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The Timing of Facial Challenges

Timothy Sandefur

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I. INTRODUCTION

Imagine a person who suffers what she believes is a violation of her constitutional rights due to the enforcement of a law that was enacted decades ago. May she challenge the facial constitutionality of this law, or does the statute of limitations confine her to an as-applied challenge only? There appears now to be considerable uncertainty among the bar and on the bench about this apparently simple question, and many practitioners and judges have come to the erroneous conclusion that facial challenges to the validity of laws must either be filed within a certain time frame after a challenged law is enacted or be barred by the

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statute of limitations.[1] This error—which springs largely from an unfortunate overlap with regulatory takings law, itself the victim of much procedural confusion—has led courts into such mistakes as saying that statutes of limitations do not apply to First Amendment cases[2] or recharacterizing cases in which laws were found facially invalid as as-applied challenges.[3] Worst of all, it has given many practitioners the misimpression that a facial challenge is time-barred one or two years after a challenged statute is enacted. This is not correct.

My purpose here is to separate out the different conceptual categories whose overlap has led to these mistakes. In brief, the facial/as-applied distinction has nothing to do with the accrual or ripeness of a cause of action challenging the constitutionality of a law. The accrual date of facial and as-applied challenges is identical (with some exceptions, as we shall see), and mere enactment is rarely, if ever, the ripening event or the moment of accrual for a case in which a party mounts a facial challenge to a law. The distinction between facial and as-applied challenges is, so to speak, substantive rather than formal; that distinction only characterizes the *merits* of a constitutional challenge. But that distinction has no relation to jurisdictional questions such as accrual, ripeness, or statutes of limitations. A plaintiff may challenge a law's validity at any time within the limitations period after that law has injured her, whether she chooses to argue that the law is facially unconstitutional or only unconstitutional as applied in her case.[4]

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1. *See, e.g.*, Coral Constr. v. San Francisco, 116 Cal. App. 4th 6, 27 (Cal. App. 1st Dist. 2004), *review granted*, 167 P.3d 25 (Cal. 2007) ("[Party arguing that] facial challenge to an ordinance accrues when the ordinance is adopted."); Chuck & Sons Towing, Inc., v. Town of Smithfield, No. PC-06-2530, at 6 (R.I. Sup. Ct. Feb. 22, 2007) ("[W]hen making a constitutional challenge based on facial validity, the statute of limitations begins to run upon the *enactment of the challenged provision*."); City of Dallas v. Lowenberg, 144 S.W.3d 46, 49 (Tex. App. 2004), *rev'd* 168 S.W.3d 800 (Tex. 2005) ("In a facial challenge to the constitutionality of a statute or ordinance, the statute of limitations begins to run upon the passage of the statute or the ordinance, with few exceptions not applicable here."). In *SMDFund, Inc., v. Fort Wayne-Allen County Airport Auth.*, (No. 02C01-0302-PL-12) (Allen County Cir. Ct. June 28, 2004), the trial court found a facial challenge time-barred because "A facial challenge is a claim that the 'mere enactment' of a statute is unconstitutional," *id.* at 3, but the appellate court affirmed on *laches* grounds, not statute of limitations grounds. SMDFund, Inc. v. Fort Wayne-Allen County Airport Auth., 831 N.E.2d 725 (Ind. 2005).

2. *See, e.g.*, Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004) (citing cases); Frye v. City of Kannapolis, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999); Lamar Whiteco Outdoor Corp. v. City of W. Chicago, 823 N.E.2d 610, 621 (Ill. App. 2d Dist. 2005).

3. *See, e.g.*, Nat'l Ass'n of Home Builders of U.S. v. City of Los Angeles, 1997 WL 312604, at * 2 (9th Cir. 1997).

4. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000) ("[T]here is no single distinctive category of facial, as

II. THE FACIAL/AS-APPLIED DISTINCTION DOES NOT RELATE TO JURISDICTIONAL PREREQUISITES

The distinction between facial and as-applied challenges is the focus of considerable scholarly controversy.[5] Conceptualizing how these two categories differ, and what courts are actually doing when using these terms, is not easy. Nor is the history of the distinction clear.[6] But whatever the outcome of these debates might eventually be, the facial/as-applied distinction is a way of categorizing the type of alleged constitutional violation. A plaintiff who argues that a law is facially invalid is claiming that the law is not, and never can be, applied in a way that satisfies constitutional restrictions. This is a claim that some fundamental flaw renders the challenged law inherently unconstitutional, regardless of factual circumstances of a particular case.[7] An as-applied challenge, by contrast, holds that while some circumstances may exist in which the challenged law is within constitutional boundaries, something special about *this* case has caused it to exceed those bounds.[8] As

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opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her.").

5. *See, e.g.*, David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 54 (2006) (citing examples of scholarly debate surrounding facial/as-applied distinction); Fallon, *supra* note 4; Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

6. The facial/as-applied distinction appears to have evolved as a part of the "overbreadth" challenge in First Amendment cases, *see* Anthony M. Barlow, *Note: First Amendment Protection of Free Press and Expression: State Licensing Laws for Newspaper Vending Machines*, 58 U. CIN. L. REV. 285, 286-289 (1990), which allows a litigant to argue that a law violates the free speech rights of others, even if the law is valid in her own case—something which she would lack standing to do outside of the context of the First Amendment. *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 452-53 (1938). The overbreadth doctrine reflects the "preferred position" of "the freedoms of the First Amendment," *Saia v. New York*, 334 U.S. 558, 562 (1948), which position was an outgrowth of the New Deal jurisprudential revolution. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL CH. 5 (2000). Since that period, the distinction has grown beyond the First Amendment context. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 743-46 (1987).

7. *See Salerno*, 481 U.S. at 745. Facial invalidity means "that no set of circumstances exists under which the Act would be valid." *Id.*

8. *See, e.g.*, Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1084 (Cal. 1995) (explaining distinction between facial and as-applied challenges). There is an intriguing parallel here with the distinction between necessary and synthetic truths in Humean or Kantian epistemology. *Cf.* WALLACE I. MATSON, A HISTORY OF PHILOSOPHY 341-42 (1968); 2 WILHELM WINDELBAND, A HISTORY OF PHILOSOPHY 532-67 (New York: Harper & Brothers 1958) (1901). A facial challenge might be characterized as an argument that a law is a *necessary* constitutional violation, while an as-applied challenge contends that the unconstitutionality is *synthetic*. This parallel is further suggested by the *Salerno* Court's reference to "categorical imperative[s]" in analyzing a facial challenge. 481 U.S. at 748. The shortcomings of this conception of philosophical truth—*see, e.g.*, Leonard Peikoff, *The Analytic-Synthetic Dichotomy* (1967) *reprinted in* AYN RAND, INTRODUCTION

Richard Fallon has noted, facial challenges "are not sharply categorically distinct from as-applied challenges."[9] Rather, the terms "facial" and "as applied" simply describe different kinds of arguments on the merits.

With the possibly confusing exception of a relationship between third party standing and facial unconstitutionality,[10] it is at least clear

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TO OBJECTIVIST EPISTEMOLOGY 88-121 (2d ed. 1990)—might be responsible for the puzzles and paradoxes that appear when one investigates the facial/as-applied distinction in greater depth.

9. Fallon, *supra* note 4, at 1336.

10. Third-party standing cases are a possible source of confusion regarding the timing of a facial challenge, and, given the complexity of third-party standing, we may be excused for putting it to one side and addressing here only the typical facial challenge brought by a plaintiff on her own behalf. But some brief comments on third party facial cases are in order.

This kind of case originates in an overlap between the facial/as-applied distinction and its parent concept of overbreadth. Overbreadth allows a plaintiff to allege that a law, though constitutional in her own case, should nevertheless be found invalid because it would infringe on the constitutional rights someone else. *See, e.g.*, Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 957 (1984). This is one kind of prudential third-party standing, which allows one person to assert the rights of another, most commonly allowed in the First Amendment context. *See* Kowalski v. Tesmer, 543 U.S. 125, 128-30 (2004). Although the Supreme Court has usually found third-party standing improper due to the jurisdictional requirements imposed by Article III of the Constitution, there are cases outside the First Amendment in which such standing is allowed. *Id*. at 129-30. *See also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) ("The standing requirement is born partly of '"an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."'"). A plaintiff who is granted third-party standing will typically argue a law is unconstitutional regardless of the fact that her particular rights are not violated. But she might argue either that the law is facially unconstitutional or unconstitutional as-applied. Family members, for example, often have third party standing to assert the rights of other family members, and a parent might argue either that a law is unconstitutional as applied to her child, or that the law is unconstitutional in every circumstance. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 711-12 (1987) (children had third party standing to assert rights of deceased parents); Prince v. Massachusetts, 321 U.S. 158 (1944) (parent arguing on behalf of child, and in vain, that law was facially unconstitutional). Likewise, a doctor who challenges the constitutionality of an abortion restriction may assert the rights of her patients, and argue that the law is facially unconstitutional. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 113-18 (1976).

The frequency of this kind of case has sown confusion between the concepts of *standing* and *facial unconstitutionality*. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 80 n.3 (1999) (Scalia, J., dissenting) ("[F]acial challenge is a species of third-party standing."). But these two have little to do with each other outside the context of third-party constitutional claims, and even in that context they are not identical. *See* Fallon, *supra* note 4, at 1359 ("There is indeed an underlying affinity between doctrines that invite facial challenges (such as the First Amendment 'overbreadth' test) and third-party standing doctrines, but only one that is exceedingly abstract: Both are governed by rules reflecting judicial judgments about the doctrinal structure that is appropriate to achieve effective implementation of constitutional norms and not about the moral deserts of particular litigants."). In third-party cases, the litigant may assert the facial unconstitutionality of a law which is not unconstitutional in her own case, but she *must* still have standing to do so. That standing is not conferred by her mere allegation of facial unconstitutionality, since Article III forbids that, but is conferred by her close relationship to the party who has been affected by the alleged unconstitutionality. *See* Powers v. Ohio, 499 U.S. 400, 413 (1991). Instead, it is conferred by the government taking some act which affects her rights and by which her cause of action accrues. A

that the facial/as-applied distinction categorizes only the nature of the alleged constitutional violation and has nothing to do with jurisdictional limits such as ripeness, accrual, statutes of limitations, or, in the case in which a plaintiff asserts her own rights, with standing. These threshold jurisdictional concepts are tools for determining whether the court has authority to hear a case, not whether the law is or is not inherently constitutional, or constitutional in some cases and unconstitutional in others. "Under Article III, a federal court must always begin a case, framed by the concrete facts including an allegation of harm to a specific plaintiff caused by an identified defendant."[11] A plaintiff who brings a constitutional challenge must first demonstrate standing (third party or otherwise), and then argue on the merits that the law is unconstitutional. Whether she chooses to argue that it is unconstitutional facially (*i.e.*, in all cases) or only as-applied (*i.e.*, in some cases and not others) has no bearing on the standing requirements of Article III.

Both facial and as-applied lawsuits are also subject to other traditional jurisdictional limits. For example, the statute of limitations requires a plaintiff to bring her case within a certain period after her cause of action accrues, and a cause of action accrues when the party knows or should know of the facts giving rise to the cause of action.[12] Thus when a defendant argues that a lawsuit is barred by the statute of limitations, the question will turn on when the plaintiff's cause of action accrued—that is, when the injury was final or "ripe." The terms "ripeness" and "accrual of a cause of action" are synonymous in most (but not all[13]) cases. A case is ripe when all factors necessary to state a claim are present—that is, when no further action is necessary to make the plaintiff's injury certain. In most cases, the moment of accrual and ripeness is obvious and simultaneous: it is when the plaintiff's car accident happens, or when the plaintiff slips on the banana peel. But in cases involving administrative decisions, such as a case involving a government denial of a building permit application, accrual and ripeness can be complicated. There, a cause of action will accrue when the

facial challenge may then be brought within the limitations period after that act. Thus, third-party standing cases are consistent with my thesis that facial challenges to a statute do not need to be brought within a certain time limit after mere enactment.

11. Fallon, *supra* note 4, at 1336-37.

12. *See, e.g.*, Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir. 1996).

13. *See* Jones v. Allen, 483 F. Supp. 2d 1142, 1149 (M.D. Ala. 2007) ("[O]nce a claim has accrued it is necessarily ripe; but the converse, that once a claim is ripe it has necessarily accrued for statute-of-limitations purposes, need not follow. Where, as here, the plaintiff challenges the constitutionality of an event that has not yet occurred, the claim may be ripe for adjudication without having accrued for statute-of-limitations purposes.")

plaintiff knows for certain that the objectionable permit requirement will be applied to her,[14] and her case will be ripe when the government makes its final decision on the permit application and the applicable administrative appeals have been exhausted.[15]

Once a plaintiff's cause of action has accrued, she may file a lawsuit at any time until the statute of limitations period runs out. And once a plaintiff is in court, she may then argue whatever theory is appropriate to her circumstances. In the usual case, whether the plaintiff chooses to argue that the law which she claims injured her is *always* unconstitutional (facial) or that it is unconstitutional only in her particular case (as-applied) bears no relationship to the question of accrual, and therefore no relationship to the statute of limitations. As a jurisdictional matter, she must prove that her case is ripe—that she has really been injured by that law[16]—and that she filed suit within the applicable statute of limitations period after the injury. But the nature of that injuring incident—or the timing of the ripening event—is not affected by, and does not affect, her argument as to the law's validity or invalidity. That is an entirely separate inquiry. Therefore, to paraphrase Professor Fallon, all federal litigation is, in a sense, "as-applied" since a court lacking power to issue advisory opinions can only hear cases in which a law has been (or will soon be) *applied*. Once that litigation has begun, a plaintiff may demonstrate that the law by which she was

14. *See, e.g.*, Norco Const., Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986).

15. Except in cases seeking just compensation for a taking property, a plaintiff bringing suit under 42 U.S.C. § 1983 is not required to exhaust her administrative remedies. *Compare* Patsy v. Bd. of Regents, 457 U.S. 496, 501 (1982) ("[E]xhaustion is not a prerequisite to an action under § 1983"), *with* Williamson County Reg'l. Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193-94 (1985) (exhaustion is required for cases seeking just compensation for regulatory takings).

16. In a case involving third-party standing, of course, the plaintiff must show that the person on whose behalf the lawsuit is brought has a ripe case and has been injured in some way by the law. In some cases, third-party plaintiffs argue that the mere fact that an allegedly unconstitutional law has been enacted is the injury and thus the moment at which the cause of action accrues. Such plaintiffs also typically argue that the law is facially unconstitutional. *See, e.g.*, Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004). Because such cases are generally brought immediately upon the enactment of a law, by a party who is not herself injured, *see id.* at 967, and who argues that the law is unconstitutional in every conceivable circumstance, it can sometimes look as though the ripeness and standing involved are flimsy. But while precipitate third-party facial challenges can therefore resemble advisory opinions, they are not. The standing requirements of Article III forbid federal courts from *ever* hearing constitutional arguments brought by individuals who merely think a law is unconstitutional but have no real interest at stake. *See* Diamond v. Charles, 476 U.S. 54, 61-62 (1986). Therefore, although prudential standing rules may be lenient in cases brought immediately upon the passage of a law by plaintiffs alleging the rights of others, and the factual record sparse, such cases must still satisfy jurisdictional prerequisites, including standing and ripeness.

injured is necessarily and in all cases unconstitutional, in which case "facial invalidation occurs as an outgrowth of as-applied adjudication."[17]

Some examples help illustrate these principles. In *Lawrence v. Texas*,[18] a defendant was prosecuted in 1998 under a law that prohibited certain types of "deviate" sexual conduct.[19] The law was enacted in the 1970s, and most recently amended in 1993, yet the plaintiffs argued that the law was facially unconstitutional,[20] and this argument was affirmed by the Supreme Court. The defendant was therefore able to advance a facial challenge on the merits because his injury occurred when he was arrested under a law he alleged to be unconstitutional. Likewise, in *Brown v. Barry*,[21] the plaintiff wanted to operate a business shining shoes and discovered that a law on the books for nearly a century required him to obtain a special permit to do so. His injury accrued when he learned of the licensing requirement and the fact that it applied to him. In his suit for injunctive relief, he was free to argue either that the law was unconstitutional in all circumstances or that it was constitutional sometimes but not in his case. Either way, his lawsuit was timely because it was filed within the limitations period after the cause of action accrued—that is, after he learned that he would be required to get the license. And in *3570 East Foothill Blvd., Inc. v. City of Pasadena*,[22] a business which was subject to an unconstitutional ordinance could challenge the ordinance's facial validity, regardless of its age, because the case was brought within the statutory period after the ordinance was applied.

In *Travis v. County of Santa Cruz*,[23] the California Supreme Court explained the rule precisely. There, the plaintiff attacked a county zoning ordinance on various grounds. The county argued that the case was time-barred, but the Court rejected this argument, noting that it was:

> not a case in which the plaintiff complains of injury *solely* from a law's enactment. . . . Travis complains of injury arising from, and seeks relief from . . . the County's imposition on his second unit permit of conditions required by the Ordinance. *Having brought his action in a*

17. Fallon, *supra* note 4, at 1337.

18. 539 U.S. 558 (2003).

19. *See generally* Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1235-38 (2004).

20. *See* Lawrence v. State, 41 S.W.3d 349, 350 (Tex. App. Houston 14th Dist. 2001) (noting that Lawrence was arguing that the law was facially unconstitutional).

21. 710 F. Supp. 352 (D.D.C. 1989).

22. 912 F. Supp. 1268 (C.D. Cal. 1996).

23. 33 Cal. 4th 757 (2004).

> *timely way after application of the Ordinance to him, Travis may raise in that action a facial attack on the Ordinance's validity*.[24]

The facial/as-applied distinction is simply not related to accrual and, thus, has nothing to do with the statute of limitations. So long as a party satisfies the jurisdictional prerequisites of Article III, or whatever other formal requirements apply, she may then proceed to argue that the law being applied to her is either facially invalid or is invalid only in her particular case. In no circumstance is a facially unconstitutional law rendered immune from facial challenges merely by the passage of time after enactment.[25]

III. CONFUSIONS BETWEEN FACIAL CHALLENGES AND FACIAL TAKINGS

A. Examples of Confusion

We have seen that a facial challenge is just one type of argument on the merits that, like an as-applied challenge, can be raised whenever jurisdictional standards such as standing and ripeness are met; facial challenges are not subject to different timing or accrual analysis than as-applied challenges. Although this argument seems basic, courts have occasionally erred by holding that a facial challenge to the constitutionality of a law is time-barred because the case was filed too long after the enactment of a law—in other words, that the cause of action in a facial challenge accrues when the challenged law is adopted. This is incorrect.

In *Lowenberg v. City of Dallas*,[26] the Texas Supreme Court recognized that the appellate court erred in this way. The case involved a Dallas ordinance requiring owners of commercial buildings to pay a fee and obtain a registration certificate. The city repealed the ordinance almost exactly a year after enacting it, but the city did not make the repeal retroactive, and therefore did not refund the fees that had been paid; moreover, it continued to collect money from owners who had not paid during the ordinance's short life.[27] Then, three years after the

24. *Id.* at 768-69 (emphasis added).

25. As Justice Souter observed in *Van Orden v. Perry*, 545 U.S. 677, 746 (2005) (Souter, J., dissenting), there are many cases where suing "puts nothing in a plaintiff's pocket and can take a great deal out," and where other influences, such as social ostracism can deter the bringing of a lawsuit. This is one good reason why lawsuits over constitutional issues, including facial challenges, should not be barred merely by the passage of time after the enactment of the challenged law.

26. 168 S.W.3d 800 (Tex. 2005).

27. *Lowenberg*, 144 S.W.3d. at 48.

repeal, property owners filed a lawsuit contending that the fees were unconstitutional and demanding a refund.[28] The court of appeals found that this facial challenge was untimely because "[i]n a facial challenge to the constitutionality of a statute or ordinance, the statute of limitations begins to run upon the passage of the statute."[29]

On appeal, the Texas Supreme Court reversed.[30] The Justices noted that the court of appeals had relied on cases concerning regulatory takings, which differed from the challenge at hand.[31] The property owners were not arguing that the fee requirement imposed a regulatory taking; they were arguing that the fee was unauthorized under other constitutional provisions. Their injury accrued not when the law was enacted, but when they were required to pay the fee.[32] The trial court had erred by confusing a challenge to the facial constitutionality of a law with a takings claim. Outside of the domain of regulatory takings cases, "a cause of action accrues when a wrong produces an injury."[33] Because the plaintiffs filed their lawsuit within the statutory period after their injury, the case was timely.[34]

Barancik v. County of Marin is an even more prominent example of an appellate court erroneously concluded that a facial challenge to a law must be brought within a specific period after the law's enactment.[35] There, the plaintiff brought suit in 1985 against a land-use decision, not on the grounds that it constituted a regulatory taking, but as a violation of due process.[36] The Ninth Circuit abruptly declared that "Barancik's facial challenge is barred by the statute of limitations. The cause of action accrued either in 1972 or 1975 or, at the latest, 1979"[37]—years in which the challenged zoning plans were adopted or amended. But Barancik was not denied a permit to construct until 1984, meaning his complaint was filed well within the statutory period after his injury. At that point, he should have been allowed to challenge the facial validity of the land-use regulation on due process grounds.

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28. *Id.* In fact, they first filed a lawsuit in federal court, then voluntarily dismissed the case and filed a case in state court.

29. *Id.* at 49.

30. *Lowenberg*, 168 S.W.3d at 802.

31. *Id.* at 801. Facial takings, as opposed to facial challenges, are discussed *infra*, section II.B.

32. *Id.* (citing Lubbock Co. v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580 (Tex. 2002)).

33. *Id.* at 802.

34. *Id.*

35. 872 F.2d 834 (9th Cir. 1988), *cert. denied*, 493 U.S. 894 (1989).

36. *Barancik*, 872 F.2d at 836.

37. *Id.*

Given that the case involved a land-use decision, it might have been that the Ninth Circuit was simply construing Barancik's due process challenge as a regulatory takings claim; after all, the Ninth Circuit later declared that a property owner with both due process and takings claims is generally required to bring only her takings claim, because it is more specific.[38] This rule—which was probably abrogated in the recent case of *Lingle v. Chevron U.S.A. Inc.*[39]—might have led the court to believe that Barancik was seeking just compensation for diminution in property value.[40] As explained below, it is common for courts to hold that such compensation claims do accrue at the time that a challenged law is enacted. But Barancik was not bringing a takings argument: his claim was that the zoning law had no rational connection to public health and safety—*i.e.*, that the law was invalid—*not* that it worked a constitutionally valid taking of property for which he deserved compensation. Thus if the court did construe his case as a takings claim, it erred by confusing two separate categories of constitutional arguments; but if it did not, it erred by concluding that Barancik's facial due process challenge accrued upon the enactment of the law.

In *RK Ventures, Inc. v. City of Seattle*,[41] by contrast, the Ninth Circuit correctly found that a facial challenge was not barred by the mere passage of time. There, nightclub owners alleged that the city engaged in an unfair, racially biased campaign to shut down clubs playing rap music. Along with their allegations of official harassment, they also contended that the city's nightclub ordinance was vague and overbroad.[42] The lawsuit was filed five years after the city enacted an ordinance cracking down on rap clubs, and seven years after the plaintiffs claimed the harassment began.[43] The case was plagued by significant statutes of limitations problems, but the court of appeals concluded that the owners' injury accrued when the city "initiated the abatement action,"[44] which came when the city "informed them of its

38. Armendariz v. Penman, 75 F.3d 1311, 1325-26 (9th Cir. 1996); Macri v. King County, 126 F.3d 1125, 1129 (9th Cir. 1997).

39. 544 U.S. 528 (2005). *See* Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1024-25 (9th Cir. 2007) (noting that *Armendariz* was abrogated by *Lingle*).

40. This is unclear, given the brevity of the *Barancik* decision and its failure to cite applicable authority. Moreover, now that the Supreme Court has made the distinction between due process and takings claims clearer, the usefulness of the *Barancik* decision is questionable.

41. 307 F.3d 1045 (9th Cir. 2002).

42. *Id.* at 1050.

43. *Id.* at 1054.

44. *Id.* at 1061.

decision to prosecute."[45] While some of the city's actions were therefore outside the limitations period (thus eliminating some of the as-applied causes of action) the court of appeals reversed the trial court's dismissal of one of their claims and also reversed its dismissal of the owners' facial challenges to the ordinance: "Because the Ordinance was enforced against appellants within the limitations period, this was error."[46]

The brevity of the court's treatment of this point might obscure the importance of this conclusion: There is simply no categorical rule that a law becomes insulated from facial challenge by the mere passage of time. Accrual is a preliminary jurisdictional question necessary for getting the plaintiff through the courthouse door. The time at which a cause of action accrues will differ depending on the facts of the case, but it will come whenever the plaintiff's rights are finally and clearly affected pursuant to the law that she believes is unconstitutional. At that point, the plaintiff can allege that the challenged law is facially invalid and/or that it is invalid as applied to her.

B. The Source of Confusion: Takings Versus Challenges

The origin of the misapprehension that a facial challenge cannot be brought beyond the statutory period after enactment lies in confusion between two different types of constitutional claims: 1) cases involving facial challenges to the validity of a law and 2) cases involving facial regulatory takings claims. The two are quite distinct.[47]

A facial *challenge* is the argument that a law is void on its face; that it is necessarily a violation of the Constitution in any and all applications.[48] The proper remedy in such a case is typically not compensation but an injunction against enforcement and a declaration that the law is invalid. Such a challenge does not necessarily allege that the plaintiff was injured when the law was enacted. Thus, a case alleging facial unconstitutionality is ripe not simply when the law is passed but, just like an as-applied challenge, when the government acts pursuant to that law and adversely affects the plaintiff's rights. A facial challenge is just one argument a plaintiff might make *after* she has been

45. *Id.* at 1059.

46. *Id.* at 1063.

47. One example of a case that appears to confuse the language of the two categories is *Santa Monica Beach Ltd. v. Superior Court*, 19 Cal. 4th 952, 961 (Cal. 1999), where the California Supreme Court characterized the plaintiff's "inverse condemnation action"—*i.e.*, regulatory takings claim—as a "facial challenge."

48. *Salerno*, 481 U.S. at 745.

injured by the application of that law; facial challenges are "'incidents' of as-applied adjudication."[49]

A facially unconstitutional law could conceivably linger on the books for many years before finally affecting a plaintiff. Imagine, for instance, a community in which all the citizens are white and in which an ordinance forbids black persons from voting. That ordinance would be facially unconstitutional, even though it would not affect any of the residents. But years later, when a black person moves into that community and discovers that the law forbids him from voting, he has suffered an injury, his cause of action accrues, and he may seek redress by challenging the facial constitutionality of the law. This sort of situation happens frequently. Recent cases striking down laws against same-sex marriage found that plaintiffs could challenge the facial validity of such laws even though they were enacted before many of the plaintiffs were even born.[50] In *Sei Fujii v. State*, the California Supreme Court found the Alien Land Law—which barred Asian immigrants from owning real property in the state—facially invalid, despite the fact that it was decades old.[51] In *State v. Palendrano*,[52] the New Jersey Superior Court found it facially unconstitutional (indeed, "obnoxious" and "senseless"[53]) to prosecute a woman for being a "common scold," even though this had been a common law crime since the days of William Blackstone.

A facial *taking*, on the other hand, occurs when the enactment of a challenged law inherently constitutes a taking of property under the Fifth Amendment, for which the owner is due just compensation. The Supreme Court has concluded that such an injury generally accrues upon the passage of the law, and, therefore, the statute of limitations clock begins to run at the moment of enactment.[54] There is good reason to doubt the propriety of this rule, as Michael Berger has noted: "Why should one facial invalidity under the Bill of Rights be shielded by limitations, but not the other? The only explanation is the poor relation

49. Fallon, *supra* note 4, at 1336.

50. *See* In re Marriage Cases, 43 Cal. 4th 757 (Cal. 2008); Goodridge v. Department of Pub. Health, 440 Mass. 309 (2003).

51. 38 Cal. 2d 718, 737-38 (Cal. 1952).

52. 293 A.2d 747 (N.J. Super. Ct. 1972).

53. *Id.* at 752.

54. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 n.10 (1997). *See also* Brubaker Amusement Co., Inc. v. United States, 304 F.3d 1349, 1357 (Fed. Cir. 2002), *cert. denied sub nom.* Penn Triple S v. United States, 538 U.S. 921 (2003).

status of property-rights protection."[55] Be that as it may, the theory adopted by many courts is that a facial takings claim is not an argument for invalidity *per se*, but rather an argument that the enactment of a law has diminished the plaintiff's property value and that the plaintiff is entitled to compensation at that moment. Thus, in *Levald v. City of Palm Desert*,[56] the Ninth Circuit described "the differences between a statute that effects a taking and a statute that inflicts some other kind of harm" by observing that in facial takings cases, "the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has affected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts."[57]

One objection to this theory of facial takings is that it has the potential of depriving subsequent purchasers of the right to challenge restrictions of property rights that took effect prior to purchase, even though that right has been explicitly recognized by the Supreme Court.[58] This confusion indicates the need for further clarification by the Supreme Court, but it need not detain us here. For our purposes it suffices that a facial takings claim is *not* a facial constitutional challenge. Indeed, a claim for just compensation actually presupposes the constitutional *validity* of the law in question, as the Supreme Court made clear in *Lingle v. Chevron USA Inc*.[59] The normative question of whether a law is constitutionally legitimate is answered by reference to the Due Process and Public Use Clauses (among others), not by the Just Compensation Clause.[60] The latter simply says that the government

55. Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 124 n.104 (2000).

56. 998 F.2d 680 (9th Cir. 1993).

57. *Id*. at 688. *Accord*, Carson Harbor Vill. Ltd. v. City of Carson, 37 F.3d 468, 476 (9th Cir. 1994).

58. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) ("Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.")

59. 544 U.S. 528 (2005).

60. *See id.* at 543: "[Questions about a] regulation's underlying validity…[are] logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.' Conversely, if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is

must pay for an otherwise legitimate taking of property. The Just Compensation Clause is not a kind of penalty for unconstitutional acts; rather, it is the second step in a two-part analysis. First, is the restriction on property rights a legitimate exercise of government authority? If not, the law is unconstitutional. If so, the government may proceed, so long as it compensates.[61]

Two regulatory takings cases from the Ninth Circuit, *National Ass'n of Home Builders of U.S. v. City of Los Angeles*[62] and *Carson Harbor Village Ltd. v. City of Carson*,[63] explicitly observe the distinction between facial challenges and facial takings, but these cases employ somewhat confusing language. In *National Ass'n of Home Builders*, an unpublished case, the plaintiffs challenged a Los Angeles ordinance imposing certain confiscatory conditions on building permits. They argued that the conditions did not meet the standards required by the Supreme Court's decision in *Dolan v. City of Tigard*,[64] and therefore that the ordinances incorporating those conditions imposed a regulatory taking for which they were entitled to just compensation.[65] The court noted that this facial takings claim accrued upon the enactment of the ordinance, and it distinguished facial takings claims from facial challenges to the constitutionality of a law.[66] But the court's brief discussion of the differences between facial takings and facial challenges included a misleading comment. The plaintiffs had urged the court to allow their facial challenge to proceed because "the Supreme Court has considered the constitutionality of statutes scores of years after enactment, citing *Loving v. Commonwealth of Virginia* . . . and *Brown v. Board of Educ.*"[67] But "*Loving* and *Brown*," wrote the court, "involved

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so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action." (quoting First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 315 (1987) (emphasis added)). *See also* Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring) ("[T]he Takings Clause . . . has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional").

61. This is not to suggest that invalidation is never a proper remedy for a regulatory taking; in fact, there are probably cases where it is proper. This, too, is a matter of controversy that is beyond the scope of this paper. *See generally* Michael M. Berger & Gideon Kanner, *Thoughts on The White River Junction Manifesto: A Reply to The "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property,* 19 LOY. L.A. L. REV. 685, 703-04 (1986).

62. 1997 WL 312604 (9th Cir. 1997).

63. 37 F.3d 468 (9th Cir. 1994).

64. 512 U.S. 374 (1994).

65. *Nat'l Ass'n of Home Builders*, 1997 WL 312604, at * 2.

66. *Id.*

67. *Id.* at *3.

as-applied, not facial constitutional challenges."[68] This is not correct. In both *Loving* and *Brown*, the Supreme Court found the challenged laws to be *facially* unconstitutional; that is, the racially discriminatory laws could in no circumstance be applied in a constitutional manner.[69]

In fact, the facial/as-applied distinction appears to make little sense in cases alleging that a statute violates equal protection, since the argument in such cases is that the statute in question is predicated upon an unfairly biased legal background.[70] In his dissent in the 1985 *Cleburne* decision, Justice Thurgood Marshall pointed out that "[t]o my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis. When statutes rest on impermissibly overbroad generalizations, our cases have invalidated the presumption on its face."[71] *Loving* and *Brown* were not as-applied cases, but facial challenges mounted by plaintiffs who appropriately brought suit within the limitations period after they themselves were injured.

The *Nat'l Ass'n of Home Builders* decision rightly observed that neither *Loving* nor *Brown* were facial takings claims,[72] but by mischaracterizing those cases as as-applied constitutional challenges, the court overlooked their real significance: Neither *Loving* nor *Brown* were subject to the special accrual standard that applies to facial takings claims because they were not takings cases. They were facial *challenges*, which are not barred by the mere age of the challenged statute.

The *Carson Harbor* court did not make this error. There, the plaintiffs argued that a land-use regulation effected a taking of their property without compensation. They brought two different kinds of takings arguments: first, that the law transferred some of the value of their property to others, and second, that the law failed to substantially advance a legitimate state interest as required under *Agins v. Tiburon*.[73] The court concluded that their injury occurred upon the enactment of the

68. *Id.*

69. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

70. Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 431 n.319 (1998).

71. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 476 (1985) (Marshall, J., dissenting).

72. *Nat'l Ass'n of Home Builders*, 1997 WL 312604, at *3.

73. 37 F.3d at 473 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

law, because "[b]oth facial claims necessarily rest on the premise that an interest in property was taken from all mobile home property owners upon the statute's enactment."[74] This conclusion is consistent with the facial takings rule.

Nevertheless, *Carson Harbor* included two important misconceptions. First, the plaintiffs there brought both a facial takings claim *and* a facial challenge. They argued not only that the law took their property for public use, but also that the law was constitutionally invalid because it failed to substantially advance a legitimate state interest. At the time *Carson Harbor* was decided, the "substantial advancement" theory was seen as a takings claim, which may explain the court's decision, but the Supreme Court has since declared that this is a due process, and not a takings theory,[75] and the *Carson Harbor* court itself seemed to anticipate this, commenting in a footnote that "[w]hen the effects of a regulation do not 'substantially advance a legitimate state interest,' compensation is not automatically due. Rather, the proper remedy for an invalid exercise of the police power is amendment or withdrawal of the regulation and, if authorized and appropriate, damages."[76] If the plaintiffs were bringing a due process claim, their injury did not accrue at the time the statute was enacted, but instead at the time when their rights were affected by the statute.

Secondly, and relatedly, the *Carson Harbor* court concluded that, under the rule requiring facial *takings* claims to be brought within a certain period of the enactment of the challenged law, "[a] landowner who purchase[s] land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury."[77] This conclusion is consistent with the decisions of many courts, but significant doubt was cast on it by the Supreme Court's subsequent conclusion in *Palazzolo v. Rhode Island*,[78] stating that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land."[79] In *Palazzolo,* the Court held that the mere passage of time cannot insulate a land-use regulation from the Fifth Amendment's compensation requirement.[80] But whatever the proper

74. *Id.* at 476.
75. *Lingle*, 544 U.S. at 543.
76. *Carson Harbor*, 37 F.3d at 473 n.4.
77. *Id.* at 476.
78. 533 U.S. 606 (2001).
79. *Id.* at 627. *See also Travis*, 33 Cal.4th at 770-71.
80. 533 U.S. at 630.

time limits for facial takings claims might be after *Palazzolo*[81] is irrelevant to the question of when facial *challenges* accrue. If anything, *Palazzolo* moves the facial takings rule in the direction of the facial challenges rule, not the other way around.

To see how the confusion between the timing of facial takings and facial challenges operates in practice, consider *Coral Construction v. San Francisco*,[82] in which a plaintiff argued that a San Francisco ordinance violated the California Constitution by granting certain preferences to public contractors based on the contractor's race. The trial court granted summary judgment for the city on the grounds that the plaintiff, Coral, lacked standing.[83] On appeal, the city argued that the court should affirm this dismissal on other grounds as well: namely, the complaint ought to have been construed as a facial challenge to the city's contracting policies, and any facial challenge was barred by the statute of limitations.[84] "The statute of limitations for asserting an infringement of constitutional rights is one year," the city argued. "And because Coral's challenge was a facial one, Coral's cause of action accrued on the date that the ordinance became effective."[85] The court of appeals found that the case was actually an as-applied rather than a facial challenge, and therefore it did not address this argument,[86] but it is worth considering as an example of the deleterious effects of confusing facial challenges with facial takings for statute of limitations purposes.[87]

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81. Justice O'Connor's concurring opinion suggested that the timing of a land-use regulation will continue to affect a court's consideration of a taking. *See Palazzolo*, 533 U.S. at 632-33 (O'Connor, J., concurring). In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court strongly suggested that her less precise formulation would govern in future cases. *See id.* at 335-37. *See further* J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. REV. 351 (2005).

82. 116 Cal. App. 4th 6 (Cal. App. 1st Dist. 2004), *review granted*, 167 P.3d 25 (Cal. 2007).

83. *Id.* at 14.

84. Brief of Respondent, Coral Constr. v. City of San Francisco, No. A101842 (Cal Ct. App. 1st Dist. Div. 4) at 32.

85. *Id.* at 33.

86. 116 Cal. App. 4th at 27.

87. Other examples include *Chuck & Sons Towing, Inc.*, *supra* note 1, in which the court declared that, "when making a constitutional challenge based on facial validity, the statute of limitations begins to run upon the *enactment of the challenged provision*." *Id.* at 6. To support this conclusion it cited three federal cases: *Maldonado v. Harris*, 370 F.3d 945 (9th Cir. 2004); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283 (5th Cir. 1997); and *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993); as well as a dissenting opinion in a state case, *L.A. Realty v. Town Council*, 698 A.2d 202, 220 (R.I. 1997) (Flanders, J., dissenting). But *Maldonado* and *Levald* were regulatory takings cases and therefore inapplicable, and *Dunn-McCampbell* involved the six-year statutory limitations period on all claims against the United States, not any jurisdictional rule facial challenge accrue upon the enactment of the challenged law.

The city cited five cases in support of its claim that facial challenges to statutes are barred if brought too late after the enactment of the statute: *Alaska Legislative Council v. Babbitt*,[88] *Utility Cost Management v. Indian Wells Valley Water District*,[89] *Acuna v. Regents of University of California*,[90] *Hensler v. City of Glendale*,[91] and *Barancik v. County of Marin*.[92] Yet none of these cases even remotely stands for this proposition.[93]

Babbitt and *Utility Cost Management* both involved specific statutes limiting particular kinds of actions. *Babbitt* involved the statutory six-year jurisdictional time limit imposed by 28 U.S.C. § 2401(a) on all damages claims against the United States[94]; *Utility Cost Management* found a case was filed too late under the California Mitigation Fee Act—specifically, because section 66022 of the California Government Code requires any challenge to the imposition of a "fee or service charge" to be brought within 120 days of its imposition. These cases neither dealt with common law statutes of limitations, nor declared that a plaintiff must bring a facial challenge to a law within a certain period after its enactment. Neither do *Acuna*, *Hensler*, or *Barancik*. *Acuna* was not a facial challenge in the first place, but a suit by a college professor who alleged that he was denied tenure because of his political views.[95] The court found that his cause of action accrued when his tenure application was rejected—a routine ripeness analysis.[96]

The dissent in *L.A. Realty*, which was also a regulatory takings case, simply never addresses the statute of limitations at all. Nevertheless, the *Chuck & Sons* court went on to find that the case was time-barred for other reasons as well, therefore making its conclusion on this point technically dictum.

88. 15 F. Supp. 2d 19 (D.D.C. 1998).

89. 26 Cal. 4th 1185 (2001)

90. 56 Cal. App. 4th 639 (1997)

91. 8 Cal. 4th 1 (1994)

92. 872 F.2d 834 (9th Cir. 1988), *cert. denied,* 493 U.S. 894 (1989).

93. The city also cited Cal. Civ. Pro. § 340(3), which applies to damages actions. Since *Coral* was in part a damages action, this provision was arguably applicable, but it has nothing to do with facial constitutionality arguments. That statute merely applies to cases against the government seeking damages.

94. 15 F. Supp. 2d at 24. Statutes of limitations are divided into two categories: jurisdictional time limits by which courts are divested of jurisdiction after a certain time period and the traditional common law statute of limitations, which is a matter of repose for stale claims. *See* Wood-Ivey Sys. Corp. v. United States, 4 F.3d 961, 965 (4th Cir. 1993). It is exceedingly confusing that the term "statute of limitations" implies that the limit is statutory, when in fact it is not; a statute of limitations is a common law principle subject to such prudential constructions as equitable tolling. *Id.* at 966. But an actual statute, like 28 U.S.C. § 2401(a), is not a "statute of limitations"; it is a statutory jurisdictional time limit which a court lacks power to alter. *See Wood-Ivey*, 4 F.3d at 965.

95. 56 Cal. App. 4th at 644.

96. *Id.* at 647.

Hensler was a regulatory takings case, and therefore subject to the special rule discussed above for facial takings claims.[97] And, as we have seen, *Barancik* was either a regulatory takings case, or a wrongly decided substantive due process case.

Thus, although Coral was not bringing a facial challenge, it could have, contrary to the city's argument. The argument that a law is facially invalid simply does not expire due to the passage of time after enactment of that law. Instead, once a plaintiff is injured by the application of a law,[98] she may challenge it at any time within the limitations period. She is not limited to arguing that the law is invalid as applied to her. Until the statute of limitations expires, she may challenge the statute either on the grounds that it is not and can never be constitutional (facially invalid) or on the grounds that it is constitutional sometimes but not in her particular case (invalid as-applied).

C. Other Potentially Confusing Cases

There are some unusual cases in which a cause of action *other than* a takings claim will accrue upon the mere enactment of a law. This occurs in the rare circumstance in which a person is injured by the legal change itself, as when a law repeals a benefit to which a person is entitled. For example, in *Waltower v. Kaiser*,[99] a convict challenged the constitutionality of a state law that eliminated a program under which he would have been eligible for early parole. The Tenth Circuit Court of Appeals found that the case was filed too late because the statute of limitations began to run on the adoption of the repeal.[100] "As a general rule," the court noted, "'a cause of action accrues when all events necessary to state a claim have occurred.' With regard to Mr. Waltower's facial challenge, all events necessary to state a claim occurred when the Act became effective."[101] The court did not find that facial challenges are inherently due within a certain period after the enactment of a challenged law; on the contrary, Waltower's right to

97. 8 Cal. 4th at 22 ("If the challenge is to the facial validity of a land-use regulation, the statute of limitations runs from the date the statute becomes effective."). *Hensler* also involved a statute, Cal. Gov. Code § 65009, which expressly declares that challenges to amendments to zoning ordinances must be brought within 120 days of the enactment of the amendment. 8 Cal. 4th at 22 n.10.

98. There are some rare cases in which a plaintiff is injured due to mere enactment. *See infra*, Section II.C.

99. 17 F. App'x. 738 (10th Cir. 2001).

100. *Id.* at 740.

101. *Id*. (quoting United States v. Hess, 194 F.3d 1164, 1175 (10th Cir. 1999)).

participate in the parole program was wholly eliminated when the law became effective. Thus, no further facts or incidents were necessary to develop his injury; that injury was complete upon enactment.

Likewise, in *Catawba Indian Tribe of South Carolina v. United States*,[102] an Indian tribe brought suit for compensation after a federal law subjected the tribe to state adverse possession laws, allowing individuals to take title to some of the tribe's land. The court found that the case was brought too late because the tribe's injury occurred at one of two moments: either when the statute had been enacted (and not, as the tribe argued, when a court interpreted the law as applying to the tribe[103]), or at "the *end* rather than the beginning of the ten-year adverse possession period."[104] In either case, the challenge was brought too late.

Although the court did not decide which was the proper accrual date, the first option is consistent with the *Waltower* court's holding that, when a plaintiff is directly injured by a change in the legal background itself, that injury is the moment a cause of action accrues.[105] Neither case stands for the proposition that the injury in a facial challenge necessarily accrues when the challenged law is enacted. Instead, under the circumstances of those cases—in which legislation fundamentally altered the legal background in which a party claimed a vested right—the injury happened to occur upon enactment.

Finally, challenges to the validity of federal regulations also make up an area of potential confusion. Congress has by statute established a six-year limitations period on all actions against the United States,[106] and courts have repeatedly declared that facial challenges to the validity of federal regulations must consequently be brought within six years of the moment when these regulations are first published in the *Federal Register*.[107] This might mislead a person into concluding that, six years

102. 982 F.2d 1564 (Fed. Cir. 1993).

103. *Id.* at 1570 ("While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect.")

104. *Id.* at 1571.

105. *Id.* ("At that time, possessors of the tribal lands holding under deeds from the State of South Carolina could begin to acquire adverse possession rights against the Tribe . . . . Any suit based on the theories presented necessarily would have to have been filed [within the limitations period of this incident].")

106. 28 U.S.C. § 2401(a) (2000).

107. *See, e.g.*, Wind River Mining Corp. v. United States, 946 F.2d 710, 713-16 (9th Cir. 1991) (explaining six-year limitations rule for federal regulations); Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997) ("On a facial challenge to

after publication, regulations are immune from facial challenge. But that is incorrect, as a closer examination of the cases reveals. Publication of a regulation is deemed the moment of accrual only to those parties who are subject to the rule at that time.[108] It is not and cannot be an injury to a party who is not at that time subject to the rule—for example, a business founded more than a half-dozen years after the initial publication of the challenged regulation. For such a plaintiff, the injury, as is true of any other case, accrues when the plaintiff is made aware (or should know) that the rule will apply. At that point, the plaintiff is free to challenge the validity of the regulation either as applied or facially—that is, the plaintiff can argue that the regulation can in no sense be valid, or that it might be valid in other cases, but not in the case at bar. The rule governing facial challenges to federal regulation is therefore entirely consistent with the position defended here: that accrual is unaffected by the plaintiff's choice between a facial or an as-applied theory.

IV. REPOSE, PREFERRED RIGHTS, AND OTHER CONFUSIONS

A. Is The Statute of Limitations Applicable to First Amendment Cases?

It is unfortunately common for the law to remedy an old error by adopting new ones. That appears to be happening as a result of confusions arising from the timing of facial and as-applied challenges in the context of the First Amendment. The confusion has led some courts into the misimpression that the statute of limitations simply does not apply to First Amendment cases.[109] This is incorrect. But because many First Amendment lawsuits involving statute of limitations arguments have been brought as challenges to land-use regulations that affect expressive rights, the rule applied in regulatory takings cases has sometimes been conflated with the rules applicable to other kinds of

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a regulation, the limitations period begins to run when the agency publishes the regulation in the *Federal Register*.").

108. *See, e.g.*, Natural Resources Defense Council v. Nuclear Regulatory Comm., 666 F.2d 595, 602-03 (D.C. Cir. 1981) ("'*[T]hose who have had the opportunity to challenge* general rules should not later be heard to complain of their invalidity on grounds *fully known them* at the time of their issuance.'" quoting Outward Cont'l N. Pac. Freight Conference v. Federal Martime Comm'n, 385 F.2d 981, 982-83 n.3 (D.C. Cir. 1967) (emphasis added)); *Wind River*, 946 F.2d at 716 ("[A] substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to *the specific challenger*." (emphasis added)).

109. Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004); Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1168 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). The *Maldonado* court noted that several district courts have actually held that the statute of limitations cannot apply to First Amendment challenges, but no federal appellate court appears to have done so. *Maldonado* and *National Advertising* both expressed "doubts" on the question but did not rule on the question.

cases. This has led trial courts to sense the need for a saving rule, and they have seized on the preferred nature of expressive rights, concluding that facial First Amendment challenges are exempt from statutes of limitations when they are not.

Perhaps the clearest example of this is *Santa Fe Springs Realty Corp. v. City of Westminster*,[110] in which the owner of an adult cabaret challenged the facial validity of a zoning ordinance restricting adult businesses. The district court rightly "refuse[d] to apply the rule applicable in takings cases" because the plaintiff was arguing that the ordinance resulted in "a continuing injury based upon [its] on-going effect on protected speech."[111] As in other "continuing injury" cases,[112] therefore, the lawsuit was timely because it was filed within the limitations period after the plaintiff's rights were violated. The district court went on to note that, given the desirability of facial challenges in many cases alleging First Amendment violations, it was doubtful whether a statute of limitations could apply at all to such laws.[113]

Similarly, in *3570 East Foothill Blvd.*,[114] the plaintiff alleged the facial invalidity of zoning laws which placed certain limits on the live dancing that could be offered in clubs and restaurants. The city argued that the facial challenge was time-barred because the one-year statute of limitations began to run when the restriction was passed.[115] The district court was not convinced that the enactment of the law was the moment when the plaintiff's cause of action accrued: "In support of this argument, the City cites several takings cases, but no cases in the First Amendment context," it noted.[116] This was true, but the inapplicability of those cases did not turn on their First Amendment nature. Rather, those cases did not apply because the ordinance "inflict[ed] a continuing harm" which "continues until the statute is either repealed or invalidated,"[117] as opposed to inflicting a single harm through an immediate confiscation of property, which is the reason behind the facial

110. 906 F. Supp. 1341 (C.D. Cal. 1995).

111. *Id.* at 1364.

112. The "continuing injury" doctrine holds that when a plaintiff is suffering not a discrete, particular injury, but an ongoing violation of rights, she may file suit at any time within the limitations period after the most recent incident. *See generally* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628 (2007).

113. *Santa Fe Springs Realty*, 906 F. Supp. at 1364-65 (citing City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757-59 (1988)).

114. 912 F. Supp. 1268 (C.D. Cal. 1996).

115. *Id.* at 1278.

116. *Id.* (citing *Levald*, 998 F.2d at 688).

117. *Id. See also Kannapolis*, 109 F. Supp. 2d at 437-38.

takings rule. The court erred in concluding that facial challenges under the First Amendment are immune from statute-of-limitations questions. Instead, the case was a typical non-takings facial challenge to a law that inflicted a continuing injury; no new First Amendment rule was necessary.

Santa Fe Springs Realty and *3570 East Foothill Blvd.* involved the continuing injury exception to the statute-of-limitations bar, but the decisions do not represent any special statute-of-limitations rule for First Amendment cases. On the contrary, the statute of limitations does apply to First Amendment cases,[118] as is clear when a plaintiff alleges a *discrete*, rather than a continuing injury to First Amendment rights. In *Chardon v. Fernandez*,[119] for example, the plaintiffs alleged that they had been terminated from their teaching jobs for their political views, in violation of the First Amendment. The Supreme Court found their cases barred by the statute of limitations.[120] Likewise, in *Hobson v. Wilson*,[121] the Court of Appeals found that the statute of limitations applied to a lawsuit in which plaintiffs alleged that the FBI violated their First Amendment rights by conducting surveillance on them. Thus, rather than establishing some special First Amendment immunity from the statute of limitations, cases like *Santa Fe Springs Realty* and *3570 East Foothill Blvd*. are best seen as routine continuing-injury cases, applying the well-known rule that the statute of limitations will apply differently when the injury alleged is a "continuing" one.[122]

While the Ninth Circuit was correct in observing that no circuit court has yet determined "whether a statute of limitations for § 1983 actions can bar a facial challenge under the First Amendment to a state statute,"[123] it would seem only to increase the doctrinal confusion to suggest that different kinds of constitutional arguments follow different accrual rules. Future courts should rely instead on well-established standards: A party that brings a suit within the limitations period after

118. *See, e.g.*, Baranowski v. Waters, 2008 WL 728366 (W.D. Pa. Mar. 18, 2008). The statute-of-limitations period for civil rights violations has been found to be a procedural, rather than a jurisdictional, statute, and therefore it can be waived by a defendant, either consciously or through inaction. Smith v. City of Chicago Heights, 951 F.2d 834, 839 (7th Cir. 1992).

119. 454 U.S. 6 (1981) (per curiam).

120. *Id.* at 8. *See also* Muniz-Cabrero v. Ruiz, 23 F.3d 607, 611 (1st Cir. 1994).

121. 737 F.2d 1 (D.C. Cir. 1984).

122. Moreover, even in cases involving overbreadth challenges—which might be characterized as a species of continuing injury case—plaintiffs must demonstrate that they have been injured in fact. Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392-93 (1988); Prime Media, Inc. v. City of Brentwood, 485 F.3d 343, 349-50 (6th Cir. 2007).

123. *Maldonado*, 370 F.3d at 955.

her injury has a timely case, and she may argue whatever theory is appropriate—that the law is unconstitutional as applied or unconstitutional on its face. Of course, a plaintiff who alleges a *continuing* injury will be treated differently than a plaintiff who alleges a discrete injury, because each incident in a continuing injury resets the limitations period, and the plaintiff may bring a suit at any time within the limitations period after the last discrete act.[124] But as far as the statute of limitations is concerned, no special rule distinguishes First Amendment cases from other theories of facial constitutional invalidity.

B. Repose, Records, And Other Concerns

One possible objection to the proposition that facial challenges do not automatically expire due to a law's age is that the law favors a policy of repose to ensure that constitutional issues are settled and established. If a person can facially challenge the validity of a longstanding law, this might cause disruption and uncertainty. There are two answers to this, one based in policy and the other on precedent. First, there is no legitimate public interest in keeping facially unconstitutional laws on the books, no matter how old they might be. As Frederick Douglass said, nothing is settled which is not right.[125] While individuals might form certain expectations on the basis of facially unconstitutional laws, and while courts may take such expectations into account, this is relevant only to the *remedy* that the court will provide—not to the questions of the merits or timing of a facial challenge. A court might decide that although a law is facially unconstitutional, declaring it invalid immediately will result in unfair surprise to innocent parties and might tailor its remedy accordingly.[126] But it cannot declare that, because a facially unconstitutional law has been on the books for years, plaintiffs are barred from alleging that the law is, in fact, facially unconstitutional.

Second, the Supreme Court's recent pronouncements on facial challenges indicate that rather than requiring facial challenges to be brought quickly, the Court actually prefers facial challenges to be brought after some time has passed, and after the law in question has been applied and has been subjected to legal analysis by lower courts. In

124. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002); Heard v. Sheahan, 253 F.3d 316, 318 (7th Cir. 2001).

125. Frederick Douglass, *The Meaning of the Fourth of July for The Negro* (July 5, 1852) *reprinted in* P. FONER & Y. TAYLOR, EDS., FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 192 (1999).

126. *Cf.* In re Archy, 9 Cal. 147, 171 (Cal. 1858) (applying the decision only prospectively, to avoid surprise).

Washington State Grange v. Washington State Republican Party,[127] the Court observed that the state had not had an "opportunity to implement" the challenged law, "and its courts have had no occasion to construe the law in the context of actual disputes" or to "accord the law a limiting construction to avoid constitutional questions."[128] The Justices were therefore reluctant to address its facial validity since "[c]laims of facial invalidity often rest on speculation" and risk a premature judgment about the law's constitutional effect.[129] The case does not represent an effort to grant facially unconstitutional laws any degree of repose, but rather a desire on the Justices' part to minimize speculative, potentially advisory opinions, and thereby to reduce the Court's interference in democratic processes.[130] Whatever weight these concerns deserve, they do not suggest that a policy of repose justifies limiting facial challenges to any specific limitations period subsequent to the enactment of a challenged law.

A similar concern appears in recent Supreme Court decisions that have narrowed the availability of facial challenges to statutes. Unfortunately, one of these decisions has fostered further confusion. In *Gonzales v. Carhart*,[131] the Court found it improper to entertain a facial challenge to the constitutionality of the federal partial birth abortion ban, both because it was inappropriate "to resolve questions of constitutionality with respect to each *potential* situation that might develop,"[132] and because the law was "open to a proper as-applied challenge in *a discrete case*."[133] This language indicates the Court's reluctance to engage in roving constitutional analysis, and it is true that Article III principles bar the Court from resolving merely potential controversies or issuing other advisory opinions.[134] Yet the *Carhart* Court's reluctance to entertain a facial challenge is confusing, given the fact that the Court never explicitly questioned whether the parties had the standing, injury, and redressability required to invoke federal court jurisdiction. So long as those factors are present, the Court has power to consider a law's constitutionality, either facially or as applied. The Court *did* have power to entertain the facial challenge in *Carhart,* and

127. 128 S. Ct. 1184 (2008).

128. *Id.* at 1190.

129. *Id.* at 1191.

130. *See* Roger Pilon, *Foreword: Facial vs. As-Applied Challenges: Does It Matter?* 2008-2009 CATO SUP. CT. REV. vii, ix-xi.

131. 550 U.S. 124 (2007).

132. *Id.* at 168 (emphasis added).

133. *Id.*

134. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 700 (1997).

nearly all of the Court's abortion cases have involved facial attacks on abortion restrictions.

But while the dissenters observed that the majority's rejection of the facial challenge was "perplexing,"[135] even they failed to note that the majority opinion wrongly suggested that facial challenges and as-applied challenges are conceptually distinct categories of adjudication, subject to different jurisdictional prerequisites. They are not; these terms are simply different ways of characterizing the nature of a law's unconstitutionality. If the *Carhart* Court simply believed it imprudent to address the question of facial constitutionality without a more fully established record, or doubted the plaintiffs' standing, it ought to have been more explicit in so holding.[136] As it stands, *Carhart*'s language suggests the wrong conclusion that facial challenges are a different category of adjudication from as-applied challenges. If uncorrected, that misconception is bound to wreak havoc on well-established rules of civil procedure.

Whatever else *Carhart* stands for, it does not hold that facial challenges are barred by the passage of time after a law's enactment. On the contrary, as in *Washington State Grange*, the Court simply indicated a need for more information before adjudicating the constitutionality arguments, information which would come through the law being applied in the particular circumstances of a case.[137] Indeed, in *Crawford v. Marion County Election Board*,[138] issued the same term as *Washington State Grange*, and only a year after *Carhart*, the Justices expressed reluctance to find a law facially invalid "on the basis of the record that has been made in this litigation"[139] and concluded that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute."[140] Thus, the Court did have authority to entertain the facial challenge but found that challenge unconvincing. *Carhart*'s confusion springs, no doubt, from the preemptive nature of

135. *Carhart*, 550 U.S. at 187 (Ginsburg, J., dissenting).

136. The Court was more explicit about the prudential basis of its reluctance to consider a facial challenge in *Sabri v. United States*, 541 U.S. 600 (2004): "Facial challenges of this sort are especially to be discouraged. Not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Id.* at 609-10.

137. *Carhart*, 550 U.S. at 168.

138. 128 S. Ct. 1610 (2008).

139. *Id.* at 1623.

140. *Id.* at 1615.

that particular lawsuit, and it indicates that, like all constitutional litigation, facial challenges are more likely to succeed with a robust evidentiary record and (as required by Article III standing principles) after a particular plaintiff has demonstrated a particular injury. Facial challenges remain available in any case in which a plaintiff has been injured by the application of a law, even an antiquated law.

V. CONCLUSION

A common misconception holds that a facial challenge to the constitutionality of a law must be brought within a certain period after the enactment of that law. This is incorrect. Any challenge to a law's constitutionality must be brought within the limitations period after the plaintiff is injured by the law, whenever form that injury might take. Only very rarely will the injury occur through the mere enactment of the law. Once injured, a plaintiff can challenge the law's constitutionality either facially or as-applied. Facial constitutional challenges should not be confused with facial *takings* claims; the latter *do* accrue upon enactment, because the enactment is deemed to have "taken" the property value. But where a facial takings claim seeks compensation for an otherwise valid law that deprives the owner of property, a facial constitutional challenge asserts that the targeted law is never constitutional under any circumstances. The facial/as-applied distinction therefore characterizes the nature of the arguments on the merits, and bears no relation to the jurisdictional questions of when a plaintiff has been injured by the challenged law or when her lawsuit is timely filed.