during the Pennsylvania ratifying convention: Just as judges would declare unconstitutional statutes void, the President would refuse to enforce them.)

(citations omitted).

64. See *Clinton v. City of New York*, 524 U.S. 417, 449 (1998).

In the first case, it is difficult to see how a legislator could conscientiously support the bill, or a President sign it, without reaching a determination that the provision can be constitutionally applied in such a case. In the second case, by contrast, it is quite easy to see how a legislator could conscientiously support the bill, or a President sign it, without reaching such a determination.

Significantly, I suggest that this distinction maps directly onto *Marbury* and *McCulloch*. The *Marbury* case involved one application of a relatively obscure provision in a crucial enactment: the provision in section thirteen of the Judiciary Act of 1789 providing original mandamus jurisdiction in the Supreme Court.⁶⁵ That Act established the national judiciary; until it was enacted, there were no lower federal courts, and no Supreme Court. It covered a wide range of topics, from the creation of district courts, circuit courts, and Supreme Court, to the terms and jurisdiction of those courts.⁶⁶

A conscientious legislator or President who believed that the mandamus provision of section thirteen would be an unconstitutional attempt to expand the Supreme Court's original jurisdiction could well decide to support or sign the bill, given that it was bundled with the provisions necessary to get the judicial branch of the government up and running. Indeed, considering that the mandamus provision itself could be constitutionally applied in some cases, a conscientious legislator or President could support that provision itself because the text covered both constitutional and unconstitutional applications.⁶⁷

By contrast, the *McCulloch* case involved the constitutionality of a law establishing the bank of the United States.⁶⁸ The establishment of the bank was central to the bill; it was its very purpose. It is difficult to imagine how a conscientious legislator or President could support or sign such a bill without determining that it was constitutional for the national government to establish a bank.

65. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

66. Judiciary Act of 1789, ch. 20, 1 Stat. at 73.

67. See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1337 n.91 (2000) (noting that *Marbury* "did not invalidate that linguistic unit of the statute insofar as it authorized the Supreme Court to issue writs of mandamus in the exercise of its appellate jurisdiction"). In addition, nothing in *Marbury* suggests that the mandamus provision would be unavailable in the limited range of cases allocated to the Supreme Court's original jurisdiction. See U.S. CONST. art. III, § 2 (providing for Supreme Court original jurisdiction in "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party"). Cf. *Ex parte Siebold*, 100 U.S. 371, 374 (1879) ("Having this general power to issue the writ [of habeas corpus], the court may issue it in the exercise of original jurisdiction where it has original jurisdiction."). Do members of the ABA Task Force on Presidential Signing Statements really believe that President Washington should have vetoed the Judiciary Act of 1789?

68. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-01 (1819). The Bank of the United States was first created by the Act of Feb. 25, 1791, ch. 5, § 1, 1 Stat. 191, 191. The statute involved in *McCulloch* was the Act of Apr. 10, 1816, ch. 44 § 1, 3 Stat. 266, 266.

As one important factor in deciding when to defer and when not to defer, I suggest that courts should focus on their comparative competence to unbundle particular statutory provisions from larger bills and to unbundle particular applications of statutory provisions in particular cases.

II. FACIAL AND AS-APPLIED CHALLENGES

Supreme Court jurisprudence is in disarray concerning facial and as-applied challenges to the constitutionality of statutes. In *United States v. Salerno*, the Supreme Court stated that it had “not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment,” and that, in all other contexts, a facial challenge can only succeed by showing that “no set of circumstances exists under which the Act would be valid.”⁶⁹ Since then, various scholars have argued that the Supreme Court has actually been more receptive to facial challenges in a variety of other areas, including the Establishment Clause, the Equal Protection Clause, and substantive due process challenges to abortion statutes.⁷⁰ Matthew Adler has gone so far as to suggest that nearly all constitutional decisions involve facial challenges.⁷¹

In opinions issued in connection with a denial of certiorari, Justices Stevens and Scalia sparred over whether the *Salerno* test should apply in challenges to abortion statutes. Justice Stevens characterized the *Salerno* statement as a mere “rhetorical flourish,” that was both unwise and a departure from precedent,⁷² while Justice Scalia described it as accurately summarizing “a long established principle of our jurisprudence.”⁷³ Although the Supreme Court granted certiorari to decide that question last term, it did not do so.⁷⁴

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

70. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 196 (5th ed. 2003); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238-39 (1994); Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859 n.29 (1991) (“Virtually all of the abortion cases reaching the Supreme Court since *Roe v. Wade* . . . have involved facial attacks on state statutes, and the Court, whether accepting or rejecting the challenges on the merits, has typically accepted this framing of the question presented.”); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 361-62 (1998).

71. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998). Professor Fallon, on the other hand, contends that litigants challenging a statute are always arguing that the statute cannot be enforced against them and that all constitutional challenges “are in an important sense, as-applied.” Fallon, *supra* note 67, at 1336-39.

72. *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of cert.).

73. *Id.* at 1178 (Scalia, J., dissenting from the denial of cert.).

74. *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961, 964-69 (2006) (unanimously remanding for consideration of narrower relief). The first question presented was the following:

Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the undue burden standard cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000)

In the meantime, the question has spread to a wide range of constitutional areas. Indeed, dispute, confusion, and uncertainty regarding facial versus as-applied constitutional challenges are becoming ubiquitous.

Consider the Commerce Clause. The recent decisions concluding that statutes are unconstitutional under the Commerce Clause were conclusions of facial invalidity.⁷⁵ The Court did not explore whether the Gun Free School Zone Act could be constitutionally applied to the particular conduct involved in *Lopez*, or whether the Violence Against Women Act could constitutionally be applied to the particular conduct involved in *Morrison*.⁷⁶ Nor did it insist on a showing that no set of circumstances exist under which the Act would be valid.⁷⁷ Nevertheless, it found the criminal prohibition in the former and the private civil remedy in the latter unconstitutional across the board.⁷⁸

Moreover, in deciding on the constitutionality of the Federal Sentencing Guidelines under the Sixth Amendment's right to a jury trial, the majority found the relevant portions of the statute mandating the Guidelines unconstitutional on their face.⁷⁹ Justice Thomas, by contrast, evaluated the two individual cases before the Court to determine if the Guidelines could be constitutionally applied to their particular cases.⁸⁰ Similar disputes or uncertainty have now spread to the adequacy of state procedural grounds to block Supreme Court review of state court judgments or federal habeas for those in state custody,⁸¹ and even to the Spending Clause.⁸² In the Spending Clause context, the Court went out of its way to add an afterword discouraging facial attacks alleging overbreadth, while noting that it has recognized the validity of such attacks in "relatively few settings" including free speech, the right to travel, abortion, and legislation under Section Five of the Fourteenth Amendment.⁸³

This last category—legislation under Section Five of the Fourteenth Amendment—provides the most striking aspect of the current uncertainty. Most of the recent cases finding acts of Congress unconstitutional under Section Five appear to find those acts unconstitutional on their

applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

Petition for Writ of Certiorari at i, *Ayotte*, 126 S. Ct. 961 (No. 04-1144). See Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 295 (2d Cir. 2006) (Walker, C.J., concurring) (noting that the Court in *Ayotte* "chose not to address the most controversial issue before it"). See also text accompanying notes 115-25 *infra* for further discussion of *Ayotte*.

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

76. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

77. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

78. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

79. *United States v. Booker*, 543 U.S. 220, 249 (2005).

80. *Id.* at 313-14 (Thomas, J., dissenting in part).

81. *Lee v. Kemna*, 534 U.S. 362, 379-83 (2002); Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 246-48 (2003).

82. See *Sabri v. United States*, 541 U.S. 600, 604-05 (2004).

83. *Id.* at 608-10.

face.⁸⁴ Indeed, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court apparently held a statute abrogating the state's sovereign immunity from patent claims to be invalid on its face, over Justice Stevens's specific argument in dissent that the statute should be upheld as-applied to the particular patent infringement involved in the case.⁸⁵ Yet in *Tennessee v. Lane*—decided the same day as the Court listed Section Five cases as among those in which such facial challenges were appropriate—the Court followed the approach that Justice Stevens had advocated in his *Florida Prepaid* dissent, upholding Title II of the Americans with Disability Act (“ADA”) as applied to the particular cases before the Court.⁸⁶

Not only has the Court—or, more accurately, Justice O'Connor⁸⁷—flip-flopped on whether to accept Justice Stevens's as-applied approach under Section Five, but Justice Stevens and Scalia—who have been debating this issue with each other for nearly a decade—emerge on different sides of the battle in different contexts. In the abortion and gay rights context, Justice Scalia resists facial challenges and insists that a statute not be found facially invalid if there are any circumstances in which the statute would be constitutional, while Justice Stevens happily finds statutes unconstitutional on their face.⁸⁸ In the Section Five context, Justice Stevens resists facial challenges and insists that a statute not be found facially invalid if it can be constitutionally applied, while Justice Scalia happily finds statutes unconstitutional on their face.⁸⁹ Justice Scalia is

84. See, e.g., *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, 91-92 (2000); *United States v. Morrison*, 529 U.S. 598, 613 (2000). The decision in *Department of Human Resources v. Hibbs*, 538 U.S. 721, 724-25, 733-34, 743 (2003), upholding the Family and Medical Leave Act (“FMLA”), also appears to have a facial rather than an as applied character. See Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 896-97 (2005).

The father of this line of cases, *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), a similarly appears to find Religious Freedom Restoration Act (“RFRA”) unconstitutional on its face. See Metzger, *supra* at 894 (describing *Boerne* as “a good example of the seemingly facial character of these decisions”); *id.* at 894 n.94 (noting that *Sabri* identifies *Boerne* as a facial challenge). *Boerne* also illustrates well Professor Metzger's point that these Section Five cases may be less facial than first appears and that facial and as-applied constitute a continuum, not a dichotomy. See *id.* at 877. RFRA may well survive as applied to the federal government. *Id.* at 899-900. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1225 (2006) (applying RFRA to the national government without discussion of its constitutionality, apparently because neither party raised the issue (nor was in a position to do so)).

85. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639-41, 653-54 (1999).

86. *Tennessee v. Lane*, 541 U.S. 509, 530-31 (2004). See also *United States v. Raines*, 362 U.S. 17, 20, 24-25 (1960) (upholding, under Section Two of the Fifteenth Amendment, a provision of the 1957 Civil Rights Act as applied to state officials, and reversing the lower court's judgment that the provision was unconstitutional on its face because it also applied to private actors).

87. Justice O'Connor was the only one to join the majority in both *Florida Prepaid* and *Lane*. See RICHARD H. FALLON, JR. DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 12 (Supp. 2005).

88. *Stenberg v. Carhart*, 530 U.S. 914, 938, 956 (2000); *Romer v. Evans*, 517 U.S. 620, 631-32, 640-41 (1996).

89. *Lane*, 541 U.S. at 530-31, 541-44; *Florida Prepaid*, 527 U.S. at 629-41, 653-54.

also receptive to facial challenges under the Commerce Clause, while Justice Stevens has not (at least yet) argued for upholding a statute as applied on Commerce Clause grounds.⁹⁰ Both resisted a facial challenge in the context of the Sixth Amendment right to a jury trial.⁹¹ And neither has shown much attraction to finding a statute unconstitutional as applied under the Commerce Clause.⁹²

In short, the law in this area is a mess.⁹³ Focusing on the comparative competence of the courts can help in resolving the muddle.

As Gillian Metzger has observed, “existing scholarship generally agrees that the debate regarding the availability of facial challenges is, at bottom, fundamentally a debate about severability.”⁹⁴ That is, the fundamental question is whether a particular application of a statute can be severed from other applications of the statute. If the particular application at issue can be severed, then a court can refuse to apply the statute in the particular case where it is unconstitutional, without addressing the validity of the statute more generally. Similarly, if the particular application at issue can be severed, then a court can apply the statute in the particular case where it is constitutional, without addressing the validity of the statute more generally.

At this juncture, focusing on the comparative competence of the courts with regard to constitutional interpretation can help. As discussed above, courts are comparatively competent at unbundling both particular statutory provisions and particular applications of those provisions.⁹⁵ That is, courts have a comparative competence in deciding severed constitutional questions.

In light of the comparative competence of courts in deciding severed constitutional questions, courts should be quite reluctant to overcome the presumption of severability,⁹⁶ and thus quite reluctant to conclude that a statutory provision with some constitutional applications is facially unconstitutional and cannot be enforced at all. Courts have little comparative competence regarding facial challenges to statutes and should largely be confined to the as-applied constitutional challenges where their com-

90. See *United States v. Morrison*, 529 U.S. 598, 613, 628-35 (2000); *United States v. Lopez*, 514 U.S. 549, 602-03 (1995); but see *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (listing areas in which facial overbreadth challenges have been recognized, including free speech, abortion, and Section Five, but not the Commerce Clause); *id.* at 610 (Kennedy and Scalia, JJ., concurring) (declining to join the afterword, and noting that the Court “does not specifically question” the practice of facial invalidation in Commerce Clause cases such as *Lopez* and *Morrison*).

91. *United States v. Booker*, 543 U.S. 220, 225-26, 234-35 (2005).

92. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2208-09, 2215 (2005); *cf. id.* at 2229, 2237 (Thomas, J., dissenting) (“If medical marijuana patients like Monson and Raich largely stand outside the interstate drug market, then courts must excise them from the CSA’s coverage.”).

93. See FALLON, MELTZER, & SHAPIRO, *supra* note 87, at 13 (asking if there is “any principled explanation of when the Court will entertain overbreadth facial challenges and when it will not”); Fallon, *supra* note 67, at 1358-59 (noting the “reigning confusion”).

94. Metzger, *supra* note 84, at 887 (citations omitted).

95. See *supra* text accompanying notes 64-68.

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

parative competence lies. They should concentrate on what they are comparatively good at: determining whether a particular application of a particular statute is constitutional.

Of course, severability is ultimately a matter of statutory interpretation. If a legislature provides that particular provisions or particular applications are not severable, a court should honor that legislative choice. Moreover, if a state court construes a state statute to be nonseverable, federal courts should adhere to that interpretation of state law.⁹⁷ But legislatures should be (and are) reluctant to so provide, and the comparative competence of courts supports that reluctance. Similarly, the comparative competence of courts also supports John Nagle's proposal of a clear statement rule that calls for severability "unless the legislature clearly states in the text of the statute its intention that a statutory provision is nonseverable."⁹⁸ This comparative competence has another effect, for (again, in Metzger's words), "[s]cholars also agree that, given the role played by severability, the availability of facial challenges ultimately turns on the substantive constitutional doctrines that govern in a particular area."⁹⁹ Henry Monaghan led the way here, arguing that it was substantive First Amendment doctrine that required an exception to the ordinary presumption of severability and therefore made facial challenges more readily available.¹⁰⁰ Michael Dorf pointed out that substantive Establishment Clause and Equal Protection doctrine, by testing for an illegitimate purpose, similarly make facial challenges more readily available.¹⁰¹ Indeed, Richard Fallon has argued that there are no transsubstantive rules governing facial challenges, but instead that courts sometimes apply doctrinal tests in particular substantive areas that 1) sweep more broadly than other doctrinal tests, or 2) limit the availability of severing unconstitutional provisions or applications from constitutional ones.¹⁰² "[W]hen a court upholds a constitutional challenge, the nature of the test that it applies will determine whether the statute is found unconstitutional solely

97. See *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) ("The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court."). See also Dorf, *supra* note 70, at 283-86.

98. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 254 (1993). He notes that a judicially created clear statement rule would be better than a more easily dislodged presumption of severability and that a "legislatively enacted clear statement rule providing that all statutes should be construed as severable absent a specific nonseverability clause" would be "best of all." *Id.* at 232-33.

99. Metzger, *supra* note 84, at 888.

100. Henry Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 24-25 (arguing that it is the substantive law of the first amendment that limits the availability of severability).

101. Dorf, *supra* note 70, at 279-80.

102. Fallon, *supra* note 67, at 1351. See also *id.* at 1368 ("The crucial, mediating variables are the general principles or doctrinal tests that courts apply in deciding constitutional cases. Some tests require courts to engage in processes of reasoning with the potential to mark a statute as invalid on its face, not merely as applied."); Dorf, *supra* note 70, at 294 (noting that the "distinction between as-applied and facial challenges may confuse more than it illuminates" and that "the proper approach to a constitutional case typically turns on the applicable substantive constitutional doctrine and the institutional setting, not the classification as a facial or as-applied challenge").

as applied, in part or in whole.”¹⁰³

This insight—that substantive constitutional doctrine affects the availability of facial challenges—leads to another: because the way in which courts fashion substantive constitutional doctrinal tests affects the availability of facial challenges, it therefore also affects the ability of courts to capitalize on their comparative competence. Thus, it is not simply that the availability of facial challenges turns on the substantive constitutional doctrine, but that constitutional doctrine should itself be shaped with an awareness of the extent to which it will tend to produce judicial decisions that decide the constitutionality of a statute as a whole.¹⁰⁴ Courts should be cognizant of this effect and reluctant to embrace substantive doctrine that undermines their own comparative competence.

This does not mean that courts should never embrace doctrinal tests that sweep broadly or limit the availability of severance. But courts should only embrace such doctrinal tests in full recognition that in so doing, they are sacrificing an important comparative competence of courts. Sometimes such a test might be unavoidable. For example, in a dispute over whether a bill became law despite an attempted pocket veto, either the bill as a whole was properly vetoed or the bill as a whole became law despite the attempted pocket veto.¹⁰⁵ Beyond this, however, the best justification for such doctrinal tests—perhaps the only one¹⁰⁶—is that a dif-

103. Fallon, *supra* note 67, at 1339.

104. Some might object that courts have no business taking such considerations into account in interpreting the Constitution. Note, however, how far-reaching such an objection would be: if considerations of comparative institutional competence are inappropriate, then the entire structure of judicial review, with different levels of judicial scrutiny, must be swept aside as well.

Moreover, regardless of how narrow or broad the considerations that a court may consider in shaping judicial doctrine to implement the Constitution, *see generally, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Fallon, *supra* note 70; Roosevelt, *supra* note 27, it is difficult to see why a court should not be able to at least take into account the comparative competence of the institutions themselves constituted by the Constitution. Such comparative competence is rooted in the structure of the Constitution itself. Moreover, the Constitution plainly contemplates that each branch will interpret the Constitution in carrying out its duties, and that the branches in interacting will frequently confront prior constitutional interpretations by others. In deciding how to handle those interactions, should one ignore the respective attributes of those branches? Surely not, particularly considering that a court facing a constitutional question frequently must adopt *some* posture regarding the influence of prior constitutional interpretations on its answer to that question. (Adopting such a posture can be avoided only if the court independently agrees with the prior interpreters.)

105. *See* The Pocket Veto Case, 279 U.S. 655, 673-74 (1929). Although they do not mention the pocket veto, it would seem that whether a bill has been validly vetoed represents an example of what Professors Adler and Dorf label “constitutional existence conditions.” *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1108-09 (2003). Although they are correct that some constitutional provisions generate existence conditions, they have a rather expansive view of what counts as an existence condition, as might be expected given their view of facial challenges. *See* Adler, *supra* note 71, at 157; Dorf, *supra* note 70, at 238-39.

106. Professor Fallon suggests that such robust protection is appropriate “where constitutional values are unusually vulnerable.” Fallon, *supra* note 67, at 1352. But a determination of which constitutional values are unusually vulnerable largely returns us to the competing claims of comparative competence discussed above. *See supra* notes 51-61 and accompanying text.

ferent comparative competence is also in play, such as the comparative competence of courts to evaluate legislation that attempts to entrench legislators' own grip on power.

It might be thought, particularly given the current prominence of the dispute in the area of abortion, that doctrine that facilitates addressing statutes on their face always tends to increase judicial findings of unconstitutionality, while doctrine that instead facilitates addressing statutes as applied always tends to limit judicial findings of unconstitutionality. But doctrine that discourages (or completely blocks) as-applied challenges can serve to reduce judicial findings of unconstitutionality, and doctrine that facilitates as-applied challenges can sometimes work (at least where a finding of facial unconstitutionality is unlikely) to make judicial findings of unconstitutionality more likely.

The Commerce Clause illustrates the point. It was unlikely that the federal law against possession of marijuana would be found unconstitutional on its face, but dissenting justices argued that it should be found unconstitutional as applied.¹⁰⁷ (In contrast, the government seemed to argue that there is effectively no such thing as an as-applied Commerce Clause challenge.¹⁰⁸) That same approach could be used to find any

Professor David H. Gans argues that courts should engage in "strategic" facial invalidations when "some defect in case-by-case adjudication" makes facial invalidation a better means of implementing the Constitution. David H. Gans, *Strategic Facial Challenges*, 85 B. U. L. REV. 1333, 1351-52 (2005). This approach appears to rest on the assumption that the judicial view of the constitution—even where the Judiciary is at its comparative disadvantage — is the correct one, while the key question to be decided in constitutional litigation is whether (and to what extent) the Judiciary should defer to the constitutional interpretation of others. In other words, it seems to assume judicial supremacy. Worse, it calls for courts to assert *broader* interpretive power precisely in those situations where they are defective.

Moreover, this approach appears to fall into the error of treating the Judiciary's primary role to be interpreting the Constitution, with the "case or controversy" requirement as a side limitation on the power—indeed, a limitation that sometimes needs to be compensated for in the name of wise policing of the rest of the government. *But see* John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 373 (1988):

The Constitution allocates to the courts the case deciding power, the power to issue judgments, that is where the duty to obey judgments comes from. The power to interpret the Constitution, however, comes from the case deciding power. To suggest that the power to interpret is primary and the case-deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect.

See also Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 147 n.139 (1999) ("We do not create courts to announce the law and then decide to constrain that function with the 'case or controversy' limitation; instead, we create courts to decide cases and controversies, and, because those courts want their controversial decisions accepted, they tend to explain those decisions with generalized reasons.").

107. *Gonzales v. Raich*, 545 U.S. 1, 26, 84-85, 107 (2005). The petitioners in *Raich* conceded the facial constitutionality of the statute.

108. At oral argument, Justice Stevens asked, "So you're saying that this statute could never have an unconstitutional application?" General Clement responded:

Under the Commerce Clause, I—that's exactly right, that would be our position. It is constitutional on its face, and it—and because of that line of authority, an as applied challenge can be brought, but the legal test that's applied in the as-applied challenge is one that considers the constitutionality of the statute as a whole.

number of federal statutes unconstitutional under the Commerce Clause in particular circumstances. For example, it is unlikely that various environmental statutes, such as the Endangered Species Act, would be found unconstitutional on their face. Doctrine that facilitates as-applied challenges, however, could yield some individual findings of unconstitutionality in particular cases.

If the idea that facilitating as-applied challenges might result in more judicial findings of unconstitutionality seems counterintuitive, consider what is probably the most common constitutional question that courts decide: the constitutionality of exercising personal jurisdiction. While on occasion statutes providing for personal jurisdiction have been found unconstitutional on their face,¹⁰⁹ current doctrine, with its emphasis on determining whether a particular defendant has purposeful contacts with the forum state, the relationship between those contacts, and the claim raised in the action, and whether it is reasonable to require a particular defendant to defend a particular claim there, plainly points toward as-applied determinations of the constitutionality of exercises of personal jurisdiction.¹¹⁰ If the doctrine were instead shaped in a way that tended

Transcript of Oral Argument at 16, *Raich*, 125 S. Ct. 2195 (No. 03-1454). Cf. Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 913 (2005) (“Whatever the effects of *Raich* on lower courts . . . one thing is clear: the as-applied challenges to which lower courts had been warming are likely over.”).

109. See *Dorf*, *supra* note 70, at 281-82 (citing *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) and *Schaffer v. Heitner*, 433 U.S. 186 (1977)). *Wuchter* found a New Jersey statute unconstitutional because it failed to require that a state official serving as the agent for a non-resident motorist provide notice to nonresidents, even though the official in *Wuchter* did in fact provide such notice. *Wuchter*, 276 U.S. at 15-16, 18-19. Similarly, *Shaffer* found unconstitutional a Delaware statute authorizing personal jurisdiction based on the ownership of shares in a Delaware corporation, even though the defendants in *Shaffer* were not merely shareholders, but officers of a Delaware corporation. *Shaffer*, 433 U.S. at 189-90, 214, 216-17. Both decisions have been criticized for this approach. See RESTATEMENT (SECOND) OF JUDGMENTS § 2 cmt. d (1982) (noting that “more discerning cases” than *Wuchter* “have recognized that the requirement is adequate notice and that it is fulfilled by actual notice whose tenor indicates it ought to be taken seriously. They thus return to the rule as it was understood before *Wuchter v. Pizzutti*.”); Earl Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 BYU L. REV. 1043, 1052 (“*Shaffer*’s result has been justly criticized. It seems rather strange to characterize as fundamentally unfair the assertion of jurisdiction over the officers and directors of a domestic corporation in a lawsuit focusing on the effect of their activities on that corporation.”).

110. See generally *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Int’l Shoe v. Washington*, 326 U.S. 310 (1945). See also *Taylor v. Fireman’s Fund Ins. Co.*, 778 P.2d 1328, 1331 (Ariz. Ct. App. 1989) (rejecting the argument that since the defendant “meets the statutory criteria for doing business in Arizona” it “thereby meets the threshold contacts required,” and noting that it had previously “found that to the extent [the long-arm statute] could be read to confer jurisdiction, it is unconstitutional as applied” to similar facts); *Harlo Prods. Corp. v. J. I. Case Co.*, 360 So. 2d 1328, 1329 (Fl. Dist. Ct. App. 1978) (holding provision of long arm statute “unconstitutional as applied to the facts of this case”); *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So. 2d 130, 134 (Fl. Dist. Ct. App. 1977) (holding provision of long arm statute “unconstitutional in its application to the circumstances of this case”); *Park Ave. Partners v. Johnson*, 342 S.E.2d 570, 571 (N.C. Ct. App. 1986) (noting that appellants concede that G.S. 1-75.4 confers jurisdiction on the superior court. They contend that this statute is unconstitutional as applied to them. If the contacts of

to evaluate statutes providing for personal jurisdiction on their face, it seems quite likely that they would be upheld. For example, would anyone find unconstitutional on its face a state statute providing for long arm jurisdiction over those who commit a tortious act in the state? Similarly, the very point of Justice Brennan's approach to transient jurisdiction—unlike Justice Scalia's—would be to open up the possibility of as-applied challenges to such jurisdiction.¹¹¹

Doctrine that favors facial challenges over as-applied challenges, therefore, does not necessarily increase the judicial conclusions of unconstitutionality. Instead, as Professor Cathie Struve has pointed out, facial challenges raise the stakes.¹¹²

This feature of facial challenges may help to explain why the Roberts Court has issued a series of unanimous rulings that lean heavily toward as-applied challenges. These cases cut across the broad swath of constitutional areas involving the question of facial as opposed to as-applied challenges: Congressional power under Section Five of the Fourteenth

a party with a state are sufficient so that the maintenance of a lawsuit against that party does not violate "traditional notions of fair play and substantial justice," the long arm statute is not unconstitutional as applied.).

Findings of as-applied unconstitutionality would be ubiquitous if states did not have long-arm statutes that either explicitly provide for personal jurisdiction to the limits of due process or have been so construed. *See, e.g.,* *Batton v. Tenn. Farmers Mut. Ins. Co.*, 736 P.2d 2, 4 (Ariz. 1987):

Although *Batton's* two-step argument—looking first at the long-arm rule and then at due process—is based on well-established Arizona case law, it unnecessarily complicates the jurisdictional inquiry. . . . [T]his two-step inquiry is redundant because our interpretation extends Rule 4(e)(2) to the permissible limits of due process. Consequently, if the constitutionally required minimum contacts are present, the defendant's conduct necessarily satisfies Rule 4(e)(2).

(citation omitted).

111. *Compare* *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 639-40 (1990) (Brennan, J., concurring in the judgment) (stating that "as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process," and that "[i]n this case, it is undisputed that petitioner was served with process while voluntarily and knowingly in the State of California") *with id.* at 619 (Scalia, J., announcing the judgment of the Court) ("jurisdiction based on physical presence alone constitutes due process").

112. Struve, *supra* note 81, at 254 ("Perhaps a more cynical view might be that the dissenters' opposition to as-applied adequacy review serves the function of raising the stakes.").

Here, too, we can see a connection with severability: a statutory nonseverability provision raises the stakes by insisting that the nonseverable provisions (or applications) stand or fall together. As Senator Schumer put it regarding a proposed amendment to the McCain-Feingold campaign finance bill:

I rise in adamant opposition to the nonseverability amendment. At the outset, let us be very clear about the unmistakable goal of this amendment. It has been signed, sealed, and delivered primarily by opponents of the bill for one and only one purpose: as a poison pill.

147 CONG. REC. S3084-02 (2001). *See also* Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 1001 (2005) (noting that a nonseverability clause can serve "an in terrorem function, as the legislature attempts to guard against judicial review altogether by making the price of invalidation too great," or as a "sort of poison-pill device" designed to "sabotage a statute").

Amendment; substantive due process protection for abortion; and First Amendment limitation on campaign finance regulation.

In *United States v. Georgia*, the Court held that Title II of the ADA validly abrogated state sovereign immunity to the extent that particular claims raised in the case were based on conduct that violated the Constitution.¹¹³ It remanded for a determination, “on a claim-by-claim basis,” of which aspects of the alleged conduct violated both Title II and the Fourteenth Amendment.¹¹⁴ In *Ayotte v. Planned Parenthood of Northern New England*, it declined to answer the first question on which certiorari had been granted—that is, whether *Salerno* applied to challenges to abortion statutes—and instead held that if a statute regulating access to abortion would be unconstitutional in medical emergencies, it is “not always necessary or justified” to invalidate the statute entirely because narrower relief may be possible.¹¹⁵ It remanded for a consideration of such narrower relief.¹¹⁶ And in *Wisconsin Right to Life, Inc. v. FEC*, the Court held that its prior decision upholding the facial constitutionality of section 203 of the Bipartisan Campaign Reform Act of 2002¹¹⁷ did not foreclose a challenge to the constitutionality of applying that section to a particular corporation’s broadcast of a particular advertisement during the 2004 election.¹¹⁸ It remanded for the district court to consider the as-applied challenge in the first instance.¹¹⁹

For gamblers who are confident of their hand, raising the stakes is a good idea, while for those less confident, it is not. Perhaps, then, these decisions can be understood as lowering the stakes in a time of transition, as the Court awaited confirmation of Justice O’Connor’s successor.¹²⁰ That is, perhaps the Court was simply avoiding highly controversial matters during Justice O’Connor’s “lame duck” term. So understood, they say little about where the Court may be going now that Justice Alito is in place.

113. *United States v. Georgia*, 126 S. Ct. 877, 881-82 (2006).

114. *Id.* at 882. As to conduct that violated Title II but not the Fourteenth Amendment, the Court left the abrogation question to the lower courts in the first instance. *Id.*

115. *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961, 964 (2006).

116. *Id.* at 969.

117. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 190 n.73, 204, 207-09 (2003) (reviewing the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.)).

118. *Wis. Right to Life, Inc. v. FEC*, 126 S. Ct. 1016, 1018 (2006).

119. *Id.*

120. Cf. Rick Pildes on *Georgia*, *Ayotte* and *WRtL*, <http://www.scotusblog.com/movabletype/archives/2006/01/22-week/> (last visited Oct. 10, 2006) (suggesting that the “Court’s actions are being shaped right now by Justice O’Connor’s unusual position of imminent retirement during the Term” and that the Court, while divided, is “bypassing those divisions by agreeing unanimously to temporize and let the lower courts confront these issues again, by which time the Court will presumably be stable again”); A Big Term for As-Applied Challenges, <http://www.scotusblog.com/movabletype/archives/2006/01/22-week/> (last visited Oct. 10, 2006) (suggesting that “there is at least one decided trend so far on the Roberts Court: A strong preference for as-applied challenges . . . at least until Justice O’Connor’s replacement is on the Court”).

Maybe so. But *Ayotte* announced, at least as a general matter, that a court “confronting a constitutional flaw in a statute” should “try to limit the solution to the problem.”¹²¹ It added, “[w]e prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact.”¹²² Not only did *Ayotte* reiterate the “normal rule” favoring partial over facial invalidation, but it also acknowledged that the ability to devise a narrow remedy depends in part on the “background constitutional rules at issue.”¹²³ Although this point was phrased in terms of the clarity of the underlying constitutional rules affecting the availability of narrower relief, it opens the door to the further acknowledgment that those rules might be shaped in order to facilitate narrower relief. Moreover, it stated that the “touchstone” is legislative intent—whether the legislature would have “preferred what is left of its statute to no statute at all”—while expressing wariness of legislatures that would simply punt constitutional questions to the courts.¹²⁴

Most strikingly, the Court in *Ayotte* distinguished its facial invalidation of Nebraska’s partial birth abortion statute on the ground that “the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn.”¹²⁵ It thus invited parties—and the Justices themselves—to be more conscious of such possibilities.

These decisions, then, may be more than simply keeping the stakes low as the buck is passed to a new set of players. Instead, they have the potential to stand as important markers on the road to a more modest judiciary, led by a Chief Justice who describes himself as a “modest judge.”¹²⁶ An additional reason for hope is that a striking feature of Samuel Alito’s opinions as a circuit judge is their narrowness; indeed his most frequently criticized opinions were far narrower than the critics typically acknowledged. For example, in *United States v. Rybar*, the defendant was charged with both the transfer and the possession of machine guns but was convicted only of possession.¹²⁷ Judge Alito addressed only the power of Congress under the Commerce Clause to criminalize the possession of machine guns, saying nothing about the transfer of machine guns.¹²⁸ Sim-

121. *Ayotte*, 126 S. Ct. at 967.

122. *Id.*

123. *Id.* at 968 (“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.”).

124. *Id.* (“All the while, we are wary of legislatures who would rely on our intervention . . .”).

125. *Id.* at 969 (citing *Stenberg v. Carhart*, 530 U.S. 914 (2000)).

126. *Confirmation Hearings on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States*, 109th Cong. 158 (2005) (noting that, while he resisted labels, “I have told people, when pressed, that I prefer to be known as a modest judge”).

127. *United States v. Rybar*, 103 F.3d 273, 275 (3d Cir. 1996) (describing the conditional guilty plea).

128. *Id.* at 286 n.1 (Alito, J., dissenting) (noting that the defendant “pled guilty to two counts of the indictment charging only possession, and thus the constitutionality of the transfer provision is not before us here”).

ilarly, the *Chittister* case involved the self-care provisions of the FMLA.¹²⁹ Judge Alito confined himself to the constitutionality of abrogating sovereign immunity in that context, not in the context of caring for family members.¹³⁰ Moreover, while concluding in *Doe v. Grady* that a warrant authorized the search of all those on the premises named in the warrant, Judge Alito did not claim that warrants in general authorized such searches, or that affidavits in support of warrants should generally be treated as incorporated into the warrant, but rather that a particular warrant that specifically incorporated the supporting affidavit as to finding probable cause should also be read to incorporate that affidavit as to the authority to search.¹³¹ Even his dissenting opinion in *Casey* concluded only that the Pennsylvania spousal notification provision was constitutional on its face, leaving open the possibility that it might be unconstitutional as applied to certain circumstances.¹³²

To those who are eager to limit Congressional power and confident of their hand, raising the stakes by facilitating facial challenges rather than as-applied challenges under the Commerce Clause, Section Five, and the Spending Clause may seem like a good bet, just as for those eager to protect abortion rights and confident of their hand, raising the stakes by facilitating facial challenges rather than as-applied challenges may seem like a good bet. The same is true for those on the opposite side of these issues. Indeed, ideological advocates of all stripes might think it in their interests to raise the stakes—all the better to increase political salience, mobilization, and even fund raising.¹³³

129. *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 225-26 (3d Cir. 2000) (describing the claim).

130. *Id.* at 228-29 (noting the absence of “any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination”); *id.* at 229 (concluding that the “FMLA provisions at issue here do not represent a valid exercise of Congress’s power to enforce the Fourteenth Amendment”).

131. *Doe v. Grady*, 361 F.3d 232, 247 (3d Cir. 2004) (Alito, J., dissenting) (noting that “the question whether occupants other than John Doe should be searched was closely tied (if not identical) to the question whether there was probable cause to search such persons, and the face of the warrant incorporated the affidavit with respect to the issue of probable cause” and concluding that the “warrant did in fact authorize a search of all persons on the premises”).

132. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 721-23 (3d Cir. 1991) (Alito, J., dissenting) (evaluating the facial attack); *id.* at 721 n.1 (“Because the plaintiffs made a facial attack . . . proof that the provision would adversely affect an unknown number of women with a particular combination of characteristics could not suffice.”); *id.* at 723 n.6 (“I cannot believe that a state statute may be held facially unconstitutional simply because one expert testifies that in her opinion the provision would harm a completely unknown number of women.”).

133. *Cf. Planned Parenthood Fed’n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1187 (9th Cir. 2006) (noting that in some cases, where

it is not possible to achieve the full legislative goal, the leaders of the battle may prefer to drop the legislation entirely in order to be able to wage a more dramatic and emotional campaign in the public arena. They may conclude that leaving an issue completely unaddressed will make it easier for them to achieve their ultimate goals than would a partial resolution that leaves their “base” discontented and disillusioned. Dropping the proposed legislation (or even having it defeated) may be the best way to gain adherents to the cause,

But it is hard to see how the judiciary has any comparative competence in gambling. And while it is possible, of course, that Chief Justice Roberts and Justice Alito will grow into less modest judges as they become accustomed to their new roles, I remain hopeful that all will bear in mind not only the comparative competence of courts, but also that when someone gambles big and loses, the loss is inevitably big.

III. CONCLUSION

The central question in constitutional adjudication is the degree of deference, if any, the judiciary should show to the constitutional interpretation by others. In deciding when to defer and when not to defer, the judiciary should focus on its comparative competence. A major way in which the judiciary is comparatively competent is in its ability to unbundle legislation, to treat a single application of a single provision of a statute in a single case. The judiciary should fashion doctrine to take advantage of this comparative competence rather than undermine it. In particular, absent a reason rooted in a different comparative competence it has, the judiciary should not succumb to the temptation to raise the stakes of constitutional disputes, but rather fashion doctrine that facilitates as-applied rather than facial challenges. Finally, there is some (albeit modest) reason for hope that this may be the direction of a more modest Roberts Court.