CONSTITUTIONAL LAW — FACIAL v. AS-APPLIED CHALLENGES

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A constitutional challenge to a law can be either "facial" or "as-applied," depending on the nature or breadth of the law's alleged invalidity under the Constitution.

I. FACIAL CHALLENGES

A facial challenge to a law is made without reference to one's own facts, claiming that the law is simply unconstitutional as written ("on its face"). One's own facts must, of course, demonstrate that one's challenge poses a case-or-controversy—*i.e.*, there is standing and ripeness—but in a facial challenge the legal assertion is not necessarily a function of the law's specific application to the challenger. Accordingly, a facial challenge in effect entails a type of third-party standing.

One of the clearest examples of a facially unconstitutional law is a 1983 policy adopted by the City of Los Angeles Board of Airport Commissioners, declaring that "the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity," which the Supreme Court unanimously invalidated in *Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). A facial challenge, if successful, will in fact lead to the total invalidation of part or all of the challenged law (as opposed to a holding that the application of one or more of its subsections to the challenger, specifically, is invalid, though the law's invalidation will in fact absolve the challenger of liability under that law).

One is likely to see facial challenges in pre-enforcement declaratory judgment suits, where litigants are often seeking to have the court enjoin a statute altogether.

II. AS-APPLIED CHALLENGES

An as-applied challenge to a law, by contrast, is a claim that the law cannot constitutionally be applied to the one's own particular conduct—*i.e.*, it would be unconstitutional for one to be convicted, held liable, or enjoined—even though the law could potentially (and perhaps without dispute) be applied constitutionally to other conduct that it purports to cover.

So, for example, if the Board of Airport Commissioners had adopted a constitutionally well-crafted policy prohibiting disorderly conduct, but airport officials applied it to expression protected by the First Amendment, the challenger would likely raise only an as-applied challenge, absolving him or her of civil or criminal liability but otherwise leaving the policy intact and enforceable against disorderly conduct as defined by the policy.

A typical instance of an as-applied challenge is a constitutional claim raised by a criminal defendant at trial—*i.e.*, an after-the-fact claim that the police or prosecutor, in the

defendant's particular case, acted unconstitutionally. Such a challenge usually does not allege that a police department procedure, prosecutorial policy, or statute is constitutionally invalid in its entirety, but simply that, in the defendant's specific case, the procedure, policy, or statute was not applied in accordance with the Constitution.

III. DEBATE OVER THE STANDARD FOR FACIAL CHALLENGES

There is currently some uncertainty, or at least some variation, regarding the standard to be employed by courts when assessing facial challenges.

In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court set forth an extremely rigorous standard for facial challenges: "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id*. at 745.

In other words, the challenger has to show that the statute cannot be constitutionally applied at all, to any covered conduct, even with saving or curing constructions of its terms. This is indeed a difficult standard to satisfy, and basically means that the law would have to be written in such a way that in *every* application, it would violate one or more constitutional provisions or principles.

However, and perhaps not surprisingly, the applicability of the *Salerno* standard has been a matter of debate. As the Fourth Circuit has commented:

> In the years since *Salerno*, some members of the [Supreme] Court have expressed reservations about the applicability of this stringent standard. See *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (Stevens, J., with two Justices concurring); but see *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1178-79 (1996) (Scalia, J., dissenting from denial of certiorari with two Justices concurring). But at the very least, a facial challenge cannot succeed if a "statute has a 'plainly legitimate sweep.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

United States v. Comstock, 627 F.3d 513, 518-19 (4th Cir. 2010) (assessing a due process challenge to the federal civil commitment statute, on remand from the Supreme Court), *cert. denied*, 564 U.S. 1030 (2011).

In addition, there are specific contexts in which courts have expressly or impliedly held the *Salerno* standard to be inapplicable. The most notable and well-established of these are so-called overbreadth challenges under the Free Speech Clause. In addition, facial challenges to abortion regulations are often not subjected to the *Salerno* standard. And there is some indication that facial Fourth Amendment challenges may not, or may not always, have to meet *Salerno*'s rigorous test. *Cf. Chandler v. Miller*, 520 U.S. 305 (1997) (sustaining a facial Fourth Amendment challenge to a state statute requiring candidates for elective office to submit to drug testing, holding that the state's interest in drug-free officials was not a special need that rendered the intrusion reasonable).