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Article

**Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions**

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**Jennifer S. Rosenberg<sup>‡</sup>**

In its first three years, the Roberts Court has issued a series of important election law decisions on topics ranging from gerrymandering and voter identification to regulation of political parties and campaign finance.<sup>1</sup> The substance of those decisions has been dramatic enough, but the decisions also illustrate the evolution of important constitutional and election law doctrines concerning facial and as-applied challenges. The Court has clarified its strong preference for as-applied challenges in the election law context<sup>2</sup> just as it has in others, such

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1. See *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009); *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2765 (2008); *Riley v. Kennedy*, 128 S. Ct. 1970, 1976–77 (2008); *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1187 (2008); *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 795 (2008); *Fed. Election Comm'n v. Wis. Right to Life*, 127 S. Ct. 2652, 2659 (2007); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2598 (2006); *Randall v. Sorrell*, 126 S. Ct. 2497, 2485 (2006). See generally Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2009 SUP. CT. REV. (forthcoming 2009) (analyzing the Roberts Court's election law cases decided between 2007 and 2008).

2. See Persily, *supra* note 1 (manuscript at 22–23).

as abortion cases.<sup>3</sup> The effect of these decisions appears to have been to make some types of voting rights claims more difficult to bring, but perhaps the more important development is the evolution in what the Court means by an as-applied or facial challenge.

For the most part, those who favor a more aggressive judicial role in protecting constitutional rights also worry about judicial timidity in favoring as-applied over facial challenges.<sup>4</sup> For impact litigators, the litigation costs often exceed the benefits of securing narrow victories for their clients through a series of effective as-applied challenges.<sup>5</sup> In the election law context, additional concerns further distort this cost-benefit calculus. This is a context in which clear rules need to be known in advance and in which plaintiffs often have little incentive to bring challenges once the injury on election day has occurred. A victory for individual voting rights plaintiffs is quite often a pyrrhic one, if applied to a narrow class of plaintiffs and only after the winner of the election has been determined.

This Article examines the evolution in the doctrine concerning facial and as-applied challenges and considers the implications of the Roberts Court's preference for as-applied challenges to statutes regulating elections. This Article argues that the renewed emphasis on as-applied challenges masks other strategies and arguments concerning how inconvenient precedent can be overturned and how the Court should stay its hand when the factual record supporting a challenge requires further development. Part I sets forth the basic doctrine concerning as-applied and facial challenges. Part II sketches out two exceptions to the general rule concerning facial challenges—First Amendment and abortion rights—that have also undergone some transformation in recent cases. Part III discusses the Roberts Court's recent election law cases, which have dealt with this issue to a surprising extent. Part IV presents our conclusions and considers whether election law

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3. See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 272 (1994).

4. See Cass R. Sunstein, *The Supreme Court—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 39 (1996) (labeling minimalists and maximalists as those who prefer as-applied and facial challenges respectively).

5. Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 34 (2008) ("Reliance on as-applied challenges may . . . entail significant litigation costs for litigants and courts.").

cases should be one more arena in which the requirements for bringing a facial challenge should be relaxed. Finally, Part V presents an epilogue that considers the constitutional challenge to the Voting Rights Act (VRA) that the Court was considering as this Article went to press.

Before delving into the case law—both historic and recent—we should admit to two caveats that should govern any critique of the doctrine in this area. First, as critical as we might be of the inconsistency and lack of clarity in the emerging doctrine, we must recognize that this is precisely the type of constitutional domain directly affected by the effort to build consensus among Justices of conflicting views. In other words, when Justices disagree as to how to answer the core constitutional questions in these cases, playing loose with these “second-order” doctrines may provide one avenue to crafting a decision that speaks for a Court majority or even supermajority.<sup>6</sup> In two of the three recent election cases upon which we focus (the Indiana voter ID case<sup>7</sup> and the Washington nonpartisan primary case),<sup>8</sup> the lopsided decisions can be attributed to such strategies. Therefore, the caustic criticism of dissents and commentators (ourselves included) ought to be tempered by recognition of the real-world challenges to achieving a clear decision from a multimember body.

Second, as we reiterate several times in this Article, these seemingly technical doctrinal moves cannot be extracted from the substantive constitutional debates present in these cases. Although we may focus at times on the propriety of as-applied or facial review of a particular dispute, the resolution of these second-order questions is intimately tied to the primary ques-

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6. Indeed, the strategic use of the as-applied/facial distinction to achieve consensus was patently clear in the transition period when Justice Alito was replacing Justice O'Connor. In two cases we later discuss, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (remanding for as-applied challenge to a law requiring parent notification for abortions), and *Wisconsin Right to Life v. Federal Election Commission*, 546 U.S. 410 (2006) (per curiam) (remanding for as-applied challenge to electioneering communications restrictions of the Bipartisan Campaign Reform Act), the Court issued *unanimous* opinions in what would otherwise seem controversial cases lending themselves to split decisions. Indeed, once *Wisconsin Right to Life* went back to the full Court, it split five to four. In both of those cases, the remands for hearings on as-applied challenges allowed the Court to stall and avoid deciding a controversial case while the Court was awaiting a transition in membership.

7. *Crawford v. Marion County*, 128 S. Ct. 1610 (2008).

8. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008).

tions over the constitutional bounds on election laws in the given domain. Relying on the facial/as-applied distinction may often appear like a strategy for avoiding the deeper constitutional inquiries involved. Yet the choice made at this branch on the constitutional decision tree almost always reflects some position as to the desired outcome in such cases in general. Thus, while we may concentrate on the significance of favoring one type of constitutional attack over another, this debate often represents a proxy war of sorts over the central constitutional values at stake.

### I. THE BASIC DOCTRINE CONCERNING AS-APPLIED AND FACIAL CHALLENGES

We begin, however, with the basics. A plaintiff can challenge the constitutionality of a statute in two principal ways. The more ambitious approach—a facial challenge—requires that a plaintiff prove that the statute is unconstitutional in all (or nearly all) of its applications.<sup>9</sup> After finding a statute to be facially unconstitutional, courts void the statutory provision so as to make it unenforceable against anyone.<sup>10</sup> The less ambitious, and therefore often more successful approach—an as-applied challenge—alleges that the statute is unconstitutional, given a particular set of facts and as applied to a particular plaintiff and others similarly situated.<sup>11</sup> The remedy for an as-applied challenge will vary somewhat depending on the nature of the allegation, but, if doing so is consistent with the meaning and intent of the statute, a court will excise the plaintiff and those similarly situated from the statute’s constitutional reach by effectively severing the unconstitutional applications of the statute from the unproblematic ones.<sup>12</sup> These definitions necessarily gloss over the theoretical controversies explored later in

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9. See Dorf, *supra* note 3, at 236; Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 365 (1998).

10. See Dorf, *supra* note 3, at 236.

11. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1081 (16th ed. 2007) (“Ordinarily, a particular litigant claims that a statute is unconstitutional as applied to him or her; if the litigant prevails, the courts carve away the unconstitutional aspects of the law by invalidating its improper applications on a case-by-case basis.”).

12. See *id.* (“If a law restricting speech is invalidated as applied to a protected speaker, it is held inapplicable to that speaker, and thus, in effect, judicially trimmed down.”).

this Article, but this rudimentary, even if assumed, distinction serves as a good jumping-off point.

The preference for as-applied challenges, which is hardly unique to the Roberts Court,<sup>13</sup> arises from concerns about judicial restraint and respect for the work of politically accountable branches.<sup>14</sup> The strongest weapon a federal court can wield is its power to declare an act of a legislative body unconstitutional. A series of doctrines counsels against the use of that power unless absolutely necessary. For example, federal courts avoid constitutional questions unless answering them is essential to deciding the challenge at hand and even then, sometimes abstain if important enough interests counsel against resolution of the issue at that time.<sup>15</sup> Similarly, the “case or controversy” requirement leads federal courts to avoid deciding cases that are moot or unripe.<sup>16</sup> The preference for as-applied challenges derives from an analogous impulse: to strike down as little of a law as possible so as to salvage the constitutional parts of the law for which either the people or their representatives voted.<sup>17</sup> In some cases, deleting (in effect) a few words from the statute is the most scalpel-like approach to curing a constitutional defect<sup>18</sup> whereas in others carving out an exception for a particu-

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13. See *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912) (finding that a statute “as applied to cases like the present” was valid); see also Douglas Kmiec, *Facing Consensus: The Importance of the “Facial” vs. “As Applied” Distinction in the Roberts Court*, SLATE, Apr. 29, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/29/facing-consensus-the-importance-of-the-facial-versus-as-applied-distinctions-in-the-roberts-court.aspx> (suggesting that the Roberts Court is furthering a trend that the Rehnquist Court began).

14. *Wash. State Grange v. Wash. Republican Party*, 128 S. Ct. 1184, 1191 (2008) (“Exercising judicial restraint in a facial challenge ‘frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.’” (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960))).

15. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (listing seven reasons why the Court might avoid resolving constitutional issues).

16. *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976))).

17. See *Wash. State Grange*, 128 S. Ct. at 1191 (“[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.”).

18. Cf. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–05 (1985)

lar plaintiff serves those values.<sup>19</sup> When the statute is not amenable to such a construction or a given plaintiff is not characteristically different from anyone else who might challenge the law, voiding the law on its face may be the only appropriate remedy to vindicate the constitutional rights at stake.

Of course, the key question remains when, if ever, facial invalidation is appropriate—that is, what does a plaintiff need to prove to have a law voided on its face? The so-called *Salerno* standard established that “the challenger must establish that *no set of circumstances exists* under which the Act would be valid.”<sup>20</sup> In addition to what appear to be acknowledged exceptions to the *Salerno* principle discussed in the following sections, the Court has tacitly embraced facial challenges in a range of constitutional contexts, both in individual rights cases and in litigation questioning the proper scope of congressional power.<sup>21</sup> At times, the Court has looked the other way by striking down laws on their face without even acknowledging the facial nature of a challenge, or pausing to consider whether the statute would, in fact, be unconstitutional in all circumstances.

Those who wish to make facial challenges easier worry that incremental, as-applied adjudication provides a less effective means for protecting many individual rights.<sup>22</sup> The *Salerno* principle, they argue, ignores strategic justifications for preferring facial over as-applied invalidation in certain settings.<sup>23</sup> For

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(rejecting a facial challenge to a moral nuisance statute and holding that the proper solution was not to strike down the entire statute, but rather to eliminate its problematic language, namely the word “lust,” in the statutory definition of “prurient”).

19. *Cf. Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (declaring a Tennessee statute invalid only to the extent that it authorized police to use deadly force against unarmed felons).

20. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added).

21. *See Dorf*, *supra* note 3, at 294.

22. *See id.* at 240 (criticizing the *Salerno* rule as vastly inefficient in light of the “wide gulf [that] separates the statute that might operate unconstitutionally under some conceivable set of circumstances from one that operates unconstitutionally under all circumstances”); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1336 (2005) (“A facial challenge may be . . . a better means of implementing the Constitution than requiring parties to mount a series of as-applied challenges because of the costs of case-by-case adjudication.”).

23. *See Gans*, *supra* note 22, at 1336; *see also Craig v. Boren*, 429 U.S. 190, 193–94 (1976) (“[A] decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence.”).

example, facial invalidation may be most effective for laws that have a “chilling effect” on the exercise of certain constitutional rights.<sup>24</sup> If the chief effect of such laws can be seen in individuals’ avoidance of constitutionally protected behavior, then as-applied litigation brought by injured plaintiffs seeking individualized, scalpel-like judicial remedies will not address the principal constitutional harm such laws cause. The same can be said for statutes that risk discriminatory application by conferring excessive discretion on enforcement authorities. For such laws, addressing individual occurrences of discriminatory enforcement through as-applied challenges might do little to address the underlying constitutional risks that the law presents.<sup>25</sup>

The putative “on-off toggle” between facial and as-applied challenges glosses over serious disagreements among judges and academics concerning how courts behave when they invoke these doctrines.<sup>26</sup> Most efforts to parse out a coherent facial-

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24. See Dorf, *supra* note 3, at 277 (supporting the notion that facial challenges are necessary to guard against the “chilling” of various fundamental rights); see also Stenberg v. Carhart, 530 U.S. 914, 938–40, 945–46 (2000) (finding that the Nebraska law chilled second trimester abortions); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843, 893 (1992) (holding a statute unconstitutional after finding that it would deter a “significant number” of women from procuring abortions).

25. See Gans, *supra* note 22, at 1361–62 (discussing *Louisiana v. United States*, in which the Court struck down Louisiana’s literacy test on the ground that it subjected voters to the “passing whim or impulse of an individual registrar” (quoting *Louisiana v. United States*, 380 U.S. 145, 153 (1965))); see also *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (finding that the challenged statute created a risk of arbitrary or discriminatory enforcement by police officers, a factor that counseled in favor of facial invalidation); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (finding that facial invalidation is warranted where a law’s vagueness “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application”). Professor David Gans also suggests that the specter of facial invalidation can spur legislators into action, especially where successful facial challenges would have “momentous consequences,” such as where an entire sentencing regime or redistricting plan would be nullified. David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 692 (2008) (offering examples of instances where the Court stayed facial invalidation of a statute in order to give lawmakers an opportunity to fix its constitutional defect).

26. See Dorf, *supra* note 3, at 294; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1323 (2000) (“[I]t is tempting to say that the Justices of the Supreme Court are not only divided, but also conflicted or even confused, about when statutes should be subject to facial invalidation.”); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 880–83 (2005). *But see* Isserles, *supra*

challenge doctrine recognize that, notwithstanding *Salerno*, the categories of facial and as-applied challenges are not mutually exclusive.<sup>27</sup> All statutory challenges actually fall somewhere along a continuum bookended by facial challenges that ask courts to invalidate entire statutes and “pure” as-applied challenges that ask courts to invalidate fact-specific instances of enforcement.<sup>28</sup> Moreover, the expansiveness of the appropriate remedy will often depend on the applicable, substantive doctrinal test, given that different constitutional claims necessarily require different types of relief.<sup>29</sup>

Finally, as Gillian Metzger has argued, “the debate regarding the availability of facial challenges [becomes], at bottom, fundamentally a debate about severability.”<sup>30</sup> In other words, the appropriateness of narrow versus broad relief depends not only on the applicable substantive doctrine or the uniqueness of the plaintiff’s injury, but also on whether the statute under review is capable of judicial “editing” to remedy the harm de-

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note 9, at 395–415 (arguing that despite its critics, the *Salerno* principle is neither draconian nor inconsistent with the Court’s facial challenge practice).

27. See David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 884–87 (2004); Fallon, *supra* note 26, at 1324 (“[T]here is no single distinctive category of facial, as opposed to as-applied, litigation.”).

28. Compare Fallon, *supra* note 26, at 1326 (arguing that every litigant challenging a statute is inherently asserting that it cannot be enforced against them and therefore that all constitutional challenges “are in an important sense as-applied”), with Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998) (“There is no such thing as a true as-applied constitutional challenge.”), and Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1387 n.56 (2000) (“[A]s-applied’ challenges in one sense (challenges that vindicate the personal rights of claimants) do not exist, but . . . ‘as-applied’ challenges in a different and weaker sense (challenges that make reference to facts about the claimant, which in turn I construe as partial invalidations of rules) do exist.”). See generally Driesen, *supra* note 27, at 859–62 (summarizing the Adler-Fallon debate).

29. See Driesen, *supra* note 27, at 883–85 (exploring the continuum of judicial decision making between as-applied and facial challenges in different areas of law).

30. Metzger, *supra* note 26, at 886–87; see also Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 HOFSTRA L. REV. 647, 664 (2002) (arguing that there has never been an instance of the Court striking down an entire statute that had both valid and invalid components). See generally Fallon, *supra* note 26, at 1368 (discussing the tension between facial challenges and the severability doctrine and observing that because valid subrules can usually be severed from invalid ones, “it is often unnecessary for a court to adjudge the validity of a statute ‘on its face’; it is enough to determine whether a valid subrule applies to a particular case”).

scribed in a given case. Even the most narrow relief that addresses a single plaintiff's particular constitutional wrong is unavailable if the statute expressly refuses to contemplate an exception for such a context.<sup>31</sup>

## II. EXCEPTIONS TO THE GENERAL RULE CONCERNING FACIAL AND AS-APPLIED CHALLENGES

### A. FIRST AMENDMENT

The Court has long recognized First Amendment overbreadth doctrine as an exception to the *Salerno* rule concerning facial challenges.<sup>32</sup> Under First Amendment overbreadth doctrine, litigants may seek facial invalidation of a statute that restricts expression, regardless of whether the litigant herself was engaging in protected speech at the time the statute was enforced against her.<sup>33</sup> In other words, the doctrine eclipses traditional standing rules by allowing a litigant to assert the rights of hypothetical third parties, without any need to establish that the statute at issue is unconstitutional as-applied.<sup>34</sup>

The primary justification for First Amendment overbreadth is that even laws that regulate unprotected speech are likely to chill the exercise of protected speech by individuals swept into their regulatory ambit.<sup>35</sup> As-applied challenges

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31. See *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 321 (suggesting that the critical underlying inquiry is: "Would the legislature have preferred what is left of its statute to no statute at all?"); see also John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 258–59 (1993) ("Some statutory provisions are the product of compromises that would be disrupted if one part was allowed to stand as another part fell; such statutes should be nonseverable.").

32. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) ("The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges.").

33. See *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) ("Although a statute may be neither . . . overbroad, nor otherwise invalid as applied . . . against a particular defendant, he is permitted to raise its . . . unconstitutional overbreadth as applied to others. And if the law is found deficient . . . it may not be applied to him either . . . [It] is stricken down on its face." (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 619–20 (1971))).

34. See *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) ("Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court . . .'" (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985))).

35. See *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 910 (1970). Compare Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 21–30 (arguing

might vindicate the rights of individuals who suffer specific injuries from an unconstitutional statute, but the mere existence of such a law on the books will lead constitutionally protected speakers to alter their behavior.<sup>36</sup> The concerns about a chilling effect on protected speech reverse the normal presumption in favor of judicial restraint and to some extent replace it with a presumption against constitutionality once an infringement on speech can be demonstrated.

It nevertheless should be acknowledged that the Court has rolled back a bit from its more capacious definitions of overbreadth. It has done so in two ways. First, as is generally true with constitutional avoidance doctrine, courts will attempt to find a limiting construction that saves the statute from an unconstitutionally overbroad definition.<sup>37</sup> When they do so, courts redefine what the law means on its face rather than merely excising the unconstitutional applications of the law. At times that may seem like more of a stylistic difference, especially given what was said earlier about the interaction with severability doctrine. The effect, however, is to prohibit all the unconstitutional applications of the statute by adopting an interpretation

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that First Amendment overbreadth flows automatically from substantive First Amendment law, namely the requirement that laws regulating speech be the least restrictive means of accomplishing their stated goals, rather than from any special standing rules or nonseverability presumption), with Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867–75 (1991) (maintaining that the justifications for the doctrine vary with the type of speech being regulated), and Martin H. Redish, *The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1032 (1983) (critiquing the chilling-effect theory).

36. The accepted justifications for First Amendment overbreadth doctrine can be just as relevant in other contexts, and the mechanics of the doctrine equally applicable. Professor Dorf asserts that the same chilling effect theory that justifies First Amendment overbreadth doctrine has and should justify extending it to all “nonlitigation fundamental rights.” Dorf, *supra* note 3, at 268–71. He also observes that the substantiality requirement used to curtail the scope of First Amendment overbreadth has also been used “for quite some time” to limit overbreadth elsewhere, including in abortion cases. *Id.* at 276; see also Monaghan, *supra* note 35, at 37–38 (arguing that overbreadth analysis should be applied “wherever the Supreme Court is serious about judicial review”).

37. See *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (“Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the statute.”).

that cures the constitutional defect while not striking down the entire provision.

Second, the Court has moved toward a test for “substantial overbreadth,” which would require that a plaintiff in a facial challenge prove more than that the statute is unconstitutional in an extraordinary or conceivable case.<sup>38</sup> Although “substantial overbreadth’ is not readily reduced to an exact definition,”<sup>39</sup> the Court has considered laws to be substantially overbroad if, when “judged in relation to the statute’s plainly legitimate sweep,”<sup>40</sup> “a substantial amount of protected speech is prohibited or chilled in the process.”<sup>41</sup> Substantial overbreadth prevents a declaration of facial unconstitutionality in the event the plaintiff can drum up some hypothetical person or class whose speech rights will be chilled or infringed upon. It seems to require that the amount of constitutionally protected speech affected by the law be significant or substantial enough that the regulation of a great deal of unprotected speech or conduct cannot be justified.

#### B. ABORTION RIGHTS

The *Salerno* Court maintained that it had never recognized an overbreadth doctrine outside the limited scope of the First Amendment.<sup>42</sup> However, the Rehnquist Court’s abortion rights cases represent one area where the Court implicitly endorsed such an approach, and one where the Roberts Court has begun to harmonize abortion cases with its general preference for as-

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38. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (rejecting an overbreadth attack against a state trespass law where the underlying trespass policy, “taken as a whole,” was not substantially overbroad); *Broadrick*, 413 U.S. at 615.

39. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

40. *New York v. Ferber*, 458 U.S. 747, 769–71 (1982) (quoting *Broadrick*, 413 U.S. at 615).

41. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002).

42. See *United States v. Salerno*, 481 U.S. 739, 745 (1987). *But see* *Sabri v. United States*, 541 U.S. 600, 609–10 (2004) (acknowledging that the Court has “recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings,” including abortion and the Fifth Amendment right to travel); *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (suggesting that facial attacks are proper whenever a statute reaches “a substantial amount of constitutionally protected conduct”); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 12 (Supp. 2005) (questioning whether there is “any principled explanation of when the Court will entertain overbreadth facial challenges and when it will not”).

applied challenges.<sup>43</sup> As Professor Fallon observed prior to Chief Justice Roberts's tenure, "[v]irtually 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."<sup>44</sup> In cases where these challenges succeeded on the merits, the usual result was an injunction gutting the entire challenged provision, regardless of whether it had some constitutional applications.

For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reached the merits of a facial challenge without any mention of *Salerno* and invalidated on their face portions of a Pennsylvania statute which would have operated as an undue burden in "a large fraction" of cases.<sup>45</sup> More recently, in *Stenberg v. Carhart*, the Court struck down Nebraska's entire so-called "partial birth abortion" statute on the ground that its lack of a health exception for the pregnant woman would lead to numerous unconstitutional applications of the statute.<sup>46</sup> Given their inconsistency with the *Salerno*

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43. See Dorf, *supra* note 3, at 272 (asserting that *Roe v. Wade* "exemplifies overbreadth analysis").

44. Fallon, *supra* note 35, at 859 n.29 (citation omitted); see also Stuart Buck, *Salerno v. Chevron: What to Do About Statutory Challenges*, 55 ADMIN. L. REV. 427, 432 (2003) ("A doctrine parallel to that of First Amendment overbreadth has emerged in the abortion context." (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992))). *But see* H.L. v. Matheson, 450 U.S. 398, 405–06 (1981) (finding that the plaintiff, an unmarried fifteen-year-old girl who lived with her parents, lacked standing to facially attack a state statute requiring parental notification). Some commentators have argued that *Casey* implicitly overruled *Salerno*, at least with respect to reproductive rights. See, e.g., Pamela S. Quinn, Note, *Preserving Minors' Rights After Casey: The "New Battlefield" of Negligence and Strict Liability Statutes*, 49 DUKE L.J. 297, 314 (1999) ("*Casey* implicitly replaced the *Salerno* test with the 'undue burden' standard in the abortion context by its application of that standard.>").

45. 505 U.S. at 895. *Casey* also underscores the need for litigants alleging non-First Amendment overbreadth to provide evidentiary support for their challenge. In *Casey*, the Court assessed the factual record associated with each challenged provision of the Pennsylvania statute. *Id.* at 884–85, 887, 901. Since the law's challengers failed to proffer evidence demonstrating that the statute's twenty-four-hour waiting period would rise to the level of being a "substantial obstacle" for any woman seeking an abortion, the Court upheld that requirement. *Id.* at 886–87. By contrast, there was a detailed factual record establishing that the spousal consent provision would create an undue burden for almost one percent of women seeking abortions, and accordingly the Court sustained that facial attack. *Id.* at 893–95.

46. 530 U.S. 914, 929–30 (2000). The Court also found a second, indepen-

standard, such cases led Justice Scalia later to excoriate the majority for creating a “political correctness” exception to the ordinary rule governing facial challenges.<sup>47</sup>

Beginning with *Ayotte v. Planned Parenthood of Northern New England*, the Roberts Court breathed new life into *Salerno* by rejecting, as a procedural matter, a facial overbreadth challenge to a New Hampshire statute regulating abortions.<sup>48</sup> The Court avoided the merits of the question—whether New Hampshire could require parental notification without accommodating immediate threats to the pregnant woman’s health<sup>49</sup>—and instead turned its attention to the remedy being sought.<sup>50</sup> Writing for a unanimous Court, Justice O’Connor reaffirmed that the “normal rule” is that “partial, rather than facial, invalidation is the required course.”<sup>51</sup> She also attempted to distinguish *Stenberg*, writing that the only reason why the Court invalidated the entire Nebraska statute was because no litigant had asked for, and the Court “did not contemplate, . . . relief more finely drawn.”<sup>52</sup>

A year after *Ayotte*, the Court reaffirmed its commitment to rolling back the abortion overbreadth exception.<sup>53</sup> In *Gonzales v. Carhart*, a 5-4 majority reversed the Eighth and Ninth Circuits’ wholesale invalidations of the Partial Birth Abortion Act of 2003.<sup>54</sup> Both circuits had struck down the Act as uncon-

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dent reason to invalidate the law, in that it “unduly burden[ed] the right to choose abortion itself.” *Id.* at 930.

47. See *City of Chicago v. Morales*, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting).

48. 546 U.S. 320, 323, 329 (2006).

49. 546 U.S. at 323–24.

50. *Id.* at 328.

51. *Id.* at 329 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)).

52. *Id.* at 331. Stuart Buck observes that although the parties in *Stenberg* may not have asked the Court to save the Nebraska statute by merely severing or narrowly construing its problematic provisions, at least one amicus brief did request such relief. See *The Buck Stops Here, The Ayotte Case*, <http://stuartbuck.blogspot.com/2006/01/ayotte-case.html> (Jan. 20, 2006, 11:34 EST) (stating that an amicus brief filed by Feminists for Life had in fact asked the Court for a narrow interpretation of the statute).

53. See, e.g., Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1751, 1757–60 (2006) (arguing that the comparative competence of courts strongly cautions against facial adjudication and predicting that with the succession of Justice O’Connor by Justice Alito, the Court would move further in that direction).

54. 127 S. Ct. 1610, 1619, 1639 (2007). Justice Ginsburg, writing for the dissenters, voiced alarm at the majority’s blatant “refus[al]” to take seriously

titutional because it failed to include a provision that would have permitted the controversial procedure in circumstances necessary to protect the health of the mother.<sup>55</sup> In overturning the circuits, the Court declared the Act impervious to facial challenges, given that the “latitude” (overbreadth) afforded First Amendment cases was inapplicable.<sup>56</sup> As if the point needed further underscoring, the Court added that the facial challenges in issue “should not have been entertained in the first instance.”<sup>57</sup> For the first time, the Court explicitly rejected the notion that all restrictions on abortion procedures require health exceptions, stating that wherever a factual dispute exists as to whether a statute poses significant health risks to women, the proper mode of judicial review is case-by-case.<sup>58</sup> With respect to the evidence proffered to demonstrate an “undue burden” on a woman’s right to have an abortion, the Court found that the challengers failed to show that the act “would be unconstitutional in a large fraction of relevant cases.”<sup>59</sup>

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precedent that not only countenanced the facial invalidation of statutes lacking health exceptions, but also endorsed the general availability of facial challenges in the abortion setting. *Id.* at 1641.

55. See *Planned Parenthood Fed’n of Am. v. Gonzales*, 435 F.3d 1163, 1172 (9th Cir. 2006), *overruled by* *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007); *Carhart v. Gonzales*, 413 F.3d 791, 803 (8th Cir. 2005), *overruled by* *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). The Ninth Circuit also found the Act impermissibly vague and unduly burdensome on a woman’s right to choose a second trimester abortion. See *Planned Parenthood Fed’n of Am.*, 435 F.3d at 1176, 1180–81.

56. *Carhart*, 127 S. Ct. at 1638–39.

57. *Id.* at 1638.

58. See *id.* at 1638–39. Although the Court left the door open for as-applied challenges to the Act, it appears as though none followed. See Edward Whelan, *The Mystery of the Missing Lawsuits: One Year After the Supreme Court’s Partial-Birth-Abortion Ruling*, NAT’L REV. ONLINE, Apr. 18, 2008, <http://article.nationalreview.com/print/?q=MjU3MmU2YmU4ZjAwNDVkY2NlOWJkNWE4NThlMGE0MWM=> (claiming that no as-applied challenges have since been brought).

59. *Carhart*, 127 S. Ct. at 1639 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)). In light of the Roberts Court’s retraction of the abortion overbreadth exception, one article suggests that reproductive rights advocates might fare better by bringing lawsuits predicated on the “purpose” prong of *Casey*’s undue burden test. See Note, *After Ayotte: The Need to Defend Abortion Rights With Renewed ‘Purpose,’* 119 HARV. L. REV. 2552, 2565 (2006). *But see* *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (imposing an evidentiary burden on litigants claiming improper motive on the part of a legislature).

### III. THE SPECIAL CONTEXT OF ELECTION LAW

The emphasis on as-applied challenges as the preferred method of challenging unconstitutional state action has been particularly salient in recent election law cases. In the context of campaign finance, regulation of political parties, and voter identification requirements, the opinions of the Roberts Court have discussed the as-applied/facial issue to a degree never before seen in an election law case. These cases illustrate the tension in the evolution of the relevant constitutional jurisprudence, while at the same time they force us to ask whether the election law context, like the First Amendment and abortion rights contexts, should be treated as special for some reason.

#### A. WISCONSIN RIGHT TO LIFE

Perhaps the largest transformation in election law during the Roberts Court has occurred in the area of campaign finance. The replacement of Chief Justice William Rehnquist and Justice Sandra Day O'Connor with Chief Justice John Roberts and Justice Samuel Alito flipped a fragile 5-4 majority that was deferential to campaign finance reforms to one that appears aggressively committed to striking such measures down as abridging First Amendment rights.<sup>60</sup> In fact, the Roberts Court has struck down all three campaign finance laws it has considered.<sup>61</sup> "Struck down" might overstate what it has done, because in a recent and significant campaign finance decision, the Court vindicated an as-applied challenge that effectively gutted the relevant provisions of the law.

In *Federal Election Commission v. Wisconsin Right to Life* (*WRTL*), the Court struck down Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA) as applied to an advertisement that asked voters in Wisconsin to call their Senators to tell them to confirm President Bush's judicial nominees.<sup>62</sup> The law prohibits the airing of such advertisements, funded by corporate treasury funds, within sixty days of a general election if

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60. See Persily, *supra* note 1 (manuscript at 15–18) (discussing the Roberts Court's campaign finance decisions).

61. See *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2766, 2775 (2008) (striking down the so-called Millionaire's Amendment to the Bipartisan Campaign Reform Act of 2002 (BCRA)); *Fed. Election Comm'n v. Wis. Right to Life* (*WRTL*), 127 S. Ct. 2652, 2659 (2007) (striking down BCRA express advocacy provisions as applied to certain types of ads); *Randall v. Sorrell* 126 S. Ct. 2479, 2485 (2006) (striking down Vermont's expenditure and contribution limits).

62. See *WRTL*, 127 S. Ct. at 2659–61.

they “refer[] to a clearly identified candidate for Federal office” (the so-called “primary definition” of electioneering communications).<sup>63</sup> A pro-life organization called Wisconsin Right to Life (WRTL) paid for the ad with corporate funds and the ad mentioned by name Senator Russ Feingold, who was up for reelection,<sup>64</sup> so it was captured by the law. However, the Court considered the ad protected-issue advocacy, instead of a less-protected electioneering communication,<sup>65</sup> and also held that the law was unconstitutional as-applied to any similar ad unless the ad was “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>66</sup> The Court split into three camps: Chief Justice Roberts’s controlling opinion (joined by Justice Alito) struck down the law as-applied;<sup>67</sup> Justice Scalia’s concurrence (joined by Justices Thomas and Kennedy) would have struck down the law on its face;<sup>68</sup> and Justice Souter’s dissent (joined by Justices Stevens, Ginsburg and Breyer) would have upheld the law both as-applied and on its face.<sup>69</sup>

Unlike the other opinions we will soon discuss, *WRTL* is notable for its vindication of an as-applied challenge, as opposed to its reservation of as-applied challenges en route to denying a facial challenge. Generally, we think of as-applied challenges as carving out exceptions to a largely constitutional statute.<sup>70</sup> However, the *WRTL* decision strikes down the law as applied to most of the advertisements to which it was directed.<sup>71</sup> Most corporate-funded advertisements that run within sixty days of a general election and that refer to candidates running for office are susceptible to some interpretation other than appeals to vote for or against those candidates.<sup>72</sup> Indeed,

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63. 2 U.S.C. § 434(f)(3)(A)(i) (2006), *declared unconstitutional as applied by WRTL*, 127 S. Ct. at 2652.

64. *WRTL*, 127 S. Ct. at 2660–61, 2663. It also mentioned Senator Herb Kohl, who was not up for reelection. *See id.* at 2699 (Souter, J., dissenting).

65. *See id.* at 2659, 2663.

66. *Id.* at 2667.

67. *Id.* at 2658. Justice Alito also wrote separately to emphasize that if the standard in the controlling opinion proved unworkable, he would also strike down the law on its face. *See id.* at 2674 (Alito, J., concurring).

68. *See id.* at 2674, 2686–87.

69. *See id.* at 2687, 2698–99, 2704–05.

70. *See Persily, supra* note 1 (manuscript at 30).

71. *See WRTL*, 127 S. Ct. at 2659.

72. *See, e.g., id.* at 2670 (“WRTL’s ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate . . .”).

the reason Congress passed such a sweeping corporate speech code was that the “magic words” standard of *Buckley v. Valeo* proved so easy to get around.<sup>73</sup> Ads would end with an exhortation to “call your member of Congress to tell them how you feel,” instead of an appeal to vote a particular way, but the message was still clear.<sup>74</sup>

In *McConnell v. Federal Election Commission*, the Court upheld Title II of BCRA on its face, but, in a footnote, left open the possibility of as-applied challenges.<sup>75</sup> The ad at issue in *WRTL* presented such a challenge, but the Court’s decision goes much farther than merely holding that particular ad protected. It created the “susceptible of no reasonable interpretation” standard for as-applied challenges to BCRA going forward.<sup>76</sup> This blew a huge hole in the law’s primary definition of electioneering communications while pretending not to revisit or undermine the central holding of *McConnell*<sup>77</sup> and while attempting merely to reconcile conflicting precedent concerning the anti-corruption interest necessary to justify bans on corporate treasury-funded ads.<sup>78</sup>

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73. See *id.* at 2692, 2702 (Souter, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976)) (“This construction would restrict the application . . . to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ or ‘reject.’”).

74. See CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 29–36, 71–73 (2001) (noting the prevalence of group-sponsored issue ads and arguing that a sixty-day bright-line test would offer a more precise standard for defining electioneering activity); JONATHAN S. KRASNO & DANIEL E. SELTZ, BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS 9 (2000). The “Buying Time” studies became a source of great controversy in the *McConnell* litigation, so much so that Chief Justice Roberts went out of his way in *WRTL* to minimize their significance. See 127 S. Ct. at 2665 & n.4 (mocking the “student coders” of *McConnell*’s evidentiary record).

75. 540 U.S. 93, 157 n.52, 224 (2003).

76. *WRTL*, 127 S. Ct. at 2667.

77. *Id.* at 2659 (“[I]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges.” (citation omitted)); see also *id.* at 2664 (“This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. So to the extent the ads in these cases fit this description, the FEC’s burden is not onerous; all it need do is point to *McConnell* and explain why it applies here.” (citation omitted)).

78. The Court reconciles *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *First National Bank v. Bellotti*, 435 U.S. 765 (1978), so as to come to the conclusion that the unique anticorruption interest does not extend beyond corporate-funded express advocacy of the election of candidates.

Although traditionally conceived as growing from impulses of judicial restraint, as-applied challenges can also provide an opportunity, as shown in *WRTL*, for the sometimes dramatic reworking of both judicial precedent and statutory meaning. It is very difficult to reconcile the holding of *WRTL* with the Court's rejection of the facial challenge to Title II in *McConnell*.<sup>79</sup> Perhaps it is so obvious that it need not be said, but this vindication of the as-applied challenge can best be explained as Chief Justice Roberts and Justice Alito's rough compromise between fidelity to precedent (*stare decisis*) and their fundamental disagreement with *McConnell*'s holding. The as-applied holding allows them to carve an exception to the law that is as large as the legislative record justifying it: most of the "objectionable" ads that formed the core justification of Title II's sweeping regulation turn out to be constitutionally protected. By striking down this law as applied to the facts of this ad and all others satisfying the "no reasonable interpretation" standard, the Court can say that BCRA Title II is constitutional in theory, but rarely in practice. Moreover, as Justice Alito's separate opinion states, the new as-applied standard allows for the possibility that further challenges will demonstrate its unworkability and prove the necessity of overturning the law on its face.<sup>80</sup>

Completely unmentioned in the controlling opinion is the fact that Title II of BCRA had its own built-in way to accommodate Roberts and Alito's misgivings: a backup definition of electioneering communications would be triggered if the primary definition were held unconstitutional. In the event the primary definition of electioneering communications (the "refers to a clearly identified candidate" standard) were declared unconstitutional, Title II provided a secondary definition:

any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate

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*WRTL*, 127 S. Ct. at 2672 ("These cases did not suggest, however, that the interest in combating 'a different type of corruption' extended beyond campaign speech.").

79. See Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1103–08 (2008) (noting the tension between *McConnell*'s overbreadth holding and the reasoning of *WRTL*).

80. *WRTL*, 127 S. Ct. at 2674 (Alito, J., concurring) ("If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell* that § 203 is facially constitutional." (citation omitted)).

for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.<sup>81</sup>

However, because it limits itself to the law as applied to those plaintiffs, the *WRTL* holding did not technically trigger the backup definition.

From the standpoint of as-applied doctrine or jurisprudence, the Court's decision to redefine the primary definition of electioneering, rather than to strike it down and trigger the backup, is peculiar along several dimensions. The remedy to an as-applied challenge depends, in part, on severability of the relevant statute—that is, the Court carves out an exception for the plaintiff while remaining true, if possible, to the purpose of the statute.<sup>82</sup> However, *WRTL* guts the primary definition of electioneering and substitutes its own definition, which is very close, but not precisely the same, as the backup definition.<sup>83</sup> In doing so, the Court rewrites a law that does not need to be rewritten and does so in a way that Congress specifically avoided. The normal preference for as-applied challenges arising from considerations of judicial restraint is completely inapposite here when Congress has clearly expressed its preference in legislation and the Court's sweeping exception swallows the legislative rule while adopting a third option for which no one voted.

Given the similarities in impact between the Court's new standard and the backup definition, it becomes even more difficult to characterize the decision as truly an as-applied holding. It is difficult to think of an ad that could be regulated under the Court's definition of electioneering (one capable of no reasonable interpretation other than an exhortation to vote for or against a candidate<sup>84</sup>) but that would not be regulated under the statute's backup definition (which covers all ads that both are incapable of no other "plausible meaning" other than an exhortation to vote for or against and also promote, support, attack, or oppose a candidate).<sup>85</sup> If that is right, then the Court actually struck down the primary definition on its face by carv-

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81. 2 U.S.C. § 434(f)(3)(A)(ii) (2006), *declared unconstitutional as applied by WRTL*, 127 S. Ct. 2652 (2007).

82. *See* Persily, *supra* note 1 (manuscript at 30).

83. *Compare WRTL*, 127 S. Ct. at 2667 (creating the "susceptible of no reasonable interpretation" standard), *with* 2 U.S.C. § 434(f)(3)(A)(ii) (setting forth the "susceptible of no plausible meaning" standard).

84. *See WRTL*, 127 S. Ct. at 2667.

85. *See* 2 U.S.C. § 434(f)(3)(A)(ii).

ing out all possible applications of the primary definition that would not have been covered by the secondary definition.

Finally, there is no mention at all in the controlling opinion that the First Amendment standard for facial challenges differs from that for the run-of-the mill constitutional case. As noted above, “substantial overbreadth” is the most that would be necessary to strike down a speech restriction on its face.<sup>86</sup> It is almost as if campaign finance (or perhaps election law more generally) were viewed as an exception to the First Amendment exception to facial challenges. Surely, the logic of the opinion and a cursory look at the legislative record suggest that, at a minimum, a “substantial number” of the applications of the primary definition of electioneering are unconstitutional, “judged in relation to the statute’s plainly legitimate sweep.”<sup>87</sup>

#### B. WASHINGTON STATE GRANGE

This last critique of *WRTL*—that it ignores the uniqueness of the facial/as-applied distinction in the First Amendment context—can also be lodged against the Court’s 7-2 decision in *Washington State Grange v. Washington State Republican Party*.<sup>88</sup> There, the Supreme Court rejected a facial challenge to Washington’s modified blanket primary system, which allowed any candidate to express a “party preference” on a unified primary ballot.<sup>89</sup> The parties argued that this represented forced association in violation of the First Amendment because voters would assume the party had endorsed, nominated, or associated itself with such a candidate, when it might specifically want to disavow such a candidate.<sup>90</sup> The Supreme Court rejected the facial challenge but left open the door to future as-applied challenges once the state had crafted an actual ballot in which a plaintiff could show voter confusion.<sup>91</sup>

*Washington State Grange* illustrates the interrelationship or slippage between the as-applied doctrine and the doctrines of ripeness and constitutional avoidance. The deficiency in the facial challenge brought by the parties there was not that it failed, per se, to prove that the law was unconstitutional in all

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86. See *supra* Part II.A.

87. See *New York v. Ferber*, 458 U.S. 747, 769–771 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

88. 128 S. Ct. 1184 (2008).

89. *Id.* at 1187.

90. *Id.* at 1189.

91. *Id.* at 1195.

its applications. Rather, the challenge failed because the law had not yet been applied at all, so it was unclear if it would be unconstitutional in all or any of its applications.<sup>92</sup> This is a subtle but important difference. At this preenforcement stage, the Court could not strike down the law because it did not know what the law actually meant, nor could it discern whether a constitutional violation would occur once it was enforced.<sup>93</sup> Unlike the paradigmatic rejection of a facial challenge on the grounds that some applications of the law would be constitutional, here the Court suggested that the law might be unconstitutional in all of its applications (that is, if it caused voter confusion), but such an injury was mere speculation at the time the lawsuit was filed.<sup>94</sup>

Perhaps more than in any other case—certainly any other election law case—the *Washington State Grange* opinion explains the rationale for avoiding facial invalidations if at all possible. The Court warns about claims of facial invalidity because they “often rest on speculation” and “raise the risk of ‘premature interpretation of statutes on the basis of factually barebones records.’”<sup>95</sup> The majority opinion also extols the virtue of a bias against facial invalidation as arising from general principles of judicial restraint (not deciding a constitutional issue unless absolutely necessary and even then crafting as narrow a rule as possible) and respect for the democratic process.<sup>96</sup> Therefore, while a law that authentically confused voters as to whether a candidate was in fact the party’s nominee or even a party member might be unconstitutional, one that merely allowed candidates to state a party preference was not.<sup>97</sup> To assess the constitutionality of the law, the Court needed to await

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92. *See id.* (“Each of the [respondents’] arguments rests on factual assumptions about voter confusion, and each fails for the same reason: In the absence of evidence, we cannot assume that Washington voters will be misled.”).

93. *See id.*

94. *See id.* at 1193. One other possible interpretation would be that the Court, once voter confusion is shown, would only strike down the law as applied to the party that had been injured by the confusion. That seems implausible given that such relief would then never cure the constitutional injury. At a minimum, the Court might prospectively immunize the party from having candidates use its name as a party preference. But it is difficult to see why one party would be susceptible to voter confusion as to whom it supports while another would not be.

95. *Id.* at 1191 (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

96. *Id.* at 1191.

97. *See id.* at 1195.

both the state's interpretation and enforcement of the law and the concomitant confusion, if any, that it would produce.<sup>98</sup>

Rather than describing this decision as one upholding the law on its face while reserving the right to strike it down as applied to some later plaintiff (*à la McConnell*), it seems more appropriate to say that the Court (despite express language to the contrary)<sup>99</sup> merely refused to pass judgment on the law because the factual record was inadequate to establish a constitutional violation. One could describe this as an argument concerning ripeness, standing, abstention, or simply the failure of the plaintiffs to provide an adequate factual record to demonstrate an "injury in fact." But whatever one calls it, the "upholding" of the law against a facial attack was really more about dismissing the claim because of a lack of information about the law and its effects.

Perhaps the best way to reveal what the Court was *really* doing is to envision what the next case would look like. Suppose a Nazi sympathizer runs in the primary and expresses a preference for the Republican Party. And suppose that preference is expressed by putting an "R" next to his name on the ballot, but the ballot in small print at the bottom of the first page (or even worse, in some separate ballot pamphlet) indicates that party preference designations do not imply any association, membership, or endorsement of the political party.<sup>100</sup> And suppose a later poll or other study reveals that most voters thought that the candidate was endorsed by the Republican Party. The Republican Party brings suit, now having already suffered the injury (suppose, even worse, that candidate wins office so the injury is long-lasting or irreparable). If the party launches a successful challenge to the law, can the Court strike down the law on its face based on these new developments or could it, at most, strike it down as applied to the Republican Party and any other party victimized by similar confusion?

In the traditional way of considering facial invalidity, it would appear that the law should be struck down on its face. The law is not unconstitutional because of the specific and

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98. *See id.*

99. *See id.* at 1196 ("[B]ecause there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse the voters, [the law] . . . is facially constitutional.").

100. As it turned out, the ballot notation for the 2008 election said "Prefers Republican Party" or "Prefers Democratic Party" under the candidate's name. *See* KITSAP COUNTY, WASH., SAMPLE BALLOT (2008), available at <http://www.kitsapgov.com/aud/elections/archive/08/sample%20ballot%20gen%202008.pdf>.

unique harms befalling the Republican Party; we simply know more about the meaning of the law and the extent of the potential injury than we did when the statute stood unenforced. Given that no remedy the Court could order would retroactively undo the harm of the confusion that led to the Nazi-sympathizing candidate's election, it makes no sense to suggest (as is often the case when considering unconstitutional applications) that the law was unconstitutional as applied to the Republican Party in the context of a particular candidacy. Any relief must be of a kind that holds this law, as enforced and interpreted, unconstitutional as applied to every party for every candidate based on the evidence gleaned from that experience.<sup>101</sup>

The Court's decision rejecting the facial challenge conflates two problems: the absence of a ballot (or state court interpretation) implementing the law and the absence of actual confusion arising from whatever ballot format the state employs.<sup>102</sup> The difference between those two deficiencies in this case is important for cases going forward. If the principal problem was the Court not knowing what the law would mean and what the ballot would look like, then the decision has a minor effect in the run-of-the-mill case in which the meaning of a law is clearer. Moreover, a challenge to the law need only wait until the ballot is printed, not until voter confusion results in the election of a candidate that the party objects to. If the crux of the Court's decision rests on the absence of voter confusion on the record before it, then the implications may be more dramatic and harmful. The result would be that a party (or rather, the polity) must first suffer the injury of voter confusion in an actual election before it or any other party can prove the law's unconstitutionality.

This is more than a mere academic or semantic point. The effect of the Court's decision is to force plaintiffs to suffer irre-

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101. One might say that the Court should strike down, on its face, the interpretation of the law by the state courts or administrative bodies while upholding the statute on its face because it could have been interpreted or enforced differently. There are two responses to this objection. First, the meaning of a state law for purposes of federal court review includes the state's definition and interpretation of the law. Second, even if one believes that the Court was, in a technical sense, upholding the statute but striking down its interpretation, it is doing both on their face. The Court's decision will apply to all potential plaintiffs because the injury will extend to them based on this new knowledge of how the law works.

102. See *Wash. State Grange*, 128 S. Ct. at 1195.

parable harm (in this case, confused voters in an election) in order to generate evidence as to the law's unconstitutionality. Chief Justice Roberts's concurrence took a different approach, which illustrates the problem with the majority's couching the case in the terms of as-applied or facial invalidity. For him, the only dispositive question was what the ballot would look like:

If the ballot is designed in such a manner that no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to "prefer," the I-872 primary system would likely pass constitutional muster. I cannot say on the present record that it would be impossible for the State to design such a ballot . . . . On the other hand, if the ballot merely lists the candidates' preferred parties next to the candidates' names, or otherwise fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment challenge.<sup>103</sup>

If the judge considers confusion to be a likely consequence of the ballot design, Roberts would have him strike it down on its face without having to wait for actual confusion at the polls.<sup>104</sup> "Nothing in my analysis," Roberts wrote, "requires the parties to produce studies regarding voter perceptions on this score, but I would wait to see what the ballot says before deciding whether it is unconstitutional."<sup>105</sup>

### C. *CRAWFORD V. MARION COUNTY ELECTION BOARD*

The *Washington State Grange* case seemed like an exotic election law dispute until a controlling opinion for the Court used its holding concerning as-applied challenges as precedent for the Court's most significant election case of the 2007-2008 Term: *Crawford v. Marion County Election Board*.<sup>106</sup> There, the Court upheld Indiana's voter identification requirement against a facial challenge, while expressly reserving the possibility that the requirement might be unconstitutional as applied to particular plaintiffs in some later case.<sup>107</sup> Like *Washington State Grange*, however, the opinion is somewhat unclear

103. *Id.* at 1197 (Roberts, C.J., concurring).

104. *See id.*

105. *Id.*

106. 128 S. Ct. 1610, 1622 (2008) (declaring that *Washington State Grange's* reasoning "applied with added force" to petitioner's arguments).

107. *See id.* at 1623 ("[W]e note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute."); *see also id.* at 1623 n.20 (responding to the dissent's concern that the law would burden "tens of thousands" of voters by arguing that such concerns were based on "speculation," not "admissible evidence").

as to whether the problem with the plaintiffs' case was a bad set of facts, an inadequate record, poor lawyering, or premature adjudication.

The Court split three ways in *Crawford*. Justice Stevens wrote the controlling opinion for himself, Justice Kennedy, and Chief Justice Roberts, rejecting the facial challenge but leaving open the possibility of future as-applied challenges.<sup>108</sup> Justice Scalia concurred, joined by Justices Thomas and Alito, arguing that the law should be upheld on its face and future as-applied challenges should be foreclosed.<sup>109</sup> Justice Souter, joined by Justice Ginsburg, submitted a dissent, as did Justice Breyer; they would have struck down the law on its face.<sup>110</sup>

The controlling opinion is somewhat inexact in its assessment of the severity of the burden on voting rights posed by the photo ID law and of the number of people for whom it will present a severe burden.<sup>111</sup> In part, this is a result of what Justice Stevens finds to be insufficient facts in the record on these critical points.<sup>112</sup> The plaintiffs did not produce a single person who would say that he or she would not vote because of the ID requirement.<sup>113</sup> The number of Indianans without ID was uncertain and contested and as to the difficulties faced by the elderly and indigent voters in their attempts to obtain ID, "the record says virtually nothing."<sup>114</sup> "[E]ven assuming an unjustified burden on some voters," the controlling opinion maintains, those challenging the law had not demonstrated that facial invalidation was the proper remedy.<sup>115</sup>

Left hanging in the opinion is the question of what type of evidence might have been sufficient to warrant striking down the law on its face or what future plaintiffs would need to demonstrate to prove the law unconstitutional as applied to

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108. *See id.* at 1613, 1621.

109. *See id.* at 1625–26 (Scalia, J., concurring) (preferring a "general assessment of the burden" over "voter-by-voter examination").

110. *See id.* at 1627 (Souter, J., dissenting); *id.* at 1643 (Breyer, J., dissenting).

111. *Id.* at 1623 n.20 (majority opinion).

112. *Id.* at 1622 ("[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.").

113. *Id.* at 1614.

114. *Id.* at 1622.

115. *Id.* at 1623 (citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) and *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008)).

them.<sup>116</sup> If the opinion really is about the deficiencies in the record, then it seems to leave open the possibility that the law is both unconstitutional on its face and as-applied to some subset of voters who have difficulty getting a photo ID. At the time the district court had heard the challenge to the ID law, no statewide election had taken place, and as mentioned before, no voter came forward to say he or she would not be able to vote because of the law.<sup>117</sup> If in a subsequent election it turns out that a large number of voters cannot vote because of the ID requirement,<sup>118</sup> maybe we will learn that the law is unconstitutional on its face because the State's anti-fraud interests do not justify such an impediment for such a large number of people. Or, even if the law is constitutional on its face, perhaps a small group of voters (or maybe even just an individual voter) has sufficient difficulty getting an ID that they can prove the law unconstitutional as applied to them. Such might have been the case for the now-famous group of nuns that had difficulty voting in the Indiana presidential primary.<sup>119</sup>

Of course, these options are more theoretical than real, at least in the context of the Indiana law. The number of voters as to whom one could definitively prove that acquiring a photo ID is severely burdensome such that they will not vote almost certainly does not rise to a level that would justify striking the law down on its face.<sup>120</sup> This is especially true given the credence and significance the Court attributed to the state's anti-fraud

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116. Soon after *Crawford*, an Indiana voter brought an as-applied challenge to the Voter ID Law, this time buttressing the constitutional claims with evidence that he personally had to travel a great distance and pay fees in order to obtain a valid state identification. *Stewart v. Marion County*, No. 1:08-CV-586-LJM-TAB, 2008 WL 4690984, at \*1-3 (S.D. Ind. Oct. 21, 2008). Recently, the district court denied the plaintiff's motion for temporary injunctive relief on the ground that despite demonstrated inconveniences, the record still lacked evidence of "a burden that, on balance, outweighs the State's interest in protecting against voter fraud" under *Crawford*. *Id.* at \*3.

117. See *Crawford*, 472 F.3d at 952.

118. Of course, "how large a number of voters" and "how severe the burden" will remain the critical questions. See *Crawford*, 128 S. Ct. at 1616 (reviewing prior election cases focusing on the severity of the burden and the number of voters affected).

119. See Associated Press, *Nuns with Dated ID Turned Away at Polls*, MSNBC.COM, May 6, 2008, <http://www.msnbc.msn.com/id/24490932/>.

120. Michael Pitts estimates that approximately 400 voters in the Indiana presidential primary election did not have their provisional ballots counted because of a failure to present ID. Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, J.L. & POL. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287735](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287735).

interests.<sup>121</sup> And for those voters who face a special burden navigating the bureaucratic hurdles to acquire an ID, launching a federal as-applied lawsuit would hardly seem to be an easier path to the voting booth.<sup>122</sup>

The lack of clarity in the meaning of the *Crawford* decision illustrates unique problems concerning the as-applied/facial distinction in voting rights cases. In the ordinary constitutional case governed by the *Salerno* standard, the demonstration of a severe burden on the rights of a subgroup disparately affected by the law (all else equal) would lead a court to find the law unconstitutional as applied to that group but not to those for whom the law does not present a severe burden. However, the constitutional test that comes from *Anderson v. Celebrezze*,<sup>123</sup> and which the Court applied in *Crawford*, acknowledges the possibility that a severe burden on a minority of people affected

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121. See Persily, *supra* note 1 (manuscript at 9–12) (discussing the importance of the Court’s decision regarding the state’s antifraud interests and the relationship between that issue and the Court’s consideration of the facial/as-applied distinction).

122. *Crawford* led lower courts to reject facial challenges with the added caveat that as-applied challenges relying on the same constitutional theories could potentially succeed. See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 979–80 (9th Cir. 2008) (rejecting a facial attack to an Arizona immigration statute that had yet to be enforced, but inviting litigants to bring future challenges “if and when . . . the factual background is developed” (citing *Crawford*, 128 S. Ct. at 1621)); *Warshak v. United States*, 532 F.3d 521, 530 (6th Cir. 2008) (declaring facial invalidation inappropriate where the full impact of a statute remained speculative and explaining that it would be “far more prudent to ‘await an as-applied challenge’ to decide whether the Act is constitutional in a discrete factual setting” (citing *Crawford*, 128 S. Ct. at 1621–23; *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1184, 1194–95 (2008))); *Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021, at \*5 (E.D. Tex. Aug. 7, 2008) (upholding a Texas law that prohibited the act of signing as a witness to more than one early voting ballot application, relying at least in part on the fact that, as in *Crawford*, the record below lacked “concrete evidence” demonstrating a severe enough burden on voter participation); cf. *Am. Ass’n of People with Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1213 (D.N.M. 2008) (rejecting both a facial challenge and an as-applied challenge to New Mexico’s statutory restrictions on third-party voter registration drives and citing *Crawford* for the proposition that plaintiffs lodging facial attacks may bear a heavy burden of persuasion). The most significant and telling post-*Crawford* voting rights opinion may be *Florida State Conference of the NAACP v. Browning*, 569 F. Supp. 2d 1237, 1237 (N.D. Fla. 2008) (rejecting a facial challenge to Florida’s voter-registration law requiring a matching verification process). Cases concerning the added burdens placed on voters mismatched in voter registration lists will become more prevalent in the continuing debate over voter fraud and access.

123. 460 U.S. 780, 789 (1983).

by the law could still justify facial invalidation of the law.<sup>124</sup> Such was the case when the Court struck down a poll tax on its face rather than simply ruling that it was unconstitutional as applied to poor people.<sup>125</sup> In *Crawford*, the controlling opinion held that the petitioners failed to prove that the law posed “‘excessively burdensome requirements’ on *any* class of voters.”<sup>126</sup> Therefore, if the plaintiffs in a future case could demonstrate a severe burden on at least some voters, the Court would then need to answer whether the class of severely burdened voters was sufficiently large to outweigh the state’s antifraud interests *and* whether the proper remedy would be invalidating the statute or simply protecting the burdened voters by striking it down as applied to them.

The potential effect of the Court’s facial holding was not lost on Justice Scalia, who thought that the only constitutional question was the impact of the photo ID requirement on voters generally, not any subgroup in particular.<sup>127</sup> He derided the controlling opinion as relying on a “record-based resolution of these cases.”<sup>128</sup> For him, the fact that the law applied to everyone and had no invidious discriminatory purpose was the end of the matter.<sup>129</sup> The burden on all voters was the same, even

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124. See 128 S. Ct. at 1623 (suggesting a potentially different outcome if the majority could have concluded that the statute imposed “excessively burdensome requirements”).

125. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). The *Crawford* Court tried to distinguish *Harper* by suggesting that unlike that case, an election-related state interest (preventing fraud) justifies the Indiana ID rule whereas a poll tax was unrelated to voter qualifications. See *Crawford*, 128 S. Ct. at 1615–16; *id.* at 1626 & n.1 (Scalia, J., concurring) (“[W]e have never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities.”). Of course, the proponents of the poll tax thought it was very relevant to voter qualifications. 383 U.S. at 674 (Black, J., dissenting). One might also ask whether, as to the state justification, the tax would then be constitutional if used to fund elections, as opposed to fund schools as was true in Virginia. See *id.* at 664 n.1 (majority opinion).

126. 128 S. Ct. at 1623 (citing *Storer v. Brown*, 415 U.S. 724, 738 (1914)) (emphasis added).

127. *Id.* at 1625 (Scalia, J., concurring).

128. *Id.* at 1627.

129. To hold otherwise “would effectively turn back decades of equal-protection jurisprudence,” Scalia argued, because “[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class.*” *Id.* at 1626. This is a peculiar argument to make in the voting rights context given that the fundamental interest prong of equal protection, not the suspect classification prong, is the constitutional source for the right to vote. Indeed, this approach would itself turn back the clock—effectively overruling a series of cases from *Rey-*

though some voters, because of their personal situations, felt different impacts from the law.<sup>130</sup> His discomfort with the specter of “constant litigation” where the “potential allegations of severe burden are endless” suggests that even those voters who suffered unique impacts from the law would be out of luck.<sup>131</sup>

#### IV. AN “ELECTION LAW EXCEPTION” TO THE DOCTRINE GOVERNING FACIAL CHALLENGES?

Justice Scalia’s concurrence did not end with his objection to the “record-based resolution”<sup>132</sup> of the voter ID case. What he next suggested provides a global argument as to why in the election law arena the Court should prefer facial challenges to as-applied ones. “This is an area where the dos and don’ts need to be known in advance of the election,” Scalia explained, “and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive.”<sup>133</sup> Ordinarily one thinks of Justice Scalia as pushing in the direction of as-applied challenges,<sup>134</sup> but in all three of the election law cases discussed above he would have either upheld (*Crawford*) or struck down (*Washington State Grange* and *WRTL*) the laws on their face.<sup>135</sup> Even if one disagrees with where he would come out, his concern as to the costs of as-applied challenges in election law cases should also worry those who would be more receptive to regulations of campaign finance and party reform and more skeptical about voter ID laws. Indeed, as a general matter, the as-applied/facial challenge doctrine in the election law arena ought to facilitate the development of clear pre-election rules

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*nolds v. Sims* (one person, one vote) to *Bush v. Gore* (vague intent of the voter standard deemed unconstitutional under the Equal Protection Clause). See *Bush v. Gore*, 531 U.S. 98, 105 (2000); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (citing *Gray v. Sanders*, 372 U.S. 368, 381 (1963)). Justice Scalia appears to make an exception for poll taxes and candidate filing fees because they were related to money, which is a way to distinguish those cases, but not explain them. *Crawford*, 128 S. Ct. at 1626 n.1.

130. *Crawford*, 128 S. Ct. at 1625.

131. *Id.* at 1626.

132. *Id.* at 1627.

133. *Id.* at 1626.

134. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting) (criticizing what he referred to as the Court’s “entirely irrational exceptions” to the usual restriction on facial challenges); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1176 (1996) (Scalia, J., dissenting).

135. See *Crawford*, 128 S. Ct. at 1627; *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1198 (2008) (Scalia, J., dissenting); *WRTL*, 127 S. Ct. 2652, 2676 (2007) (Scalia, J., concurring).

(clarity). The doctrine should also recognize the irreparability of the injury that often occurs if the results of an election must serve as the record for establishing an individual's voting rights claim (irreparability). Finally, it should acknowledge that the costs to the individual (or even to litigators or political parties) in bringing a voting rights lawsuit often outweigh the benefits of vindicating the individual right to vote (cost).

Given the breakdown in the as-applied/facial challenge distinction, it would be sloppy to advocate for greater facilitation of facial challenges *per se*. Whether the Court says it is striking down a law on its face or as-applied is less important than its adjudication of the case with a concern toward the salient features of election law challenges described above: clarity, irreparability, and cost. Little practical difference usually exists between a facial challenge that leads to the voiding of a narrow statutory provision and an as-applied challenge that leads to broad relief for the plaintiff and a large number of others who are similarly situated (as in *WRTL*).<sup>136</sup> In the election law context as in others, courts will be called upon both to make exceptions for parties uniquely burdened by a particular law and at other times to void entire statutes (or large sections of them).

Neither extreme position—that courts should only deal with such challenges facially or as-applied—is tenable or desirable. Thus, while tentatively suggesting that the Court ought to lower the bar for facial challenges in election law cases, we mean to say that broader relief beyond that narrowly tailored to a plaintiff's circumstances ought ordinarily to be available. The need for clear pre-election rules and the drawbacks of deciding legal issues only when the candidate or party who might benefit is well-known argues against the ordinary hesitancy of courts to avoid constitutional questions before ascertaining the precise scope of potential injuries. Even though we would advocate greater judicial rulemaking, as opposed to exception-carving, we recognize that reasonable disagreement exists as to whether courts should be more protective of democracy-related rights or more deferential to state laws regulating elections. For those who believe that checking the burdens on minority parties, speakers, and voters remains the central constitutional goal in evaluating election law statutes, then the rules judges create in this realm should reflect greater concern for the “ex-

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136. See *supra* Part III.A.

ceptional” cases of those who shoulder the disproportionate weight of such laws.

Because the constitutional law of elections represents a family of doctrines sometimes only loosely connected by their relationship to the proper functioning of American democracy, it is somewhat difficult to argue for a sweeping “election law exception” to the general principles governing facial and as-applied challenges. We do not and could not argue that any constitutional question touching on elections must be given the most capacious answer by judges irrespective of statutory context. Moreover, it may be the case that in some election law domains the concerns expressed above are less present than in others. In the realm of campaign finance, for example, the cost of piecemeal adjudication has not deterred public interest organizations and parties from launching a series of as-applied challenges.<sup>137</sup> But when those characteristically election-related concerns are present, the courts ought to relax the burdens on facial challenges that exist in the ordinary case.

Beyond a modest shift in presumptions in favor of considering an election law’s facial validity, however, we would also advocate something akin to “substantial overbreadth” analysis in many election law contexts. Space constraints prevent a detailed explication here, but as explained earlier in this Article, it remains a puzzle why the Court did not seem to conduct such an analysis in the First Amendment election contexts of campaign finance<sup>138</sup> and party associational rights.<sup>139</sup> In a case challenging barriers to voting, moreover, something like overbreadth analysis seems unavoidable. The inquiry in *Crawford*, as in any similar case, boils down to whether the state can justify the likelihood that a certain number of voters will find it difficult or impossible to vote because of the law. Although “how many voters?” and “how difficult?” remain the important questions under any inquiry, the Court must decide whether the state interests justify the disproportionate burden placed on a minority of potential voters. That question can rarely be answered by saying that the burdened voters ought to bring as-applied challenges: poll taxes are not unconstitutional as ap-

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137. See, e.g., Persily, *supra* note 1 (manuscript at 15–18).

138. See *id.*

139. See, e.g., *Wash. State Grange*, 128 S. Ct. at 1195 n.10 (holding that the statute was constitutional under the First Amendment because “[it] does not require the parties to reproduce another’s speech against their will, nor does it co-opt the parties’ own conduits for speech”).

plied only to poor people, and literacy tests would not be unconstitutional (if at all)<sup>140</sup> as applied only to illiterate people. The prerequisite to voting is either justifiable—in the abstract and given the recognized potential to prevent some from voting—as a proper means of serving some state interest or not.

## V. EPILOGUE

The Supreme Court is currently considering an challenge to the constitutionality of Section Five of the newly reauthorized Voting Rights Act (VRA) in *Northwest Austin Municipal Utility District Number One v. Mukasey* (“NAMUDNO”).<sup>141</sup> That provision requires “covered jurisdictions” to receive federal permission for changes to laws concerning voting.<sup>142</sup> Section Five was passed to constrain certain jurisdictions, particularly but not exclusively in the South, from enacting racially discriminatory election laws.<sup>143</sup> The Court will now consider whether the law is unconstitutional on its face or as-applied to the plaintiff, a municipal utility district in Austin, Texas. The utility district argues that the law exceeds congressional power under Section Two of the Fifteenth Amendment<sup>144</sup> and Section Five of the Fourteenth Amendment<sup>145</sup> if it is read to cover a small jurisdiction with no history of racial discrimination in voting. Although the district court rejected both facial and as-applied challenges to the statute, the utility district has now largely abandoned its as-applied argument and described its challenge to the Supreme Court as primarily a facial one.

Because it is based on a federalism argument challenging congressional power, the *NAMUDNO* case differs from the as-applied challenges the Court has considered in *WRTL*, *Washington State Grange*, and *Crawford*.<sup>146</sup> Unlike those cases, the

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140. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 54 (1959) (upholding the constitutionality of literacy tests).

141. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (NAMUDNO)*, 573 F. Supp. 2d 221 (D.D.C. 2008), *prob. juris. noted* 129 S. Ct. 894 (2009).

142. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 177, 196–99 (2007) (describing the selection of “covered jurisdictions” and the statute’s purpose of remedying some legislatures’ attempts to “deprive African Americans of their right to vote, regardless of what a federal court might order”).

143. See *id.*

144. *NAMUDNO*, 573 F. Supp. 2d at 283.

145. *Id.* at 223–24.

146. See generally Metzger, *supra* note 26 (discussing federalism and as-applied challenges).

plaintiff here does not allege that the law places a unique burden on its constitutionally guaranteed rights, *per se*. Rather, the petitioner in *NAMUDNO* argues that the law is particularly unjustified as applied to it, so much so that Congress does not have the power to capture this jurisdiction within the regulatory reach of the law.<sup>147</sup> Under this view of the Enforcement Clauses of the post-Civil War Amendments, Congress may not pass a law that unfairly groups jurisdictions with and without histories of discrimination in voting rights.

The district court rejected the utility district's as-applied challenge on several grounds.<sup>148</sup> First, the Supreme Court's decision in *City of Rome v. United States* rejected a similar as-applied claim to the earlier incarnation of the VRA brought by a city that disclaimed any history of discrimination in voting rights.<sup>149</sup> The district court read *Rome* to hold that "where, as here, Congress has compiled a sufficient legislative record to defeat a facial constitutional challenge . . . an as-applied challenge based on a political subunit's record of nondiscrimination must also fail."<sup>150</sup> Second, even if Congress must provide a more focused jurisdiction-based justification for coverage—a position never taken by the Court's majority—the relevant unit for identifying discrimination would be the state, not each locality within it.<sup>151</sup> Otherwise, Congress could never compile a sufficiently comprehensive record of discrimination by every affected governmental body to justify prophylactic civil rights legislation.<sup>152</sup> In the case of the VRA, Congress at least provided examples of voting rights violations for each of the covered states, even if not for each of the hundreds of governmental sub-units within them.<sup>153</sup> Finally, Congress acts as a *national* policymaker when it enacts prophylactic or remedial civil rights legislations. Its findings are necessarily national in scope, not tailored to every single jurisdiction affected by the proposed law.

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147. See *NAMUDNO*, 573 F. Supp. 2d at 278–82.

148. See *id.*

149. 446 U.S. 156, 157–58 (1980).

150. *NAMUDNO*, 573 F. Supp. 2d at 280 (internal citation omitted).

151. *Id.* at 280–81.

152. *Id.* (agreeing with the NAACP that adopting a local instead of state approach would "require Congress to determine the appropriateness" of the law in every "state, county, city, village, [and] utility district").

153. See Persily, *supra* note 143, at 195–207 (discussing the legislative record for the reauthorized VRA).

The structure of the VRA also provides its own administrative analog to as-applied challenges. Through its “bailout” provisions<sup>154</sup> the VRA allows jurisdictions to escape coverage by proving in court their record of good behavior with respect to minority voting rights for the previous ten years.<sup>155</sup> Therefore, if a covered jurisdiction considers itself unjustifiably burdened by the requirement of preclearance, it can sue for bailout in the U.S. District Court for the District of Columbia. To do so does not require a showing that the law is unconstitutional as-applied to the jurisdiction, just that its recent record of behavior with respect to voting rights has proven that coverage is unwarranted.

Recognizing this potential avenue of relief, the plaintiff in *NAMUDNO* asked, in the alternative, that bailout be made available to it.<sup>156</sup> Under the statute, however, only jurisdictions that register voters have the status requisite for bailout.<sup>157</sup> Neither the state of Texas, nor Travis County, has sought bailout.<sup>158</sup> In fact, Travis County, where the municipal utility district is located, has intervened in opposition to the district’s constitutional challenge to the VRA.<sup>159</sup> Therefore, the utility district, in effect, is asking the Court to reinterpret the notion of covered jurisdictions so as to avoid the alleged constitutional difficulties that such broad coverage presents.

Because striking down the VRA on its face would represent a tectonic shift in federal court review of congressional power to enforce civil rights, a Court that is skeptical of the VRA’s constitutionality might gravitate toward some version of an as-applied challenge. The *NAMUDNO* case would be the wrong vehicle for the Court to take such a stand. Striking down the statute as applied to a subjurisdiction or allowing it to bailout

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154. See 42 U.S.C. § 1973b(a)(1) (2000).

155. See *id.*; J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006* 257, 258–66 (Ana Henderson ed., 2007) (describing the history of the bailout provisions); Michael McDonald, *Who’s Covered? Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 255, 257 (David L. Epstein et al. eds., 2006) (describing the history of the bailout mechanism and exploring alternatives).

156. *NAMUDNO*, 573 F. Supp. 2d at 231.

157. 42 U.S.C. § 1973l(c)(2) (“The term ‘political subdivision’ shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.”).

158. *NAMUDNO*, 573 F. Supp. 2d at 277.

159. *Id.* at 230.

would not represent mere tinkering at the edges of the VRA regime. Editing the statute in this way cuts to the heart of what Congress was trying to do when it developed a coverage formula that was well-known to be both over- and under-inclusive. Congress considered the statute necessary to capture most of the worst offenders of minority voting rights. Such a ruling would have implications for other civil rights laws by effectively carving out exceptions for any jurisdiction for which findings of discrimination have not been made.

For a Court uncomfortable with the depth and breadth of the statute's regulation of states and localities, another quasi-as-applied challenge is available. The Court could wait until a qualified jurisdiction attempts to bail out and then read the bailout requirements in such a way as to avoid constitutional difficulty. Because very few jurisdictions have attempted to bail out and none have been refused since 1982,<sup>160</sup> we do not know how high the bar for bailout really is. If and when a jurisdiction on the margin is refused bailout, then the Court can reconsider whether those criteria are unduly burdensome. Only when a jurisdiction attempts to do so, however, could the Court carve out what constitutes an as-applied exception to the general statutory scheme. Just as the Court recrafted the standard for express advocacy in *WRTL*,<sup>161</sup> it could "edit" the bailout provisions to make it somewhat easier to escape Section Five coverage.

Moreover, if the Court is concerned by the federalism costs of the new VRA, it could read the new retrogression standard in such a way as to make preclearance more likely. Under the reauthorized VRA, a jurisdiction will be denied preclearance from the Attorney General or the U.S. District Court for the District of Columbia if its proposed voting law has the purpose or effect of "diminishing the ability of" minority voters "to elect their preferred candidates of choice."<sup>162</sup> The preclearance standard represents the true burden, if any, on the covered jurisdictions. Coverage, by itself, which is the source of the complaint in *NAMUDNO*, only raises federalism concerns if jurisdictions have a legitimate fear that their voting laws will not be allowed to go into effect. If, in operation, the standard pushes the constitutional envelope by denying preclearance to voting laws

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160. See Hebert, *supra* note 155, at 257.

161. See Fed. Election Comm'n v. Wis. Right to Life, 127 S. Ct. 2652, 2655 (2007).

162. 42 U.S.C.A. § 1973c(b) (West Supp. 2008).

that are usually constitutional, then the Court can either vindicate as-applied challenges to that standard or, more likely, simply interpret it narrowly enough to assuage concerns about the burdens it places on states' rights.

Each of these avenues of relief is reminiscent of the paths the Court has taken in *Washington State Grange* and *Crawford*, when it rejected a facial challenge while leaving open the door to future as-applied challenges. Just as in those cases the Court raised what seemed like ripeness concerns in the context of its discussion of facial challenges, the *NAMUDNO* case comes to the Court without a firm record as to how the new VRA will work in practice. Just as the Court wanted to wait until the ballot in Washington confused voters or the voter ID law disenfranchised an identifiable group of people, so too in *NAMUDNO* should it wait to see the extent of the burden the new VRA places on covered jurisdictions. If it turns out that the law unduly restricts covered jurisdictions in their enforcement of clearly constitutional voting laws, then the Court can consider an as-applied challenge in those enforcement contexts.