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THE SIGNIFICANCE OF THE SHIFT TOWARD AS-APPLIED CHALLENGES IN ELECTION LAW

*Joshua A. Douglas**

I. INTRODUCTION

Election law is experiencing immense change. The Supreme Court's recent approach to election law cases has significant implications for the scope of the right to vote and the meaning of political participation and self-governance. This Article examines the importance of the Court's recent pronouncement that plaintiffs can bring election law challenges only as applied to a particular political actor for a particular situation, instead of challenging a law in its entirety.¹ The "as-applied only" rule may seem like simply a procedural method for construing election laws or a mere semantic distinction, but, as I show, in reality the Court's decisions have significant substantive ramifications.

Shortly before the Supreme Court issued its opinion in *Crawford v. Marion County Election Board*,² upholding the right of states to require that voters show a photo identification to vote, noted election law scholar Professor Rick Hasen warned of the perils of a ruling that narrowed the scope of election law litigation solely to as-applied challenges.³ He explained that such an approach would make those laws

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1. See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1193-95 (2008).

2. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1615 (2008).

3. Rick L. Hasen, *About Face: The Roberts Court Sets the Stage for Shrinking Voting Rights, Putting Poor and Minority Voters Especially in Danger*, FINDLAW'S WRIT, Mar. 26, 2008, http://writ.lp.findlaw.com/commentary/20080326_hasen.html; see also Tony Mauro, *Supreme Court Upholds Indiana Voter ID Law Just Before Primary*, LEGAL TIMES, Apr. 29, 2008, available at <http://www.law.com/jsp/article.jsp?id=1209373541997> ("Hasen adds that if laws like Indiana's

“no longer . . . subject to facial challenges. That means, in turn, that the laws will have to be in effect for a while before they are challenged, and that they will cause damage in the interim, at a minimum.”⁴ He also posited that this approach would have an adverse effect on poor and minority voters.⁵

This Article seeks to determine if the Court’s recent rulings in *Crawford* and *Washington State Grange v. Washington State Republican Party*⁶ had, in the short term, a detrimental effect on voters’ rights. Was it more difficult for voters during the 2008 election cycle to vindicate their rights because the Supreme Court boldly stated that plaintiffs may bring election law challenges only as applied? Have judges now conferred on states an almost unfettered ability to regulate their elections, to the detriment of voters, advocacy groups, candidates, and political parties? Is there a better approach to election law that can replace the facial or as-applied dichotomy?

To discern whether these two significant election law cases in the 2007 Term had an effect on subsequent challenges to election regulations, I analyze federal election law decisions from both 2004 and 2008. If the Court’s pronouncements in *Washington State Grange* and *Crawford* had an immediate impact on the landscape of election law litigation, then we would expect to see lower federal courts in 2008 more easily rejecting broad constitutional challenges to election laws because, even if the law might be unconstitutional in another setting, it is valid as applied to that particular political actor. Further, when plaintiffs win an election law case, the relief will likely be narrow in scope.

Washington State Grange and *Crawford* may have impacted federal court decisions in two ways: First, there could be a direct impact, whereby courts cite the cases for the proposition that only as-applied challenges are appropriate. Second, there could be an indirect impact, in that federal courts portend an overall wariness to issue broad decisions striking down election regulations. Of course, we will need several more election cycles to fully understand the ultimate effect of these cases. For now, my research shows that these cases had a slight but noticeable immediate impact and that the Court’s pronouncements have altered the way in which federal courts analyze election law cases. These decisions do not represent a sea change in the law but instead foretell a more

must now be challenged ‘as applied,’ that is ‘going to make it tough for a lot of plaintiffs who are burdened’ to make their case.”).

4. Hasen, *supra* note 3.

5. *Id.*

6. *Wash. State Grange*, 128 S. Ct. at 1195.

nanced approach that gives states wider leeway in regulating their election processes.

Uncovering the effect of the Court's focus on as-applied challenges helps to measure the underlying value of the right to vote.⁷ This conclusion reinforces the premise that the right to vote is a judge-made right and that the scope of that right generally depends on the individual judges deciding these cases. Of course, at a basic level, we all know that judges decide close election law disputes—the 2000 presidential election and the 2008 Minnesota Senate recount provide high-profile examples of this proposition.⁸ What is less obvious is that judges have tremendous power in shaping the right to vote for the operation of everyday elections.

In the 1960s, Supreme Court Justices conferred a high value on the right to vote and sought to protect the right against state encroachment, often by striking down election regulations on their face.⁹ Judges used facial challenges to effectuate widespread changes in how states regulated their elections, with the upshot being greater protection for individual voters. Today, judges are narrowing the scope of the individual right to vote through the use of decisions that construe election laws only as applied to those who bring suit; *Washington State Grange* and *Crawford* were the catalysts for the current zenith in that trend.¹⁰ The as-applied rule from *Washington State Grange* and *Crawford* has allowed federal judges to swing the pendulum toward favoring government regulation at the expense of political actors, such as voters. This Article therefore reinforces the idea that seemingly routine judicial rules—such as a preference for facial or as-applied challenges—play an important role in shaping the right to vote.

7. See generally Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89 (2009) (discussing the underlying messages in the Court's recent election law cases as they impact the public sphere); Nathaniel Persily & Jennifer Rosenberg, *Defacing Democracy? The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009) (examining the implications of the distinction between as-applied and facial challenges in election law).

8. *Bush v. Gore*, 531 U.S. 98 (2000) (halting the recall effort in Florida and effectively deciding the disputed election between the presidential candidates); John Schwartz, *Minnesota Justices Are Skeptical in Senate Case*, N.Y. TIMES, June 1, 2009, at A10. The Minnesota Supreme Court handed down its decision in the dispute between Norm Coleman and Al Franken shortly before the printing of this Article. See *Sheehan v. Franken*, No. A09-697 (Minn. June 30, 2009) (per curiam), <http://www.mncourts.gov/opinions/sc/current/OPA090697-6030.pdf>.

9. See *infra* Part II.B.

10. See *infra* Part II.C.

Ultimately, this analysis provides a cogent explanation of how judges define the meaning of political participation.¹¹

The following discussion explains the pitfalls of the Court's current focus on as-applied challenges for election law cases. Facial challenges are better than as-applied challenges at vindicating the rights of many voters at once. Without facial challenges, a law might be in force in perpetuity even though its application to a certain set of voters is unconstitutional, because no one has brought a successful as-applied suit to challenge that application of the law. In the process, not only do some voters suffer an unconstitutional burden on the right to vote, but there can also be a chilling effect on voters' political participation.

However, the Court has also provided cogent reasons for why facial challenges to all election laws are inappropriate, such as the desire to avoid constitutional questions and protect legislative prerogatives.¹² Therefore, I conclude that the Court should abolish the "as-applied only" rule and instead adopt an approach more favorable to the ideals of protecting voters' rights and providing clarity, but less onerous than a rule that requires courts to uphold or strike down a law on its face in all instances: the First Amendment overbreadth doctrine. This middle ground allows courts to vindicate the rights of voters who suffer an unconstitutional burden without impinging too much on the rights of states to regulate their elections. It requires courts to sever an unconstitutional application of an election law even if the law is valid as applied to the voter who brought suit, thereby saving most of the law but excising the unconstitutional portion.

This Article proceeds in five Parts. Following this introduction in Part I, Part II discusses the history of election law litigation in terms of facial versus as-applied challenges. Part III analyzes federal court of appeals, district court, and state court cases that have cited *Washington State Grange* and *Crawford* and aggregates election law decisions during 2004 and 2008 to determine the effects of the Supreme Court's recent pronouncement that election law challenges should only be as applied. Part IV explains the importance and implications of judicial rules such as these in the democratic process. Finally, Part V argues that the Court should eliminate the distinction between facial and as-applied challenges in its election law jurisprudence and adopt, as a middle ground, the overbreadth doctrine in its place.

11. See Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 722-30 (1994).

12. See *infra* notes 255-57 and accompanying text.

II. THE SHIFT FROM FACIAL TO AS-APPLIED CHALLENGES IN ELECTION LAW

When the Supreme Court entered the business of deciding the constitutionality of election regulations, it typically did so through the lens of facial challenges. Only recently has the Court backed away from striking down election laws on their face, instead preferring the piecemeal approach of as-applied litigation. Lower courts have followed suit. This Part explores that shift.

A. *Facial Versus As-Applied Challenges*

Whether a court considers the constitutionality of a statute under a facial or as-applied approach is crucial both to the method of jurisprudence and to the ultimate outcome.¹³ Facial challenges present a completely different path from as-applied challenges; whereas a facial challenge asks whether a statute is constitutional in all of its applications, in an as-applied challenge, the plaintiff must show only that the law is invalid in that particular situation.¹⁴ Each method of examining a statute has distinct interpretative rules and, therefore, different implications for constitutional jurisprudence.¹⁵ Of course, the terms “facial” and “as-applied” are less than precise, and courts and scholars have struggled to clearly define the two approaches.¹⁶ Nevertheless, the Supreme Court has recently attempted to distinguish the doctrines, particularly in election law cases, so it is important to

13. See David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1334 (2005) (“Few areas of law more sharply present the issue of the Court’s role in implementing the Constitution than the law governing facial and as-applied challenges to statutes.”).

14. See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994). Professor Richard Fallon disagrees with this dichotomy, suggesting that “there is no single distinctive category of facial, as opposed to as-applied, litigation.” Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000). Fallon notes that although a litigant “must always assert that the statute’s application to her case violates the Constitution” the deciding court “will typically apply a general norm or test and, in doing so, may engage in reasoning that marks the statute as unenforceable in its totality.” *Id.* at 1327-28. Professor Matthew Adler takes a different view, arguing that all challenges to statutes are, at their core, facial challenges. See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157-58 (1998). My analysis reveals that the Court’s election law jurisprudence has carved out a stark distinction between facial and as-applied challenges.

15. The doctrines also create much confusion for courts and scholars. See Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1748 (2006) (“Supreme Court jurisprudence is in disarray concerning facial and as-applied challenges to the constitutionality of statutes.”).

16. See, e.g., Adler, *supra* note 14, at 157-58; Dorf, *supra* note 14, at 239-42; Fallon, *supra* note 14, at 1327-28; Gans, *supra* note 13, at 1339-41.

begin with a discussion of the differences between these methods of constitutional adjudication.

1. Facial Challenges

Facial challenges allow courts to vindicate the rights of many in one fell swoop. The starting place for understanding how the Supreme Court analyzes a plaintiff's request to strike down a law in its entirety is the Court's 1987 decision in *United States v. Salerno*.¹⁷ In that case, two criminal defendants challenged the Bail Reform Act's¹⁸ pretrial detention provisions, asserting that the law violated due process by allowing the government to detain defendants based on a finding of future dangerousness.¹⁹ The Court noted that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."²⁰ In essence, the Court required the criminal defendants to show that the law would be unconstitutional in every single conceivable application.²¹

Several commentators have noted that in analyzing a facial challenge, a court interprets the law in the abstract, devoid of context in the application of the law to the real world.²² As Professor Massey notes, "courts are incapable of assessing effects in facial challenges cases because there are no effects to be observed."²³ Thus, "there is room for courts to treat facial challenges as a form of constitutional prophylaxis."²⁴ Simply put, the Court asks itself whether the government may enforce the law in question against any person and in any situation. If there is a conceivable way in which to enforce the law, then the Court will reject the facial challenge.

The Court's general rejection of facial challenges has several implications for challenging a statute. First, plaintiffs typically have a harder time winning their case. They must show that the statute, beyond the application to them, is unconstitutional. Second, states may innovate in the way they use their police powers without worrying that a court

17. 481 U.S. 739 (1987).

18. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. §§ 3141-50 (2006)).

19. *Salerno*, 481 U.S. at 743-44.

20. *Id.* at 745.

21. See Gans, *supra* note 13, at 1335-36.

22. *Id.* at 1337; Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C.L. REV. 1, 54 (2007).

23. Massey, *supra* note 22, at 54.

24. *Id.*

will strike down all applications of a given law. In *Sabri v. United States*,²⁵ the Court chastised the petitioner for his strategy of bringing a facial challenge, stating that “facial challenges are best when infrequent.”²⁶ The Court noted that although invalidating a law on its face might be “efficient in the abstract,” any gain would be offset by “losing the lessons taught by the particular.”²⁷ When a court invalidates an entire law on its face, states have a harder time learning which applications are permissible versus impermissible. Third, rejecting facial challenges allows the Court to avoid making sweeping decisions that alter the landscape of how a state implements a statute or encroaching upon legislative prerogatives, thereby adhering to the doctrines of separation of powers and constitutional avoidance.²⁸ Based on these doctrines, the Court can uphold most laws and avoid a difficult analysis of the law’s constitutionality in various other settings. It is a lot easier to reject a facial challenge and opine that a law might be unconstitutional in a different, abstract setting than to provide clear answers on when exactly a state can enforce the law. In sum, the Court generally prefers a slow method of constitutional adjudication, in which it can consider solely the application of a statute to particular situations.

2. As-Applied Challenges

In an as-applied challenge, the plaintiff need only demonstrate that the law is invalid when applied to that particular plaintiff.²⁹ That is, a state still can enforce the statute against most people, even if a court strikes down certain applications of the law.³⁰ In this mode of constitutional adjudication, a statute receives more deliberate examination, whereby it can be applied in various settings—most constitutional, but perhaps some unconstitutional. Importantly, the plaintiff must challenge the application of the law to him- or herself, not to a third party. “Under the as-applied model, courts implement constitutional norms on a slower, more gradual basis.”³¹

25. 541 U.S. 600 (2004).

26. *Id.* at 608.

27. *Id.* at 609.

28. See Persily, *supra* note 7, at 94; see also *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008).

29. See Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 424-25 (1998).

30. See Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 881 (2005) (noting that “a successful as-applied challenge still allows the state to ‘enforce the statute in different circumstances’” (quoting Dorf, *supra* note 14, at 236)).

31. Gans, *supra* note 13, at 1335.

As-applied challenges present significant hurdles for the vindication of individual rights. In particular, the results of as-applied challenges are gradual, with an individualistic focus. Change comes slowly through an as-applied lawsuit because the court considers only whether the statute violates the plaintiff's rights in that particular instance, instead of more broadly. As one commentator noted, there are considerable costs to as-applied jurisprudence: "Its gradualism and more individualistic focus may, in certain circumstances, make more difficult the enforcement of constitutional rights."³² Thus, if a court holds a particular statute unconstitutional as-applied, the government still may enforce that statute in a different circumstance.³³

B. Facial Challenges in Election Law

The Warren Court of the 1960s brought about a significant growth in rights vindication in election law. Throughout the decade, the Supreme Court persisted in striking down election regulations that deprived individuals of their constitutional right to vote.³⁴ Importantly, the Court did not provide protection on a case-by-case basis, solely invalidating particular applications of laws for certain individuals. Instead, the Court struck down numerous laws in their entirety that made explicit distinctions on who enjoyed the benefits of the franchise.³⁵ Thus, the Court did not widely defer to the states to determine who could vote or wait to see the actual effects of an election regulation, but instead struck down various laws on their face. An analysis of these cases reveals that the Court used the vehicle of facial challenges to usher in widespread election reform in quick fashion.

For example, several states sought to limit the eligible electorate in certain elections to those who the state determined actually had a particularized vested interest in the outcome.³⁶ Consider *Cipriano v. City of Houma*, in which the Court analyzed a Louisiana law that gave only

32. *Id.* at 1336 (discussing the "costs of case-by-case adjudication").

33. *See* Dorf, *supra* note 14, at 236.

34. *See, e.g.*, *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632-33 (1969); *Harman v. Forssenius*, 380 U.S. 528, 533-34 (1965).

35. *See, e.g.*, *Cipriano*, 395 U.S. at 706; *Kramer*, 395 U.S. at 632-33; *Harman*, 380 U.S. at 533-34.

36. *See, e.g.*, *Cipriano*, 395 U.S. at 706 (striking down a Louisiana law that gave only "property taxpayers" the right to vote in elections regarding a municipal utility's issuance of revenue bonds); *Kramer*, 395 U.S. at 632-33 (invalidating a law that prohibited otherwise eligible people from participating in district meetings and local school board elections).

“property owners” the right to vote in certain elections.³⁷ The Court held that the state had not met its burden of justifying the law, particularly given the ““exacting standard of precision we require of statutes which selectively distribute the franchise.””³⁸ The Court required the state to justify the disparate treatment of voters in every situation to which the statute might apply and struck down the law on its face.

Similarly, in *Kramer v. Union Free School District No. 15*, the Court considered the effect of a law that granted the franchise to some eligible voters but not to others, analyzing not only the application of the law to the named plaintiffs but also to various other categories of potential voters.³⁹ The voters successfully secured a ruling that the statute violated all voters’ rights, not just the voters who challenged the law.⁴⁰

In case after case in the 1960s, the Court considered facial challenges to election laws that potentially affected wide classes of otherwise eligible voters. In *Harper v. Virginia State Board of Elections*,⁴¹ the Court invalidated Virginia’s poll tax without any discussion of whether the poll tax actually affected the plaintiffs who brought the challenge.⁴² That is, there is no indication from the Court’s opinion that the named plaintiffs in *Harper* could not have paid the poll tax, but this did not stop the Court from considering a challenge to the law on its face. In some ways, therefore, the Court actually applied an overbreadth analysis, concluding that the poll tax at issue was unconstitutional once the state applied it to other valid voters even if the law was not necessarily invalid as applied to the named plaintiffs.⁴³ Voting is so important that the Court allowed the named plaintiffs to bring suit to vindicate the rights of others who might be denied the franchise because of the overbroad poll tax. However, even though

37. *Cipriano*, 395 U.S. at 706.

38. *Id.* (quoting *Kramer*, 395 U.S. at 632).

39. *Kramer*, 395 U.S. at 630 (“Besides appellant and others who similarly live in their parents’ homes, the statute also disenfranchises the following persons (unless they are parents or guardians of children enrolled in the district public school): senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools.”).

40. *Id.* at 633.

41. 383 U.S. 663 (1966).

42. *Id.* at 666; see also *Harman v. Forssenius*, 380 U.S. 528, 533-34 (1965) (invalidating, on its face, a Virginia law that required voters in federal elections either to file a certificate of residence each year or, at their option, pay a poll tax).

43. *Dorf*, *supra* note 14, at 267; see also *infra* note 267 and accompanying text.

casting a ballot is a form of “speech,”⁴⁴ the Court has never expressly adopted the First Amendment overbreadth doctrine for election law.⁴⁵ As I discuss in Part V, this approach actually makes perfect sense for voting, a purportedly fundamental right.⁴⁶

The reapportionment cases during the 1960s similarly brought about wholesale changes via facial invalidation to how a state drew its electoral maps.⁴⁷ For example, in *Reynolds v. Sims*, the Court held that Alabama’s attempt to redraw its state electoral districts was unconstitutional, as the state’s plan had the effect of making some votes in the state count more than others.⁴⁸ The case presented a direct attack on the law for all voters and all districts, not just for the particular plaintiffs who brought suit.

Thus, the election law decisions of the Warren Court embodied the height of using facial challenges to strike down election laws wholesale. The Burger Court of the 1970s and early 1980s began a gradual, albeit implicit, erosion of this practice. During this period, the Court began to construe election laws as applied to the particular plaintiff who brought suit and ignore potential facial challenges, even though it did not explicitly highlight this distinction. For example, in *Storer v. Brown*,⁴⁹ the Court analyzed a California ballot access law that limited who could appear on the ballot⁵⁰ and determined that “if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates.”⁵¹ Thus, even if the ballot access law might be unconstitutional in some settings, that alone was not enough to invalidate the provision.⁵²

44. See, e.g., Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 25 (2009) (noting that voting “is a right so fundamental that its protections are found twice in the U.S. Constitution: the First Amendment right to political speech, expressed through voting, and the Fourteenth Amendment’s protection of the act of voting as a fundamental right”).

45. One commentator suggests that the Court implicitly employed the overbreadth doctrine in *Louisiana v. United States*, 380 U.S. 145 (1965). See John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53, 81-82 (2004).

46. See *infra* Part V.

47. See *Reynolds v. Sims*, 377 U.S. 533, 536-37, 585-87 (1964); *Gray v. Sanders*, 372 U.S. 368, 370, 380-81 (1963); *Baker v. Carr*, 369 U.S. 186, 187-88, 237 (1962).

48. *Reynolds*, 377 U.S. at 536-37.

49. 415 U.S. 724 (1974).

50. *Storer*, 415 U.S. at 726-27.

51. *Id.* at 737.

52. *Id.* at 736-37 (“Having reached this result, there is no need to examine the constitutionality of the other provisions of the Elections Code as they operate singly or in combination as applied to these candidates. Even if these statutes were wholly or partly

Similarly, in *Brown v. Socialist Workers '74 Campaign Committee*,⁵³ the Court held that Ohio could not constitutionally apply its campaign disclosure requirements to the Ohio Socialist Workers Party, but the Court chose not to rule on the facial validity of the law.⁵⁴ Cases like these, which quietly rejected facial challenges in favor of a piecemeal as-applied approach, provided the foundation for the more recent and more explicit strict interpretation of the facial/as-applied dichotomy in election law cases.

C. As-Applied Challenges in Election Law

In the past few years, the Supreme Court has explicitly rejected facial challenges while inviting as-applied challenges to laws regulating election administration.⁵⁵ For example, in *McConnell v. Federal Election Commission*,⁵⁶ the Court rejected a facial challenge to prohibitions on electioneering communications,⁵⁷ but in *Wisconsin Right to Life, Inc. v. Federal Election Commission*,⁵⁸ the Court ruled that *McConnell* had not foreclosed the possibility of a plaintiff bringing a successful as-applied challenge to these provisions.⁵⁹ This demonstrates how the Court has generally closed the door to facial challenges to election laws while at the same time opening the door to considering piecemeal lawsuits regarding particular applications of a law. The Court has exhibited a willingness to wait before it overturns the entirety of an election regulation, instead preferring to see how the application of that law plays out in the context of an actual election.⁶⁰

During the 2007 Term, the Supreme Court heard two cases that directly involved a state's ability to promulgate election rules and explicitly invoked the facial/as-applied distinction.⁶¹ In both cases, the

unconstitutional, [these candidates] were still properly barred from having their names placed on the 1972 ballot.”).

53. 459 U.S. 87 (1982).

54. *Id.* at 101-02.

55. *See, e.g.,* *Clingman v. Beaver*, 544 U.S. 581, 597-98 (2005) (rejecting a facial challenge to Oklahoma's semiclosed primary system).

56. 540 U.S. 93 (2003).

57. *Id.* at 206-09.

58. 546 U.S. 410 (2006).

59. *Id.* at 412.

60. *But see* *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2771-74 (2008). As I explain below, the Court seemed to indicate in *Davis* that the statute inherently violated a candidate's First Amendment rights, meaning that it was invalid in all situations. *See infra* text accompanying notes 115-17.

61. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008). The Court heard two other election law cases

Court sided with the state, determining that states enjoy wide discretion in handling the “nuts-and-bolts” of election administration.⁶² The Court had been leaning toward rejecting facial challenges in other contexts for years,⁶³ but the decisions in *Washington State Grange* and *Crawford* signify the zenith of the Court’s explicit admonition that it will allow only as-applied challenges to attack an election law. Between the Warren Court’s facial invalidation of many election laws in the 1960s and the Roberts Court’s explicit rejection of facial challenges in *Washington State Grange* and *Crawford*, the Court had implicitly rejected facial challenges in favor of an as-applied approach, but it had not explicitly made this distinction.⁶⁴ As Professor Nathaniel Persily explains, *Washington State Grange* and *Crawford* therefore reflect a stark maturation in the Court’s use of the facial/as-applied dichotomy for election law, in that the cases “appear to signal a shift at least in the way the Court discusses as-applied and facial challenges, if not in what the Court means by the distinction.”⁶⁵ As I discuss below, this shift presents significant ramifications for how judges shape the scope of the right to vote.⁶⁶ It also leads to negative implications for the protection of voters’ rights. The effects of these cases show why the Court should refocus its election law jurisprudence. My solution, as presented more fully in Part V, is to abolish the distinction between facial and as-applied challenges that *Washington State Grange* and *Crawford* solidified in favor of a more lenient overbreadth standard. Before reaching a solution, however, we must precisely understand the holdings in these cases and why the Court’s approach is a cause for concern.

1. *Washington State Grange v. Washington State Republican Party*

In *Washington State Grange*, the Court considered Washington’s newly enacted primary scheme.⁶⁷ Previously, Washington’s voters selected the candidates for the general election through a “blanket

during the 2007 Term, but neither explicitly invoked the facial/as-applied doctrine. See *Davis*, 128 S. Ct. at 2765; *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 795 (2008). As Persily and Rosenberg point out, “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.” See Persily & Rosenberg, *supra* note 7, at 1658-59.

62. See Persily & Rosenberg, *supra* note 7, at 1658-59.

63. See, e.g., *Salerno v. United States*, 481 U.S. 739, 745 (1987).

64. See *supra* notes 54-59 and accompanying text.

65. Persily, *supra* note 7, at 96.

66. See *infra* Part IV.

67. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1187-88 (2008).

primary” system.⁶⁸ In a blanket primary, candidates from all parties appeared on one ballot, and all voters selected from among those candidates, with the candidate receiving a plurality of votes within each major party moving on to the general election.⁶⁹ After the Supreme Court invalidated a similar blanket primary system in *California Democratic Party v. Jones*,⁷⁰ the Ninth Circuit Court of Appeals struck down Washington’s blanket primary system.⁷¹ In response, Washington State Grange, a civic organization, proposed an initiative to replace the invalidated primary system.⁷² The citizens of Washington approved the new initiative, and it became effective in December 2004.⁷³

Under the new primary system, a candidate for office must declare his or her “major or minor party preference, or independent status.”⁷⁴ In turn, the primary election ballot designates each candidate’s party preference.⁷⁵ The political party cannot disassociate itself from a candidate; thus, for example, a candidate who holds ideals repugnant to the Republican Party could list his or her party preference as Republican, and this preference would appear next to his or her name on the primary ballot. All voters can vote in Washington’s primary elections, and the two candidates who receive the most and second-most votes move on to the general election, regardless of their stated party preferences.⁷⁶

Immediately after the law went into effect, the Washington State Republican Party filed suit, challenging the law on its face.⁷⁷ The Republican Party argued that the law violated its First Amendment right to freedom of association, because the law required the party to associate with a candidate whom the party did not necessarily endorse.⁷⁸ In essence, the Republican Party asserted that the law was facially invalid because the party was forced to associate with any candidate claiming party affiliation.⁷⁹

The Supreme Court focused its analysis on the pre-election nature of the case—that is, the Republican Party challenged the law in the

68. *Id.*

69. *Id.* at 1188.

70. 530 U.S. 567, 586 (2000).

71. *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198, 1201 (9th Cir. 2003).

72. *Wash. State Grange*, 128 S. Ct. at 1189.

73. *Id.*

74. *Id.* (quoting WASH. REV. CODE ANN. § 29A.24.030 (West 2005)).

75. *Id.*

76. *Id.*

77. *Id.* The Washington State Democratic Central Committee and Libertarian Party of Washington State joined the Republican Party as plaintiffs. *Id.*

78. *Id.*

79. *Id.*

abstract, not in the context of an actual election.⁸⁰ The Court noted that “[t]he State has had no opportunity to implement [the new primary system], and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions.”⁸¹ Lest readers not understand that this was the crux of the analysis, the Court reiterated this point several times.⁸² In particular, the Court focused on the fact that because the Republican Party challenged the primary system on its face, “we have no evidentiary record against which to assess their assertions that voters will be confused.”⁸³ The Court warned that it could not speculate about “hypothetical” or “imaginary” cases,⁸⁴ as “[e]xercising 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.’”⁸⁵ The Court wanted to see a clear demonstration of what the ballot would look like under the new primary system before ruling on its constitutionality.⁸⁶

To support its decision, the majority took pains to emphasize that a facial challenge was inappropriate in this situation. The majority likely focused on this point to mask what seems to be an obvious fallacy in the Court’s analysis: Although it might be helpful to see the actual ballots

80. *Id.* at 1190-91.

81. *Id.* at 1190.

82. *See, e.g., id.* at 1191 (noting that facial claims rest on “speculation”); *id.* at 1193 (“We reject each of [the Republican Party’s] contentions for the same reason: They all depend, not on any facial requirement [of the law], but on the possibility that voters will be confused as to the meaning of the party-preference designation. But [the Republican Party’s] assertion that voters will misinterpret the party-preference designation is sheer speculation.”); *id.* (“But these cases involve a facial challenge, and we cannot strike down [the law] on its face based on the mere possibility of voter confusion.”); *id.* at 1196-97 (Roberts, C.J., concurring) (“But because [the Republican Party] brought this challenge before the State of Washington had printed ballots for use under the new primary regime, we have no idea what those ballots will look like.”).

83. *Id.* at 1194 (majority opinion).

84. *Id.* at 1190.

85. *Id.* at 1191 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). The Court distinguished a second type of facial challenge in the First Amendment context, whereby a court might construe a law to be overbroad because a “‘substantial number’ of its applications are unconstitutional, ‘judged in relation to the statute’s plainly legitimate sweep.’” *Id.* at 1190 n.6 (quoting *New York v. Ferber*, 458 U.S. 747, 769-71 (1982)). The Court warned for that this second type of facial challenge, “[w]e generally do not apply the ‘strong medicine’ of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.” *Id.*; *see also Hersh v. United States*, 553 F.3d 743, 763 n.23 (5th Cir. 2008). The bulk of the Court’s decision regarding as-applied challenges and election administration, however, did not involve this First Amendment overbreadth doctrine.

86. *See Wash. State Grange*, 128 S. Ct. at 1197 (Roberts, C.J., concurring).

and the way in which they designate a candidate's party preference, the Court's decision in *Washington State Grange* seemed divorced from the reality of how voters would actually construe the meaning of the ballot.⁸⁷ As Justice Scalia pointed out in his dissent, voters who viewed the new ballots would obviously understand that they conveyed a political message that connected a party and a candidate, regardless of what the ballots actually looked like or how they read.⁸⁸ Indeed, given the Court's decision in *Washington State Grange*, it is difficult to imagine a scenario in which the Court will strike down any election regulation on its face before the state implements that law. If the Court simply could "imagine" a ballot design that would convey the message that the party and candidate were not politically associated, then the Court could probably imagine a similar scenario for any election law so as to construe it as constitutional. Simply put, the Court essentially eliminated the possibility of a pre-election facial challenge to any election law. As the Justices themselves noted, the only open avenue to challenge this type of law is through an as-applied challenge, when the Court can see the costs and benefits of using a particular law in an actual election.⁸⁹

2. *Crawford v. Marion County Election Board*

The Court used its new precedent in *Washington State Grange* to send these same messages in *Crawford v. Marion County Election Board*.⁹⁰ In *Crawford*, a political party, two elected officials, and several nonprofit organizations that represented groups of elderly, disabled, poor, and minority voters challenged Indiana's requirement that voters show a photo identification to vote.⁹¹ Although the Court held that the

87. Another explanation is that narrowing the focus to an as-applied challenge helped to create consensus on the Court. See Persily & Rosenberg, *supra* note 7, at 1646 n.6. But, as Persily and Rosenberg point out, "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." *Id.* at 1666.

88. *Wash. State Grange*, 128 S. Ct. at 1202 (Scalia, J., dissenting) ("It does not take a study to establish that when statements of party connection are the sole information listed next to candidate names on the ballot, those statements will affect voters' perceptions of what the candidate stands for, what the party stands for, and whom they should elect."). Another manner of understanding the Court's approach is through the lens of ripeness and constitutional avoidance. See Persily, *supra* note 7, at 96; Persily & Rosenberg, *supra* note 7, at 1663-64. Ultimately, the Washington ballots for the 2008 election stated "(Prefers Republican Party)" or "(Prefers Democratic Party)" under the candidate's name. See Sample Ballot - Kitsap County, Washington (Nov. 4, 2008), available at <http://www.kitsapgov.com/aud/elections/archive/08/sample%20ballot%20gen%202008.pdf>.

89. *Wash. State Grange*, 128 S. Ct. at 1195 ("That factual determination must await an as-applied challenge.").

90. 128 S. Ct. 1610 (2008); see also Persily, *supra* note 7, at 96.

91. *Crawford*, 128 S. Ct. at 1614.

plaintiffs had standing to challenge the law,⁹² it rejected the plaintiffs' facial challenge.⁹³ The plaintiffs had argued that the voter identification law unduly burdened the right to vote for elderly, poor, and homeless voters and those who had a religious objection to being photographed.⁹⁴ Noting the "heavy burden of persuasion" for a facial challenge, the Court determined that the record was insufficient to invalidate the law.⁹⁵ The Court stated, "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."⁹⁶

For example, the Court found that the record was devoid of a reliable indicator of how many registered voters did not have photo identification.⁹⁷ The Court also stated that there was no "concrete" evidence of the burden the law imposed on voters without an identification.⁹⁸ Similarly, "[t]he record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed."⁹⁹ Thus, the plaintiffs had failed to show that the statute lacked a "plainly legitimate sweep."¹⁰⁰

However, the Court implicitly invited as-applied challenges to the law: The lead opinion noted that record evidence and facts of which it could take judicial notice suggested that Indiana's voter identification law might impose a heavier burden on certain voters.¹⁰¹ In particular, the law might adversely affect elderly persons born out-of-state, people who would have difficulty obtaining a state-issued identification because of economic or other personal limitations, homeless people, or people with a religious objection to being photographed.¹⁰² Although the Court discounted the burdens that the law imposed based upon the record before it, it left open the possibility that these groups of voters could still challenge the law.¹⁰³ The Court stated, however, that "even assuming that the burden may not be justified as to a few voters, that conclusion is

92. *Id.* at 1615 n.7.

93. *Id.* at 1622-23.

94. *Id.* at 1621.

95. *Id.* at 1622.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1623 (citing *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008)).

101. *Id.* at 1621.

102. *Id.*

103. *Id.*

by no means sufficient to establish petitioners' right to the relief they seek [(facial invalidation)] in this litigation."¹⁰⁴

The Court provided further guidance in a footnote, offering an explicit example of when the law might go too far:

Presumably most voters casting provisional ballots will be able to obtain photo identifications before the next election. It is, however, difficult to understand why the State should require voters with a faith-based objection to being photographed to cast provisional ballots subject to later verification in every election when the [Board of Motor Vehicles] is able to issue these citizens special licenses that enable them to drive without any photo identification.¹⁰⁵

Thus, although the Court would not invalidate the law on its face, it provided, in effect, an advisory opinion regarding when the law would overreach. Presumably, religious voters who object to being photographed can successfully challenge the law as applied to them.¹⁰⁶ As two election law commentators have suggested, this approach perhaps represents a "pragmatic" compromise, in that

this model does discourage courts from second-guessing the overall reasonableness of controversial legislative enactments (reducing the risk of judicial conflict with the party-in-government), and it may help to lower the stakes of voting rights litigation (which, one might hope, will in turn reduce the likelihood that judges' partisan preferences will influence their decisions).¹⁰⁷

Cutting the other way, Justice Scalia's concurring opinion seems to curtail the propriety of as-applied challenges to election regulations.¹⁰⁸ Justice Scalia advocated for an approach that provides clear answers, in which the Court determines whether a law imposes disproportionate burdens on certain voters (presumably in the abstract) and whether those burdens are too severe.¹⁰⁹ The Court therefore should *not* consider whether a law imposes a severe burden on the particular voter who

104. *Id.* (footnote omitted).

105. *Id.* at 1621 n.19.

106. One voter was already unsuccessful in his as-applied challenge to Indiana's law. *See Stewart v. Marion County*, No 1:08-CV-586, 2008 WL 4690984, at *4-5 (S.D. Ind. Oct. 21, 2008). However, the plaintiff in that case did not present the hypothetical facts that the Supreme Court suggested could lead to a successful as-applied challenge (a religious voter who objected to obtaining an identification with a photograph). *See Crawford*, 128 S. Ct. at 1621 n.19.

107. Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 535 (2008).

108. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring in the judgment).

109. *Id.* at 1624-25.

brought suit given that voter's specific circumstances.¹¹⁰ It follows that a holding "that burdens are not severe if they are ordinary and widespread would be rendered meaningless if a single plaintiff could claim a severe burden."¹¹¹ Justice Scalia explicitly recognized the pitfalls of encouraging as-applied litigation in this setting, given that "[t]his is an area where the dos and don'ts need to be known in advance of the election" and "[a] case-by-case approach naturally encourages constant litigation."¹¹² Thus, it seems that one reason Justice Scalia concurred only in the judgment was his disagreement that the voter identification law might be invalid as applied to certain individuals.¹¹³ Justice Scalia wanted to go further and hold the law constitutional in every application; that is, rule that the law is facially valid.¹¹⁴

The import of these two cases is not necessarily that *every* election law plaintiff must bring his or her suit only as applied. For example, in a recent campaign finance case, the Court struck down the so-called "Millionaire's Amendment" on its face, stating that Congress could not allow disproportionate campaign finance limits for opponents of self-financed candidates.¹¹⁵ But in that case, the Court seemed to indicate that because of the inherent First Amendment implications of the law, there was no meaningful way for the statute validly to apply to some candidates and not to others.¹¹⁶ Once a self-financed candidate contributed a certain amount to his or her own election campaign, the statute automatically raised the contribution limit for that candidate's opponent.¹¹⁷ Thus, even if an opposing candidate never actually took advantage of the increased contribution limit, the law still "harmed" the self-financed candidate by opening the door to unequal contribution opportunities. Further, the Court is arguably more hostile to campaign finance regulations than to run-of-the-mill election laws, so it is possible that the Court was more receptive to remedying a theoretical harm from

110. *Id.* at 1625.

111. *Id.*

112. *Id.* at 1626.

113. *Id.* at 1624 ("The lead opinion assumes petitioners' premise that the voter-identification law 'may have imposed a special burden on' some voters, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny[.] That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.") (citations omitted).

114. *See id.*

115. *Davis v. Fed. Elections Comm'n*, 128 S. Ct. 2759, 2773 (2008).

116. *Id.*

117. *Id.* at 2770.

a campaign finance provision.¹¹⁸ In this circumstance, the Court struck down the law in its entirety.¹¹⁹ Accordingly, I do not argue that the only way to achieve success in challenging a law that regulates an election is to bring an as-applied challenge.¹²⁰ Rather, potential plaintiffs should be cognizant that, based on the Court's pronouncements in *Washington State Grange* and *Crawford*, the Court has shifted its focus to prefer as-applied litigation in election law.¹²¹

3. Recent Lower Court Decisions

Before looking at the larger trends in election law litigation stemming from *Washington State Grange* and *Crawford*, it is interesting to note that lower courts deciding recent election law disputes have seemed to mimic the Supreme Court's approach, rejecting facial challenges while inviting litigation regarding election laws as applied to particular voters, candidates, or political parties. This suggests that the implicit message from the Supreme Court had begun to trickle down to lower courts even before *Washington State Grange* and *Crawford*, laying the groundwork for lower courts' immediate and explicit application of the rule after the Supreme Court's decisions in these cases. It further underscores that *Washington State Grange* and *Crawford* did not dramatically alter the election law landscape but were instead catalysts for making this trend more pronounced and explicit.

For example, in *Miller v. Brown*¹²²—decided before *Washington State Grange* and *Crawford*—the Fourth Circuit rejected a facial challenge to Virginia's open primary law but ruled that the law was unconstitutional as applied to the particular situation in that case, in which a political party wished to exclude those who had voted for a

118. See Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court 1* (Columbia Law Sch. Pub. L. & Legal Theory Working Paper Group, Paper No. 09-198, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338895.

119. *Davis*, 128 S. Ct. at 2773.

120. Further, this analysis is not meant to suggest that the Roberts Court rejects facial challenges wholesale. In addition to *Davis*, the Court sustained a facial challenge to the District of Columbia handgun ban in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). See Metzger, *supra* note 118, at 8-9.

121. Compare *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 207 (2003) (rejecting a facial challenge to the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002)), with *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2659 (2007) (holding the same statute unconstitutional as applied to the specific advertisements in that case). Persily and Rosenberg suggest that the Court in *Wisconsin Right to Life* came close to striking down every application of the law in question by carving out an exception to the law that almost swallowed the rule. See Persily & Rosenberg, *supra* note 7, at 1662-63.

122. 503 F.3d 360, 368 (4th Cir. 2007).

candidate of a different party from participating in the primary.¹²³ The court found that the law was permissible in the abstract because Virginia provided parties with several ways to exclude voters in the candidate-selection process, but that the State had failed to justify the burdens the law imposed in this situation given that the incumbent had selected, as was his choice, a primary for this election.¹²⁴ Thus, the court preferred a slower adjudication, allowing the State of Virginia to regulate its election but striking down those applications that went too far.

Similarly, in *Alaskan Independence Party v. Alaska*¹²⁵—decided in October 2008, after *Washington State Grange* and *Crawford*—the political party argued that Alaska’s mandatory direct primary system, in which all candidates on the general election ballot had to be “nominated in a primary election by a direct vote of the people,” violated its associational rights.¹²⁶ The party contended that the state’s mandatory primary improperly compelled it to nominate its candidates through a primary election instead of a convention and unfairly permitted candidates to claim affiliation with the party even if that candidate did not espouse the party’s beliefs.¹²⁷ The Ninth Circuit rejected the party’s facial challenge to the mandatory primary system.¹²⁸ The court instead required the party to show that the law impermissibly forced it to associate with a particular person who did not share the party’s values.¹²⁹ Moreover, the court held that the proper way to challenge the state’s law regarding whether it impermissibly allowed candidates who did not agree with the party to claim affiliation was through as-applied litigation.¹³⁰ Thus, the party was unsuccessful in its facial challenge, but the court opened the door to possible future as-applied challenges to the law.¹³¹

Another similar trend stemming from this mode of adjudication is that lower courts often try to narrow their holdings, especially when invalidating an election regulation. As the Second Circuit noted when holding that it was unconstitutional for New York to deny absentee

123. *Id.* at 371.

124. *Id.* at 368, 371.

125. 545 F.3d 1173, 1181 (9th Cir. 2008).

126. *Id.* at 1175 (quoting ALASKA STAT. § 15.25.010 (2008)).

127. *Id.* at 1177, 1180.

128. *Id.* at 1180.

129. *Id.*

130. *Id.* at 1181 (stating that “to the extent Appellants argue that certain specific candidates for office have been improperly certified by Alaska in the past, these challenges would be properly brought on an as-applied, not facial, challenge”) (citing *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008)).

131. *See id.*

ballots for elections for political party county committees when it provided absentee ballots for every other election,

[t]he fact pattern here is unusual, and our holding in this case is necessarily narrow. We do not hold that there is a general constitutional right to obtain absentee ballots. Nor do we hold that there is a constitutional right to obtain absentee ballots in all county committee races in New York State. Instead, after applying a deferential standard of review, and after examining the record in this as-applied challenge, we conclude that the arguments proffered by the State are so extraordinarily weak that they cannot justify the burdens imposed by Election Law § 7-122.¹³²

Of course, circuit courts have not altogether rejected the possibility of invalidating an election law on its face. In striking down a North Carolina campaign finance regulation as violative of the First Amendment, the Fourth Circuit recognized that striking down the law as applied would simply lead to additional litigation, with little resolution of the underlying issues.¹³³ Therefore, there is not an absolute rule against facial challenges but instead a preference, in most situations, for piecemeal adjudication through as-applied litigation. This preference has increased in the wake of *Washington State Grange* and *Crawford*, showing that, while there was a mild preference for as-applied litigation before these cases, the Court's pronouncements have been catalysts for further rejection of facial challenges to state election regulations.

In sum, based on a quick survey of recent circuit court cases, it seems that although lower courts may have implicitly understood that facial challenges are disfavored in election law cases, *Washington State Grange* and *Crawford* solidified and increased the practice of rejecting facial constitutional challenges and limiting election law cases to as-applied litigation. But this does not explain whether these two Supreme Court cases significantly altered the results in election law decisions. An examination of federal circuit and district court cases before and after these two Supreme Court cases will demonstrate whether voters, advocacy groups, political parties, and candidates now have a harder

132. *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 112 (2d Cir. 2008).

133. *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 285 (4th Cir. 2008). The court stated, "The number of as-applied challenges necessary to remedy the over-breadth and vagueness of this multi-factored statutory test would involve many different lawsuits and litigation that would take years to conclude. In the meantime, political speakers would be left at sea, and, worse, subject to the prospect that the State's view of the acceptability of the speaker's point of view would influence whether or not administrative enforcement action was initiated."

Id.

time in achieving wholesale changes to a state's election practice because of these decisions.

III. ANALYSIS OF 2004 AND 2008 ELECTION LAW CASES

The Supreme Court's decision in *Crawford v. Marion County Election Board* may have been the most significant election law case since *Bush v. Gore*.¹³⁴ The debate over voter identification was deeply partisan and continues to rage.¹³⁵ As I observed above, lying beneath the surface of this partisan debate—and the decision in *Washington State Grange*—was an explicit shift in how the Court views election law challenges. This Part seeks to determine whether the Court's decisions in *Washington State Grange* and *Crawford* had an immediate impact on how voters, candidates, or political parties may bring constitutional challenges to election regulations. To that end, I have analyzed the cases that have cited these decisions so far and have compared the success rates of constitutional challenges to election regulations before and after the Court's 2008 decisions. Although the sentiment against facial challenges may have already been present underneath the surface of lower courts' election law decisions, *Washington State Grange* and *Crawford* made the distinction between facial and as-applied litigation more explicit, thereby altering the outcome in some cases and making it easier for states to defend their election regimes.

A. Cases Explicitly Relying upon *Washington State Grange* and *Crawford*

One measure of determining if *Washington State Grange* and *Crawford* have had an immediate impact is to study the manner in which lower courts have cited these two decisions. The analysis shows that these cases affected the way in which political actors were able to

134. See generally *Bush v. Gore*, 531 U.S. 98 (2000) (finding that the Florida Supreme Court's method for recounting votes violated the Equal Protection Clause of the Fourteenth Amendment but ruling that no other method was possible within the short time period before Florida needed to certify its electoral votes). The decision effectively resolved the 2000 presidential election in favor of George W. Bush.

135. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 638-44 (2007) (providing a summation of voter identification measures); Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287735 (forthcoming 2009) (empirically assessing the effect of Indiana's voter identification laws on voters during the 2008 primary election); Kelley Shannon & Jay Root, *Democrats Stop Voter ID Bill*, HOUSTON CHRON., May 27, 2009, available at <http://www.chron.com/disp/story.mpl/ap/tx/6442809.html> (discussing the Texas legislature's attempt to enact a voter identification law).

challenge a government's electoral practice and also influenced the procedure for other non-election law constitutional challenges.

In the year subsequent to the Court's decision in *Crawford*,¹³⁶ federal circuit courts, federal district courts, and state courts have cited *Washington State Grange* sixty times and have cited *Crawford* thirty-four times.¹³⁷ Perhaps the most interesting aspect of lower courts' reliance on these cases is that many of them have nothing to do with election law.¹³⁸ Instead, courts have cited *Washington State Grange* and, to a lesser extent, *Crawford*, for general principles of law regarding the availability of as-applied challenges in various settings.

136. As *Crawford* is the later of the two cases, I have confined my research to the year following this decision, that is, all decisions citing either case through April 28, 2009. This cut-off date is inherently arbitrary, but it allows for a full year's analysis of the trickle-down effect of both cases. Reviewing all lower court decisions within a year of *Crawford* (as opposed to within a year of *Washington State Grange*) makes sense in light of the fact that *Crawford* strongly reinforced the original as-applied ruling in *Washington State Grange*. Thus, the combination of these two cases sent a particularly strong signal regarding the proper approach to challenging an election regulation. This analysis therefore also includes the three cases that cited *Washington State Grange* between the date of that decision, March 18, 2008, and the date of the *Crawford* decision, April 28, 2008. Those three decisions are: *In re Katrina Canal Litig. Breaches*, 524 F.3d 700 (5th Cir. 2008) (decided on April 11, 2008), *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33 (D.D.C. 2008) (decided on April 11, 2008), and *Skytel Corp. v. Slattery*, No. 06-cv-218, 2008 WL 924531 (D.N.H. Mar. 31, 2008). None of these three are election law cases, and all cited *Washington State Grange* for the general as-applied proposition.

137. See app. tbls.1 & 2, available at http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v37n03_CC1-Douglas_Appendix.pdf.

138. See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 980 (9th Cir. 2008), *amended and rehearing denied*, 558 F.3d 856 (9th Cir. 2009) (determining that the Federal Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a-24b (2006), did not preempt the Legal Arizona Workers Act, ARIZ. REV. STAT. §§ 23-211-26 (LexisNexis 2007), and citing *Crawford* for the proposition that plaintiffs bear a heavy burden when bringing a facial challenge); *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 711 (5th Cir. 2008) (affirming the denial of a motion to remand to state court under the Class Action Fairness Act, 28 U.S.C. § 1453 (2000), and citing *Washington State Grange* for the proposition that a court should rest its decision on the narrowest ground possible).

Cases Citing	Federal Lower Courts	State Courts	Election Law Cases	Non-Election Law Cases	Cited for As-Applied Proposition	Cited for Something Other than As-Applied Proposition
<i>Washington State Grange</i>	56	4	16	44	56	8 ¹³⁹
<i>Crawford</i>	32	2	23	11	9	28 ¹⁴⁰

Table 1: Cases Citing *Washington State Grange* and *Crawford* within One Year after the Court Decided *Crawford* on April 28, 2008

Forty-four of the sixty decisions citing *Washington State Grange* are not election law cases.¹⁴¹ All of these cases cited *Washington State Grange* solely for the general proposition that courts prefer as-applied instead of facial challenges.¹⁴² Thus, it appears that *Washington State Grange* had a somewhat significant impact on all constitutional adjudication, not just election law cases. This comports with the Roberts Court's general disposition against facial challenges.¹⁴³ That is, the immediate impact of *Washington State Grange* has been to solidify the Roberts Court's preference for as-applied litigation,¹⁴⁴ both in election law and other cases.

Only sixteen cases citing *Washington State Grange* dealt directly with an election law issue,¹⁴⁵ and of those cases, twelve cited the decision for the as-applied proposition.¹⁴⁶ When cited in an election law case, therefore, the as-applied holding had a significant impact on lower

139. Note that in four of the eight cases, the courts cited *Washington State Grange* for both the as-applied proposition and another proposition. See app. tbl.1, *supra* note 137.

140. Note that in three of the twenty-eight cases, the courts cited *Crawford* for both the as-applied proposition and another proposition. See app. tbl.2, *supra* note 137.

141. See app. tbl.1, *supra* note 137.

142. See app. tbl.1, *supra* note 137.

143. See, e.g., Hartnett, *supra* note 15, at 1758; Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 959 n.318 (2008); Metzger, *supra* note 118.

144. See Metzger, *supra* note 118.

145. One case that cited *Washington State Grange* was merely the remand of that case to the Ninth Circuit. See *Wash. State Republican Party v. Washington*, 545 F.3d 1125, 1126 (9th Cir. 2008). I have excluded this remanded case from my analysis.

146. See app. tbl.1, *supra* note 137.

courts' decisions. By contrast, only two cases cited *Washington State Grange* for its actual substantive holding: that the First Amendment protects the right of a political party to choose its own nominee for public office.¹⁴⁷ Of course, this holding is not widely applicable, so the fact that courts have not relied upon it is not particularly surprising. What is more noteworthy is that the as-applied holding from *Washington State Grange* has had a vibrant independent life. Only four of the sixty cases that cited *Washington State Grange* did *not* cite it for the standard regarding facial versus as-applied challenges; all four instead cited the decision as the Court's most recent formulation of the "severe burden" test for election law cases.¹⁴⁸

Thus, the data demonstrate that the main impact of *Washington State Grange* so far has been its ruminations on facial versus as-applied challenges. This holds true for both election law cases and cases involving challenges to other types of statutes. That is, *Washington State Grange* represents a higher hurdle for all plaintiffs who wish to vindicate their rights against a governmental practice, not just voters. Instead of having a unique impact on election law, the focus on as-applied challenges has had broader implications for various types of statutes that plaintiffs believe go too far. By contrast, *Washington State Grange* seems to have had much narrower consequences on the substantive election law issue the Court decided. In sum, the legacy of *Washington State Grange* may very well be the channeling of litigation seeking to overturn statutes to as-applied challenges, but not solely for election law cases.

It appears that *Crawford* will have a slightly different legacy. Of the thirty-four cases that cited *Crawford* within a year of the decision, twenty-three involved a challenge to a state's election practice.¹⁴⁹ That is, in comparison to *Washington State Grange*, *Crawford* has had a narrower impact on other areas of the law and is used mostly in election law cases. Lower courts cite *Crawford* for a range of propositions. Of those thirty-four cases citing *Crawford*, merely nine do so for the

147. *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1178-79 (9th Cir. 2008); *Kurita v. State Primary Bd. of the Tenn. Democratic Party*, No. 3:08-0948, 2008 WL 4601574, at *7, *16 (M.D. Tenn. Oct. 14, 2008).

148. *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008); *Paralyzed Veterans of Am. v. McPherson*, No. C06-4670, 2008 WL 4183981, at *14-15 (N.D. Cal. Sept. 8, 2008); *Walton v. Dir., Mo. Dep't of Revenue*, No. 4:08CV596, 2008 U.S. Dist. LEXIS 41477, at *30 (E.D. Mo. May 23, 2008); *Mowles v. Comm'n on Governmental Ethics & Election Practices*, 958 A.2d 897, 904 (Me. 2008).

149. See app. tbl.2, *supra* note 137.

holding that challenges to a statute can only be as applied.¹⁵⁰ Six of those nine cases were election law decisions.¹⁵¹ By contrast, the majority of lower court cases citing *Crawford* did so for other propositions relating to election law, such as the constitutionality of photo identification laws¹⁵² or the general recitation of the “severe burden” test.¹⁵³

Finally, *Washington State Grange* and *Crawford* have had very little impact on state courts, and state judges most often cited these cases in election law decisions. State judges cited *Washington State Grange* only four times, twice in cases involving election law and three times for the as-applied proposition.¹⁵⁴ Similarly, state courts cited *Crawford* only twice, both times in an election law case and both times for *Crawford*'s substantive holding.¹⁵⁵ Accordingly, neither case has had a major impact on state courts, but, much like the federal courts, state courts are more likely to cite *Washington State Grange* for the as-applied proposition and *Crawford* for its holding on voter identification.

As this discussion indicates, with regard to limiting lawsuits to as-applied challenges, *Washington State Grange* and *Crawford* work in tandem. *Washington State Grange* applies broadly to all types of constitutional disputes and stands for the proposition that facial challenges are disfavored. *Crawford*, by contrast, applies more narrowly, mostly to election law cases, and lower courts cited that decision for a wide range of concepts, including the channeling of election law

150. See app. tbl.2, *supra* note 137.

151. See app. tbl.2, *supra* note 137.

152. See, e.g., *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009); *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1316-17 (10th Cir. 2008); *NAACP v. Browning*, 569 F. Supp. 2d 1237, 1240, 1249 (N.D. Fla. 2008).

153. See, e.g., *Lemons v. Bradbury*, 538 F.3d 1098, 1103 (9th Cir. 2008); *Walton*, 2008 U.S. Dist. LEXIS 41477, at *30-32.

154. See *Abbott v. Burke*, No. M-969, 2009 WL 1064462, at 66 (Trial Order) (N.J. Super. Ct. Ch. Div. Mar. 24, 2009) (Opinion/Recommendations to the Supreme Court) (citing *Washington State Grange* for the as-applied proposition in a case about state funding for schools); *Independence Inst. v. Coffman*, No. 07CA1151, 2008 WL 5006531, at *4 (Colo App. Nov. 26, 2008) (citing *Washington State Grange* in an election law case for the as-applied proposition); *Mowles v. Comm'n on Governmental Ethics & Election Practices*, 958 A.2d 897, 904 (Me. 2008) (pointing to *Washington State Grange* in an election law case for the proposition that “[t]he ‘mere possibility of voter confusion’ is insufficient to establish a compelling state interest” (quoting *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1193 (2008))); *In re Multi-Circuit Episcopal Church Prop. Litig.*, CL 2007-0248724, 2008 Va. Cir. LEXIS 85, at *11 (Va. Cir. Ct. June 27, 2008) (citing *Washington State Grange* for the as-applied proposition in a case not involving election law).

155. See *Curley v. Lake County Bd. of Elections & Registration*, 896 N.E.2d 24, 27 n.4 (Ind. Ct. App. 2008) (citing *Crawford* for its substantive holding regarding voter identification); *Las Vegas Convention & Visitors Auth. v. Miller*, 191 P.3d 1138, 1155-56 n.98 (Nev. 2008) (citing *Crawford* in an election law case for its substantive holding).

challenges to as-applied litigation. This also holds true for state court cases, although state courts have cited these decisions much less often. Most important for the purposes of this Article, lower courts have used both cases several times to reject plaintiffs' facial challenges to both election laws and other laws.

Therefore, what we see is a gradual shift limiting the ability of voters and others to vindicate their rights. Lower federal court decisions citing *Washington State Grange* and *Crawford* show that they do not represent a sea change in the law, but the tides are certainly turning. This makes sense, as one staple of Supreme Court jurisprudence is its adherence to gradual change.¹⁵⁶ But it still should sound an alarm regarding how judges define the scope of the right to vote, as I discuss in Part IV.

Any conclusions we can draw from this analysis, however, are necessarily opaque, as lower courts' records in citing these cases have been mixed. *Washington State Grange* stands for the proposition that plaintiffs in all areas, including election law, typically may vindicate their rights only through as-applied challenges, while *Crawford* stands for various propositions more specifically related to election law. In the next sub-Part, I explore whether these cases were also catalysts for an unstated general movement in the law disfavoring broad challenges to election regulations.

B. Comparison of 2004 and 2008 Lower Federal Court Decisions

Washington State Grange and *Crawford* signify the Court's desire to allow governmental entities to experiment with various election regimes, making it even harder for political actors to challenge election laws. Even if courts do not directly cite these cases, the Court sent the signal that judicial temperament toward election law should be to protect the power of the states in managing elections, thereby making it harder for political actors to vindicate their rights. The default is now to uphold the government's election regime.

Comparing federal election law decisions in 2004 and 2008 is one logical way to discern whether the Court's rejection of facial challenges had an immediate adverse effect on voters' rights.¹⁵⁷ The 2004 election

156. See Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 301 (1996) (arguing that "measured" change in constitutional adjudication allows for stability and protects the judiciary from political activism).

157. Of course, this is not to say that all of the cases in 2008 involved the 2008 election, as several cases dealt with previous elections and simply reached the courts in this year. I use 2004 and 2008 merely as measurement tools to analyze the manner in which courts decide election law cases.

cycle was rife with election law litigation, particularly because 2004 was a presidential election year.¹⁵⁸ The 2008 election was similarly full of election-related litigation, and most of these cases came down after the Court rendered its decisions in *Washington State Grange* and *Crawford*.¹⁵⁹ Thus, the political and judicial landscape was largely the same in these years,¹⁶⁰ and one major difference was the Court's decisions in these two cases. In essence, cases during 2004 provide a "control" group, with the intervening Supreme Court cases potentially altering how lower courts approached election law decisions in 2008. Lower courts immediately take notice of new Supreme Court case law, so this analysis presents one simplified manner of discerning the impact of *Washington State Grange* and *Crawford*. Although not a perfect measure, comparing election law cases in these two years will provide an initial indication as to whether voters now have a higher burden as a result of these cases.

The Court decided *Washington State Grange* on March 18, 2008,¹⁶¹ and *Crawford* on April 28, 2008,¹⁶² well before the November 4, 2008 election. In 2008, only one federal court of appeals decision (out of fifteen) and seventeen district court decisions (out of eighty-six) considering the constitutionality of an election law came down before the Court decided *Washington State Grange*.¹⁶³ Thus, there was ample time for the general principles surrounding *Washington State Grange* and *Crawford* to have an immediate impact on the lower courts, and in turn, on the political process during the 2008 election.

Further, courts during presidential election years are no doubt more involved in judicial rulemaking for elections during this time, when the issues are particularly ripe. See Persily, *supra* note 7, at 89 (noting that the Court often decides election law issues that "have immediate thematic relevance to the ongoing campaign, even when the Court is not actually deciding a case that grows out of the campaign itself. Such was the case with the Supreme Court's election law docket from the 2007-2008 term and the historic 2008 election.").

158. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 28-29 (2007) (finding a large increase in election litigation since 2000); Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 252-53 (2007).

159. As I discuss below, I exclude from my analysis lower court decisions in 2008 that came down before the Supreme Court issued *Washington State Grange*, the first of these two cases. See text *infra* Part III.B.1-.2; see also *infra* note 166.

160. Of course, by 2008, there were more President George W. Bush appointees on the federal bench; the influence of political ideology on election law cases is an area that requires further study.

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

162. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

163. See app. tbls.5 & 6, available at http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v37n03_CC1-Douglas_Appendix.pdf.

My analysis is not intended to demonstrate a direct impact from these cases to a statistically significant level for the entirety of election law. The sample sizes are too small to make any definitive conclusions. I have also omitted a comparison of state court cases during these periods in an effort to simplify the analysis, especially given that these Supreme Court decisions directly bind state courts only when the courts construe federal law. Instead, I make a narrower finding from this data: There is a discernable trend of federal judges becoming more likely to favor the governmental entity in election law cases. Thus, although not statistically significant, I surmise that the evidence discussed below shows that current judicial temperament—stemming in particular from the as-applied rule in *Washington State Grange* and *Crawford*—is to uphold the government’s election-related conduct.

1. Courts of Appeals

The federal courts of appeals seemed slightly less likely to strike down an election law in 2008—after *Washington State Grange* and *Crawford*—as compared to 2004. Courts of appeals rendered seventeen reported decisions on the constitutionality of a state’s election regulation in 2004.¹⁶⁴ The courts upheld the election law in its entirety in eight of these cases, meaning that the state won 47.1% of the time.¹⁶⁵ For comparison purposes, when omitting the three cases that the courts of appeals decided from January 1, 2004, to March 18, 2004 (the date in 2008 when the Supreme Court decided *Washington State Grange*),¹⁶⁶ the

164. See app. tbl.3, available at http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v37n03_CC1-Douglas_Appendix.pdf. In this analysis, I use the word “state” as an overarching term to include the governmental entity that promulgates a particular election law under review.

165. I have placed a case that upholds one part of a law but strikes down another portion in the “law struck down” column, as the court struck down at least part of the state’s election scheme. By invalidating even a portion of a law, the court is altering the status quo and essentially telling the state that it has gone too far in promulgating its electoral processes. Even if a court upholds part of a law, therefore, its action in invalidating another portion sends a powerful message about the limits of governmental regulation of elections. For example, in *Anderson v. Spear*, 356 F.3d 651, 654, 675-77 (6th Cir. 2004), the court struck down seven and upheld two Kentucky election law statutes. Because the panel decision struck down a portion of the state’s election code, this case falls into the “law struck down” bucket.

166. For comparison purposes, I analyzed cases decided between March 18 and the end of the year in both 2004 and 2008 (the Court decided *Washington State Grange* on March 18, 2008). If the as-applied rule from *Washington State Grange* and *Crawford* trickled down to lower courts, one would expect to observe this trend beginning with *Washington State Grange*. *Crawford*, the later case, reinforced this rule. Accordingly, it makes sense to measure the effect of these decisions from the first case stating the new rule.

state's success rate rises to 50.0% (the court upheld the state's regulation in its entirety seven of fourteen times).

In 2008, the federal courts of appeals made a substantive ruling about the constitutionality of a particular election law in fifteen cases and upheld the law in its entirety in nine of them, meaning that the state won in 60% of the cases.¹⁶⁷ Only one of these cases came down before the Court's decision in *Washington State Grange* on March 18, 2008;¹⁶⁸ as the state lost that case,¹⁶⁹ omitting it from the analysis brings the government's success rate up to 64.3%. In short, governmental entities were slightly more successful in defending their election schemes in 2008: after *Washington State Grange*, the state won 64.3% of the time, and in 2004 for the same time period, the state won only 50.0% of the cases. Thus, the federal courts of appeals seemed more likely to reject an election law challenge in 2008.¹⁷⁰ Although it is impossible to know definitively if *Washington State Grange* and *Crawford* were directly responsible for this shift or if there are simply too few cases to signify an actual change, it does suggest that the road to challenging the constitutionality of a state's election regulation may have become slightly steeper.

167. See app. tbl.4, available at http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v37n03_CC1-Douglas_Appendix.pdf.

168. *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008).

169. *Id.* at 377.

170. Again, I do not mean to suggest that these results are statistically significant. Rather, they provide a glimpse into the overall trend in the federal courts.

	At Least Part of Law Invalidated	Law Upheld in Its Entirety	Government's Success Rate
All cases decided in 2004	9	8	47.1%
Cases decided between Mar. 18, 2004 and Dec. 31, 2004	7	7	50.0%
All cases decided in 2008	6	9	60.0%
Cases decided between Mar. 18, 2008 (<i>Washington State Grange</i>) and Dec. 31, 2008	5	9	64.3%

Table 2: Federal Courts of Appeals Invalidation of Election Laws, 2004 and 2008

Because the sample size is so small, an examination of the types of cases in which the court struck down an election law provides a more cogent analysis. As mentioned above, in 2004 the federal courts of appeals struck down a state's election practice nine times.¹⁷¹ Several of these cases may have gone the other way after the Court closed the door to facial challenges. Consider *Anderson v. Spear*.¹⁷² Hobart Anderson sought to conduct a write-in candidacy in Kentucky's gubernatorial election.¹⁷³ In October 1999, before the election, he brought suit, seeking an injunction and declaratory judgment that several of Kentucky's election laws were unconstitutional.¹⁷⁴ He alleged that the laws in question prohibited him from conducting several campaign activities.¹⁷⁵ But he did not bring an as-applied challenge, asserting that the state had unconstitutionally applied the laws to him during the election; rather, he

171. See *supra* note 165.

172. 356 F.3d 651 (6th Cir. 2004).

173. *Id.* at 653-54.

174. *Id.* at 654.

175. *Id.*

brought a pre-election facial challenge.¹⁷⁶ Although the election in question had already taken place, the Sixth Circuit struck down several of the provisions.¹⁷⁷ For example, the court held that Kentucky's 500-foot "buffer zone" around a polling place, within which a candidate could not distribute literature, was overbroad.¹⁷⁸ This is a proper application of the overbreadth doctrine, as it is particularly warranted for all types of election laws, not just those that impact political expression or other First Amendment ideals.¹⁷⁹ Unlike in an as-applied approach, however, to win on this claim, the court did not require Anderson to show that he attempted to hand out literature or that the state was going to apply the law specifically to him. Instead, the court allowed him to bring a successful facial challenge to the law.¹⁸⁰ The court also struck down the definition of "contribution" in the state's campaign finance laws as facially unconstitutional because it did not include a candidate's contributions to his or her own campaign accounts.¹⁸¹

Under the current *Washington State Grange/Crawford* regime, however, Anderson may not have prevailed on his facial challenges. Instead, the court would have had to consider whether the 500-foot buffer zone, as applied to Anderson's attempt to distribute materials within the zone at a particular polling site, violated that candidate's constitutional rights. A court might find, for example, that a 500-foot buffer zone is perfectly appropriate for some precincts but not for others given the arrangement of the precinct and the amount of intrusive campaigning at that site. The proper inquiry would be whether a 500-foot barrier presented an unconstitutional burden at the polling sites where Anderson sought and was denied the ability to campaign. Similarly, the definition of "contribution" may have been constitutional in certain applications but not others, which is exactly when, under *Washington State Grange* and *Crawford*, only an as-applied challenge is appropriate. Thus, the push toward as-applied challenges in the 2008 election law cases—and the concomitant rejection of pre-election challenges—might have changed the outcome in *Anderson*.

*American Civil Liberties Union of Nevada v. Heller*¹⁸² presents a similar story. In that case, the American Civil Liberties Union brought a

176. *Id.*

177. *See generally id.* (striking down seven Kentucky election law statutes). The court upheld two of the provisions. *See id.* at 675-77.

178. *Id.* at 662-63.

179. *See infra* Part V.

180. *Id.* at 656.

181. *Id.* at 666-67.

182. 378 F.3d 979 (9th Cir. 2004).

successful facial overbreadth challenge to a Nevada law that required certain groups or entities publishing campaign literature to reveal, in the publication itself, the names and addresses of the publications' financial sponsors.¹⁸³ A court, after *Washington State Grange* and *Crawford*, might well conclude that the state was justified in requiring disclosure for certain types of donors, or perhaps donations over a certain amount. That is, a court might now be hesitant to strike down a disclosure law in every circumstance, instead preferring piecemeal litigation to determine when the disclosure requirement is appropriate. Of course, the court in *Heller* determined that the law was overbroad under the First Amendment,¹⁸⁴ so if the Court adopts the overbreadth doctrine for election law cases generally, as I advocate below, then the rule from *Washington State Grange* and *Crawford* would not apply. But the proper approach is now less clear after these two decisions.

One more example drives home the point and highlights the notion that *Washington State Grange* and *Crawford* gave states wider leeway to experiment in their election schemes. In *Green Party of New York State v. New York State Board of Elections*,¹⁸⁵ the Second Circuit upheld a preliminary injunction against New York's application of one of its voter enrollment regulations.¹⁸⁶ Under the statute in question, if a political party failed to receive at least 50,000 votes for that party's gubernatorial candidate, the State Board of Elections was required to remove that party's name from the voter registration form and convert all voters affiliated with that party to non-enrolled status.¹⁸⁷ The Second Circuit held that the political parties had a substantial likelihood of prevailing on the merits, implicitly stating that the law was unconstitutional.¹⁸⁸ The court limited its holding to the political parties listed in the injunction, which comports with an as-applied challenge, as it affected only those political parties who did not receive 50,000 votes in the gubernatorial election but still could show a modicum of support.¹⁸⁹ Nevertheless, the language the court used to describe the burdens the law imposed on the parties and the failure of the state to justify those burdens suggests that the law could not withstand

183. *Id.* at 981.

184. *Id.* at 1002.

185. 389 F.3d 411 (2d Cir. 2004).

186. *Id.* at 422-23.

187. *Id.* at 415.

188. *Id.* at 422-23.

189. *Id.* at 422.

constitutional scrutiny in any of its applications.¹⁹⁰ Thus, the import of the court's decision was that the law was invalid on its face. After *Washington State Grange* and *Crawford*, however, the court may have been more hesitant to make this broad pronouncement if it could consider only how the state had actually applied the statute to the political parties in question. Perhaps there was a setting in which the state could validly apply the law, such as if the state coupled the 50,000 vote requirement with the lack of other indicators that the political party remained viable. Accordingly, after *Washington State Grange* and *Crawford*, the court might have been less willing to make a sweeping statement on the validity of this election regulation.

In 2008, by contrast, the courts of appeals were slightly more stringent in sustaining only as-applied challenges. As mentioned above, the federal courts of appeals struck down portions of a state's election law in six cases.¹⁹¹ In the only decision that came before *Washington State Grange* and *Crawford*, the Sixth Circuit invalidated an Ohio statute that mandated petition circulators to be paid only on a per-time basis, as opposed to per signature.¹⁹² Although the court did not say so explicitly, its opinion reads as if the law was unconstitutional on its face.¹⁹³ The five cases that came after *Washington State Grange* and *Crawford* present more of a mixed bag. Notably, none of these cases cited *Washington State Grange* or *Crawford*. In many of them, the courts were careful either to clarify that the laws were invalid only as applied or to emphasize that a successful facial challenge was "strong medicine to be applied sparingly and only as a last resort."¹⁹⁴

As another example of a court's reluctance to strike down a law in its entirety after *Washington State Grange* and *Crawford*, consider the Second Circuit's approach in *Price v. New York State Board of Elections*.¹⁹⁵ The court ruled that New York's failure to allow the voters in question to vote absentee in the election for political party county committee, even though the voters qualified for absentee ballots under New York law for other elections, improperly burdened the voters' First

190. *Id.* at 420 ("We think the burdens imposed on plaintiffs' associational rights are severe."); *see also id.* at 421 (stating that "it does not appear that the challenged statutory provision is necessary to achieve the state's asserted interest").

191. *See app. tbl.4, supra* note 167.

192. *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 377 (6th Cir. 2008).

193. *See id.* ("The provision, however, runs afoul of the First Amendment because it creates a significant burden on a core political speech right that is not narrowly tailored.")

194. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 285 (4th Cir. 2008) (quoting *United Seniors Ass'n v. Social Sec. Admin.*, 423 F.3d 397, 406 (4th Cir. 2005)).

195. 540 F.3d 101, 112 (2d Cir. 2008).

Amendment rights.¹⁹⁶ Although the court did not cite either *Washington State Grange* or *Crawford*, it took pains to emphasize that its holding applied only to these voters, suggesting that the law might not impermissibly burden other voters in other circumstances.¹⁹⁷

However, even in light of *Washington State Grange* and *Crawford*, at least one court was willing to strike down a particular election practice with little regard for whether the plaintiff challenged the statute on its face or as applied. In *Nader v. Brewer*,¹⁹⁸ the Ninth Circuit invalidated Arizona laws that required circulators of presidential nomination petitions to be residents of the state and nomination petitions to be filed at least ninety days before the primary election.¹⁹⁹ The court stated that these requirements severely burdened the rights of candidates and those supporting them who were not from Arizona, and could not withstand strict scrutiny review.²⁰⁰ Although seemingly outside of the “as-applied only” rule of *Washington State Grange* and *Crawford*, this case actually demonstrates how many laws simply are not amenable solely to a facial or as-applied challenge and exemplifies how the distinction is often blurred.²⁰¹ Ralph Nader and many of his supporters were not from Arizona, and the statute in question required petition circulators to be from Arizona.²⁰² A ruling that the statute was unconstitutional as applied to Ralph Nader meant that it was unconstitutional as applied to anyone not from Arizona. As the statute affected only non-residents, there was no possible way for the state to enforce its law against anyone other than those similarly situated to Nader.²⁰³ It follows that for Nader to succeed, the court would have to hold the law unconstitutional in every application. In this instance, there was no neat separation between as-applied and facial challenges. The Court’s declarations in *Washington State Grange* and *Crawford* about as-applied challenges to election laws were largely irrelevant when applied to facts such as those in *Nader*. This case also shows that the *type* of case matters. A court facing a facial challenge to a voter identification law after *Crawford* most certainly will

196. *Id.* at 103-04.

197. *Id.* at 112; *see also supra* note 126.

198. 531 F.3d 1028 (9th Cir. 2008).

199. *Id.* at 1030-31.

200. *Id.* at 1040.

201. *See generally* Fallon, *supra* note 14 (discussing how there is no neat way to separate facial from as-applied challenges).

202. *Nader*, 531 F.3d at 1030, 1032.

203. *Id.* at 1031; *see also* *Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) (holding that the Ohio Secretary of State “violated Nader’s First Amendment rights when he enforced Ohio’s registration and residency requirements against Nader’s candidate-petition circulators”).

reject that challenge in favor of an as-applied approach, but the rule might not be as clear to lower courts for other types of cases.

None of this analysis presents a perfect measure of whether the Supreme Court's decisions in *Washington State Grange* or *Crawford* fundamentally altered the landscape of election law jurisprudence. The statistical analysis shows only a minor shift; the description of the cases reveals that some cases might have gone the other way. At most, we can conclude that the courts of appeals are being particularly careful to limit the scope of their rulings in election law decisions. The cases suggest that it has become harder to bring a successful facial challenge to an election regulation. Thus, what we see is a gradual change, whereby governments are able to try out various election regimes with minimal court interference. In the process, political actors such as voters, candidates, or political parties have a harder time vindicating their rights. That is, recent decisions in the courts of appeals show that judges have swung the pendulum even further in favor of a governmental entity's election scheme by narrowing the manner in which a plaintiff can challenge an election law. The Supreme Court's decisions in *Washington State Grange* and *Crawford* provide a cogent explanation for this recent narrowing of voters' and others' rights.

2. District Courts

District courts rendered many more election law decisions than the courts of appeals during these time periods; thus, a comparison of the decisions in 2004 and 2008 provides further insight into whether voters or other political actors are finding it more difficult to vindicate their rights or obtain broad relief.

To determine if there has been a discernable shift after *Washington State Grange* and *Crawford*, I catalogued every reported district court decision from both 2004 and 2008 that ruled upon the legality of a government's election law practice.²⁰⁴ The plaintiffs in these cases were

204. See app. tbls.5 & 6, *supra* note 163. I analyzed only cases that ruled one way or the other on whether the government had acted unlawfully. Therefore, I did not include election law cases in which the court addressed procedural matters or dismissed for a non-merit based reason, such as lack of standing. See, e.g., *Molinari v. Bloomberg*, No. CV-08-4539, 2008 WL 5233854, *11 (E.D.N.Y. Dec. 15, 2008) (denying motion to transfer venue); *Sajo v. Bradbury*, No. CV 04-853, 2004 WL 1803324, *1 (D. Or. Aug. 12, 2004) (dismissing case as moot). Additionally, I included cases in which the plaintiff sought a preliminary injunction, as many election law cases fall under this rubric, often not going beyond this stage. In a case involving a request for a preliminary injunction, the court does not render a final decision on the constitutionality of the government's action, but it does make an initial determination of whether the plaintiff is likely to succeed on the merits. See John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 *FORDHAM L. REV.* 33, 35 (2007) (noting that "the strength of the plaintiff's case under the substantive law—

voters, voting advocacy groups, candidates, political parties, and other entities that sought to challenge a state or federal government election regulation.²⁰⁵ The challenges ranged from questioning a state's ballot access law to campaign finance disputes to Voting Rights Act litigation. Thus, the analysis of district court adjudication of these disputes paints a fairly broad picture of the state of election law for 2004 and 2008, the last two presidential election years.

In 2004, federal district courts determined the validity of a local, state, or federal government election action in seventy-seven cases.²⁰⁶ The courts struck down at least part of a state's election law practice thirty-one times, ruling entirely in favor of the government in the remaining forty-six cases.²⁰⁷ That is, the state's success rate in having its election law decision upheld in its entirety was approximately 59.7%.²⁰⁸ For comparison to 2008, when confining the time period to March 18, 2004 (the date in 2008 of the *Washington State Grange* decision) to the end of 2004, the district courts struck down an election law at least in part twenty-seven times and ruled entirely for the state in thirty-eight cases, giving the state a 58.4% success rate during this period.²⁰⁹

In 2008, federal district courts rendered eighty-six decisions that considered whether the governmental entity in question had gone too far in its election regime.²¹⁰ The court upheld the government's practice in its entirety fifty-four times and granted at least some relief thirty-two times.²¹¹ Thus, the governmental entity had a success rate of approximately 62.3% for all of 2008.²¹² After *Washington State Grange*, district courts struck down at least part of an election law in twenty-eight cases and upheld the law in its entirety forty-one times, giving the state a 59.4% success rate during this time period.²¹³ In several of the cases in

usually referred to as the plaintiff's likelihood of prevailing—is an important, perhaps the most important, factor in determining whether the plaintiff can obtain preliminary relief"). Therefore, suits seeking injunctive relief provide an indication regarding whether the government's election regime is lawful. They are thus appropriate to include in a discussion of whether courts have looked more favorably upon the current governmental practice in an election law case.

205. In several cases, the plaintiff was the United States, bringing Voting Rights Act claims against covered jurisdictions. *See, e.g.,* United States v. Vill. of Port Chester, No. 06 Civ. 15173, 2008 WL 190502, at *1 (S.D.N.Y. Jan. 17, 2008); United States v. Alamosa County, 306 F. Supp. 2d 1016, 1017-18 (D. Colo. 2004).

206. *See* app. tbl.5, *supra* note 163.

207. *See* app. tbl.5, *supra* note 163.

208. *See* app. tbl.5, *supra* note 163.

209. *See* app. tbl.5, *supra* note 163.

210. *See* app. tbl.6, *supra* note 163.

211. *See* app. tbl.6, *supra* note 163.

212. *See* app. tbl.6, *supra* note 163.

213. *See* app. tbl.6, *supra* note 163.

which the plaintiffs won, the relief was through as-applied, not facial, challenges.²¹⁴ In at least one case, the court rejected a facial challenge by using the principles from *Washington State Grange* and *Crawford* without actually citing those decisions, showing how lower courts have mimicked the Supreme Court's attitude toward facial challenges even if the district courts did not directly cite these cases.²¹⁵

	At Least Part of Law Invalidated	Law Upheld in Its Entirety	Government's Success Rate
All cases decided in 2004	31	46	59.7%
Cases decided between Mar. 18, 2004 and Dec. 31, 2004	27	38	58.4%
All cases decided in 2008	32	54	62.3%
Cases decided between Mar. 18, 2008 (<i>Washington State Grange</i>) and Dec. 31, 2008	28	41	59.4%

Table 3: Federal District Courts Invalidation of Election Laws, 2004 and 2008

Although the numbers are almost identical, the cases reveal more than the raw data may indicate. Combined with the discussion of the decisions that cite *Washington State Grange* and *Crawford* for the as-applied rule, this analysis suggests that plaintiffs may now have a harder time achieving broad relief in an election law case. Of course, this trend

214. See, e.g., *Ohio Right to Life Soc'y v. Ohio Elections Comm'n*, Case No. 2:08-cv-00492, 2008 WL 4186312, at *11-12 (S.D. Ohio Sept. 5, 2008); *Citizens for Police Accountability Political Comm. v. Browning*, 581 F. Supp. 2d 1164, 1172-74 (M.D. Fla. 2008). *But see* *Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1154-55 (D. Utah 2008) (striking down a campaign finance law both on its face and as-applied).

215. See *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, No. 3:08-CV-483, 2008 WL 4416282, at *7-8 (E.D. Va. Sept. 24, 2008).

may stem from a number of factors, and the sample size may not be large enough to draw definitive conclusions. Regardless, although there has not been a major shift, the consequences of *Washington State Grange* and *Crawford* are not unnoticeable. For example, even if plaintiffs secure a ruling that the government's action is unlawful, that relief is likely to be narrower because courts are constrained from ruling upon the facial validity of a law.²¹⁶ That is, the almost identical numbers of district court decisions in 2004 and 2008 do not take into account the type of relief currently available to plaintiffs, which the as-applied only rule from *Washington State Grange* and *Crawford* circumscribes. Additionally, it is impossible to measure how many cases were never filed as a result of potential plaintiffs' apprehension about the as-applied approach in *Washington State Grange* and *Crawford*. This data therefore underrepresents the potential effect of these decisions. Nevertheless, given what we know about the shifting paradigm from *Washington State Grange* and *Crawford*, one eminently logical conclusion is that the federal courts have taken the cue that states should be freer to conduct their elections as they see fit. In short, stemming from *Washington State Grange* and *Crawford*, there is a general sentiment in the federal courts to construe election law statutes narrowly and in the government's favor.

Here is the upshot: When lower courts cite *Washington State Grange*, and to a lesser extent, *Crawford*, they are likely to do so for the proposition that plaintiffs must limit election law challenges to as-applied suits. This comports with the Roberts Court's general disfavor for facial challenges to all sorts of statutes.²¹⁷ At the same time, voters are finding it slightly more difficult to challenge a state's election regulation, particularly in the federal courts of appeals, beyond perhaps achieving minor narrow victories for a specific application. This, in turn, affects who chooses to bring suit, as those who believe they will secure only modest relief are unlikely to endure the hassles of a lawsuit.²¹⁸ Whether there is a direct causation or a mere correlation between these Supreme Court cases and the general trend in election law jurisprudence is not yet clear. In any event, there is an observable, albeit gradual and minor, trend toward making it more difficult for voters to win lawsuits

216. See *supra* note 215 and accompanying text.

217. See, e.g., Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 689, 563, 573-90 (2009); David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 694-95 (2009).

218. See Persily & Rosenberg, *supra* note 7, at 1645 (noting that voting advocacy groups may be less likely to spend the time and money to challenge an election law if they are likely to achieve only narrow and specific success).

that broadly challenge a state's election regime. Thus, instead of a sea change in election law, *Washington State Grange* and *Crawford* represent a modest—yet still alarming—movement. Judges, who determine the scope of the right to vote, have used the procedural hurdle of rejecting facial challenges to tip the scale in favor of the state, making it more difficult to broadly challenge a governmental entity's election law practice.

IV. IMPLICATIONS OF THE TREND TOWARD ALLOWING ONLY AS-APPLIED ADJUDICATION

The preceding analysis underscores the main thesis of my scholarship: The meaning of the “right to vote” is wholly dependent on how Supreme Court Justices, and as a corollary, lower federal judges, define that right.²¹⁹ During every election cycle, federal judges confront myriad election-related cases. The manner in which the judges construe those challenged laws provides guidance on the scope of protection for the right to vote.²²⁰ Thus, in the 1960s, Supreme Court Justices sought to widely protect the right to vote; this era was the peak of judicial protection of the franchise.²²¹ The current Court, by contrast, has provided less protection to an individual's right to vote, tipping the balance toward the states in regulating their elections. My research demonstrates one manner in which the Justices have done so: through limiting challenges to a state's election regime to only as-applied litigation.

This analysis leads to two conclusions. First, judges have tremendous power in shaping democratic principles, and, by extension, the meaning of our system of self-governance. Second, the Court's current focus on as-applied challenges should cause some apprehension about the role of the Court in election law disputes. As I further examine in Part V, given these practical concerns stemming from the approach in

219. See generally Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2009) (questioning the fundamentality of the “right to vote” in the face of conflicting adjudicatory standards) [hereinafter Douglas, *Right to Vote*]; Joshua A. Douglas, Note, *A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote*, 75 GEO. WASH. L. REV. 372 (2007) (assessing the “severe burden test” in light of cases stemming from the 2004 presidential election).

220. Professor Metzger explains that the impact of the Roberts Court's focus on as-applied litigation generally depends on the content of the substantive constitutional doctrine involved. Metzger, *supra* note 118. As I show, given the power of the Justices in defining political rights, the facial/as-applied distinction in the election law context has a direct impact on the meaning of the right to vote.

221. See *supra* Part II.B.

Washington State Grange and *Crawford*, the Supreme Court should abolish the distinction between facial and as-applied challenges and instead adopt the overbreadth doctrine for election law cases.

A. *The Role of Judges in Shaping Democratic Self-Governance*

One underlying theme of the Supreme Court's decisions in *Washington State Grange* and *Crawford* is that judges have tremendous power in defining the meaning of political participation. Professors Elmendorf and Foley recently provided a theoretical backbone to my theory that judges are uniquely responsible for shaping the right to vote.²²² These professors considered the Court's varying analytical approaches to election law cases during the 2007 Term²²³ and concluded that the Justices generally are more concerned with the practical implications of their decisions than with having a consistent and coherent approach.²²⁴ As Professor Elmendorf and Professor Foley write,

Our tentative view is that this methodological pluralism, coupled with a lack of explicit normative direction, tends to suggest that most Justices (even Scalia) approach constitutional election law thinking less about doctrinal coherence or interpretive principle than about the implications of their rulings for the system of government as a whole. The Justices sense that constitutional adjudication has an important role to play in legitimating the ground rules of electoral competition, notwithstanding that the text of the Constitution and conventional historical sources do very little to define the scope of political rights.²²⁵

Thus, the Justices are mostly concerned with the practical effects of their election law decisions. This comports with my notion that the Justices shape the meaning of the right to vote through their largely ad hoc approach to election law cases.²²⁶ That is, the "right to vote" is not an abstract, amorphous concept or a well-defined, consistent principle; instead, it is simply whatever the current Supreme Court Justices say it is.

By rejecting virtually all facial challenges, the Court has signaled that most election laws probably pass muster for at least one election

222. See Elmendorf & Foley, *supra* note 107, at 537.

223. *Id.* at 517-29.

224. *Id.* at 537.

225. *Id.*

226. See sources cited *supra* note 217.

cycle.²²⁷ In essence, the default is that a particular regulation will impose no constitutionally-suspect burden on voters or other political actors.²²⁸ The Court starts out with the foundation that the state has promulgated a constitutional election scheme, making it virtually impossible to imagine an election law that the Court would strike down on its face before it can see how the law actually works in practice.²²⁹ The rights of political actors, particular voters, candidates, or minor political parties become derogated in the process, because they are unable to vindicate their rights until they can provide concrete and specific evidence on the actual effect of the law.²³⁰

Currently, the Justices believe that when the right to vote abuts the power of the state, the state should usually win.²³¹ The byproduct is a derogation of protection for actors in the political process. The Court has sent the signal that states have almost unfettered discretion in regulating their elections. Any relief voters or others achieve will likely be at the margins and narrow in scope through piecemeal as-applied litigation. Further, as one commentator noted, the reality of this approach is that voters might never achieve relief because, even though the Court left open the possibility of as-applied challenges in theory, voters will be unlikely to succeed in practice.²³² In *Washington State Grange* and

227. See Persily & Rosenberg, *supra* note 7, at 1666-67 (noting that “[t]he effect of the Court’s decision [in *Washington State Grange*] is to force plaintiffs to suffer irreparable harm (in this case, confused voters in an election) in order to generate evidence as to the law’s unconstitutionality”); see also Metzger, *supra* note 118; Persily & Rosenberg, *supra* note 7, at 1666 (noting that the effect of the push to as-applied challenges in election law is to make some voting rights claims more difficult to bring).

228. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 322 (2007) (arguing that “scrutiny levels [in election law cases] depend on presumptive, first-pass determinations regarding the constitutional status (permissible or impermissible) of the challenged law”).

229. Chief Justice Roberts attempted to refute this notion in his concurrence in *Washington State Grange*, stating that the ballot design itself—which a political party could challenge before the election—would be the dispositive point. See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1197 (2008) (Roberts, C.J., concurring).

230. Of course, there may also be a positive practical effect of this default rule, as it gives election administrators wide leeway in trying out new voting technologies. See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1716 (2005) (“[Mandating a uniform voting technology] can also be expected to stifle innovation by locking in a particular type of security enhancement, while discouraging other possibilities that may be more effective and easier to implement.”). Thus, a particular election mechanism may burden voters in the first instance, but the by-product is that governments may innovate in how they run elections.

231. See Persily, *supra* note 7, at 109 (noting the general restraint the Roberts Court has exercised over election laws, with the exception of campaign finance regulations).

232. See Vikram David Amar, *What the Supreme Court’s Recent Decision Upholding Indiana’s Voter ID Law Tells Us About the Court, Beyond the Area of Election Law*, FINDLAW,

Crawford, the Court sent this veiled message through the lens of rejecting facial challenges. The Justices currently in the majority—most often the conservative members of the Court—provided protection to states' election regimes through a judicial gloss on the types of lawsuits political actors can bring to vindicate their rights. Lower courts, sensing this message, began to follow suit and more often ruled for the state in an election challenge. The change is gradual, as we see from the effects of *Washington State Grange* and *Crawford*, but this does not diminish its importance. In short, the facial/as-applied dichotomy says a lot about how the protection for the right to vote depends on the way in which judges use judicial rules to shape election law litigation.

This conclusion holds true for various aspects of election law, from requiring voters to show photo identification to regulating political parties to having onerous voter registration rules. Professor Tokaji noted that if lower courts follow the Supreme Court's recent "high bar for plaintiffs seeking to mount . . . facial challenge[s]," voters will have a very difficult time obtaining pre-election relief when challenging a restriction on registration.²³³ This is because any relief is possible only after voters suffer a violation of their constitutional rights during an election and then can demonstrate the effect of the law as applied to them. The upshot is that states have much greater power in regulating their elections, which can lead to partisan election officials skewing the state's rules in their favor.²³⁴

Persily and Rosenberg recently provided an explanation for the Court's strict adherence to as-applied litigation for election law that focuses directly on the process of judicial decision-making on the Supreme Court.²³⁵ They argue that the trend toward as-applied adjudication is consistent with an under-the-surface mechanism to constrain unfavorable precedent and rework statutory meaning.²³⁶ For example, Persily and Rosenberg suggest that in *Federal Election*

May 8, 2008, <http://writ.lp.findlaw.com/amar/20080508.html> (noting that the practical reality of the Court's decision in *Crawford* is that "for some claims and right-holders, it's facial challenge or bust. Thus, in turning away facial challenges in cases like these, the Court may seem to be leaving a path for as-applied challenges, but in practice, it may well be effectively foreclosing any meaningful challenge at all.").

233. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 489-90 (2008).

234. *See id.* at 491 ("To the extent courts deny standing to plaintiffs in these cases or restrict the availability of facial challenges, there is great potential for mischief on the part of partisan elected or appointed officials.").

235. *See generally* Persily & Rosenberg, *supra* note 7.

236. *Id.*

Commission v. Wisconsin Right to Life (“WRTL”),²³⁷ the Court ruled almost all activity under the campaign finance statute unconstitutional as applied so as to work around a previous decision rejecting a facial challenge,²³⁸ thereby “carv[ing out] an exception to the law that is as large as the legislative record justifying it.”²³⁹ Persily also contends that the as-applied approach helped to build consensus for the majority ruling in both *Washington State Grange* and *Crawford*, as the Justices who were “on the fence” felt that they could condone an opinion that left the door open to future challenges.²⁴⁰

Persily and Rosenberg’s analysis shows how the facial/as-applied debate affects the internal decision-making in these cases.²⁴¹ What the Justices fail to explicitly acknowledge (or perhaps even realize) is that these rules have stark practical effects on the political process. For example, in *Crawford*, Justice Stevens might have believed that a decision rejecting facial challenges to voter identification laws but allowing future as-applied litigation was an appropriate compromise given the approach of his conservative colleagues.²⁴² Taking this more incrementalist strategy would produce a far more palatable outcome than a starker opinion denying all possible relief, as Justice Scalia advocated in his *Crawford* concurrence.²⁴³ That is, Justice Stevens might have believed that writing the controlling opinion so as to leave the door open to as-applied litigation was a better strategy than being in the dissent to an opinion that rejected all possible challenges to a voter identification law. But as a result of the *Crawford* majority, lower courts seem to be narrowing their decisions and ruling in favor of the state more often because of the signals the Supreme Court has sent. Thus, if Justice

237. 127 S. Ct. 2652 (2007).

238. Compare *id.* at 2659, with *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 157 n.52 (2003). *McConnell* had left the door open to an as-applied challenge to the law. See *McConnell*, 540 U.S. at 157 n.52.

239. Persily & Rosenberg, *supra* note 7, at 1661. Persily and Rosenberg note that in this way, the Court “can say that [the statute] is constitutional in theory, but rarely in practice.” *Id.*; accord Persily, *supra* note 7, at 94 (explaining further how Chief Justice Roberts sought consensus in election law cases through a renewed focus on the distinction between facial and as-applied challenges); see also Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1085-91 (2008) (discussing the incongruity between *McConnell* and *WRTL*).

240. Persily, *supra* note 7, at 94 (suggesting that this approach “appeals to those on the fence who view siding with the majority as a small and perhaps reversible step, rather than the creation of a sweeping rule of law”).

241. Persily & Rosenberg, *supra* note 7, at 1657-72.

242. Persily, *supra* note 7, at 104.

243. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring in the judgment).

Stevens's ruling was an attempt to cabin a harsher result for the rights of voters, his strategy may have backfired through the lower courts' application of these rules. In this way, the rejection of all facial challenges has created unintended negative consequences stemming directly from the power that the Supreme Court has in shaping political rights. If anything, the effects of *Washington State Grange* and *Crawford* show that the Court is not a passive bystander but rather is the institution with the most power to define the scope of the right to vote, even if the rules it promulgates can be understood as a means of internal decision-making.

Thus, the decisions in *Washington State Grange* and *Crawford* represent a gradual trend of today's Supreme Court Justices toward narrow judicial protection for those who seek to challenge a state election regulation. The Court did not say so explicitly in these decisions, but by closing the door to virtually all facial challenges, the Court is placing a high burden on voters and others who seek to vindicate their rights. This burden is in stark contrast to the rules of the 1960s, when the Supreme Court allowed facial challenges to election laws and thereby encouraged sweeping electoral change. Unpacking these trends leads to a realization that individual Justices have immense power in defining the most basic right in our democracy.

Recognizing the power of individual Justices and judges to shape the right to vote also leads to further lessons for the study of election law. Scholars should remain intensely attuned to the unintended and unstated consequences of Supreme Court decisions in this area because they have significant repercussions for the functioning of our democracy. This analysis allows us to divorce ourselves from attempting to glean an overarching principle for all election law jurisprudence, instead requiring us to focus on the idiosyncrasies of the individual Justices and their approaches to these cases. The effects of *Washington State Grange* and *Crawford* show that what the Justices say actually matters a great deal to the current scope of political rights. It also signals that the make-up of the Supreme Court has a huge impact on the scope of the right to vote: The right to vote is simply whatever the nine current Supreme Court Justices say it is. The everyday rules of election law are not usually contentious topics during a prospective Justice's nomination hearing;²⁴⁴ realizing that the Court is actually the most significant arbiter

244. During Chief Justice Roberts's and Justice Alito's confirmation hearings, the Senate Judiciary Committee members asked both nominees general questions about the right to vote. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109 Cong. 170-173 (2005) (questioning from Senator

in shaping political rights suggests that we should scrutinize nominees more closely on this topic. In sum, *Washington State Grange* and *Crawford* represent an important but often overlooked trend: Justices and judges have great power in shaping political rights through “everyday” rulings in election law cases.

B. A Cause for Concern

For those who believe that election law should be mostly about vindicating group rights and ensuring that leaders do not become entrenched, this shift toward allowing only as-applied challenges—and the accompanying trend toward upholding state election regulations—should cause immense concern. Structuralists generally believe that the role of the courts is to safeguard against partisan leaders using the political process to entrench themselves in the majority.²⁴⁵ As Professor Pamela Karlan observes, the Supreme Court “deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals . . . but rather to regulate the institutional arrangements

Kennedy); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109 Cong. 380 (2006) [hereinafter *Confirmation Hearings of Alito*] (questioning from Senator Kohl). No Senator pressed either nominee on more core values regarding the meaning of the right to vote or the role judges should play in shaping a state’s powers in managing an election. Although some committee members questioned Roberts on the Voting Rights Act, the most robust discussion of election law during Justice Alito’s confirmation hearing occurred when Professor Samuel Issacharoff testified before the committee on the principles underlying the “one person-one vote” rule, advising the Senate that it should assure itself that any Supreme Court nominee would “assume the full responsibility of protecting the integrity of our democratic processes.” *Confirmation Hearings of Alito, supra*, at 689.

245. See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 510, 523 (2004) (arguing that an individualistic perspective makes little sense because the Court is required to make value judgments about how to structure a democratic election and in the process decide important structural issues such as the role of political parties, the power of minority groups, or the appropriate amount of competition); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998) (“Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention. Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment.”); Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 688 (2004) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)) (stating that “of the various structural goals of democracy, the one courts ought to focus on is ensuring competition and, through it, electoral accountability”); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731 (1998).

within which politics is conducted.”²⁴⁶ Under this view, the role of the judiciary is to regulate the proper relationship between political institutions and to limit the exercise of state power when used to achieve anti-competitive ends.²⁴⁷

The Court’s practice in *Washington State Grange and Crawford*, however, was to rubberstamp a state’s electoral scheme, at least for one election, until a voter or political party can gather enough evidence on how the law actually operates in the context of a real election. This provides a great incentive for state officials—who are traditionally self-interested by virtue of election to their positions—to shape the rules of the game to benefit their political persuasion.²⁴⁸ Thus, not only is the Court under-protecting those who challenge the state’s actions, it is also failing to ensure that those in power do not use that power for unfair means.

It may not seem like much when the Court states that “facial challenges are best when infrequent.”²⁴⁹ When the Court applied this rule to election law, however, it signaled that the balance of power tipped heavily toward the state in managing an election, impacting the meaning of self-governance. Lower courts take notice, and even if they do not specifically cite this rule, they are more likely to reject a plaintiff’s argument in an election law case. In the process, the Court fails to achieve the structuralist ideal of warding off entrenchment.

Moreover, based upon this seemingly procedural rule of rejecting facial challenges, the current Court has effectively said that the scope of the right to vote is quite narrow. If the Court continues down this path,

246. See Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1346 (2001).

247. See Issacharoff & Pildes, *supra* note 245, at 717-18.

248. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *LAW OF DEMOCRACY* 64 (rev. 2d ed. & Supp. 2005) (highlighting “the always present risk that election regulations enacted by self-interested legislatures can be a vehicle for incumbent or partisan protection”); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1248 (2005) (suggesting that, in the absence of “clear [state] rules,” local election administrators may apply rules that benefit their preferred candidate or hurt the candidates they oppose); Recent Case, *Seventh Circuit Upholds Voter ID Statute*, 120 HARV. L. REV. 1980, 1984 (2007) (noting that simply deferring to legislatures in a voter identification case is “an especially worrisome choice given the concern that election regulations may be passed to entrench the very legislators creating them”); see also *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring in part and concurring in the judgment) (“Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit.”).

249. *Sabri v. United States*, 541 U.S. 600, 608 (2004).

we can expect to see it rejecting many more challenges to state election regimes, and states likely will continue to impose obstacles to political participation. The stated reasons for imposing these burdens might be to enhance efficiency or ward off election fraud, but partisan election officials also can use their electoral schemes to shape the rules of the game—with little concern for court interference. When a voter, candidate, or political party does obtain relief, that relief is likely to have little impact on voting rights as a whole; a court is much more likely to uphold a law on its face but strike down the state's specific application of the law to that plaintiff. The voter or candidate might have his or her rights vindicated for that election, but the state can still apply the law to others or tweak it to carve out the unconstitutional portion. Under this approach, the Court's decisions are unlikely to initiate wholesale changes in how states run their elections.

This all comes at the expense of those who burdensome laws are most likely to adversely affect: minority voters, third-party candidates, and minor political parties. Due to their place in the minority, they are already disadvantaged in the electoral system. If they were in the majority, theoretically they could shape the rules of the game through electoral procedures—which courts are now less likely to curtail. Instead, they must resort to the judiciary to vindicate their rights. But they might not find success there, as the Supreme Court has narrowed the ability of these political actors to challenge a state's election rules.

The effects of the “as-applied only” rule of *Washington State Grange* and *Crawford* are in their infancy. The data of lower federal court decisions suggests that there is a slight, yet still perceptible, trend toward more easily upholding a state's election scheme.²⁵⁰ The concern is that as states realize the implications of *Washington State Grange* and *Crawford*, they might try to become even more innovative in promulgating election regulations that will entrench the majority. Those adversely affected—minority voters and candidates—will bear a greater burden in challenging these regulations. Thus, although the data comparing 2004 and 2008 do not show a large change, if the trend continues, it seems likely that the pendulum will swing even further toward the state during the next election cycle. The Supreme Court in *Washington State Grange* and *Crawford* was the catalyst for this shift. The by-product is a failure to achieve structuralist goals or ward off entrenchment, underscoring once again the power of Supreme Court Justices in defining what it means to have a “right to vote.”

250. See *supra* notes 118-27 and accompanying text.

V. ABOLISHING THE FACIAL/AS-APPLIED DISTINCTION
FOR ELECTION LAW CASES AND ADOPTING THE
OVERBREADTH DOCTRINE IN ITS PLACE

Acknowledging that Justices and judges have a particularly unique role in defining the right to vote and recognizing that recent decisions have in effect curtailed that right leads to the conclusion that courts should relax the procedural-type requirements for this area of law. Courts must be ever vigilant to ensure that states are not infringing upon the right to vote, given that courts shape democratic principles. Because voting is so important to our notion of self-governance, there is reason for added judicial scrutiny of election laws. Requiring as-applied challenges mutes this scrutiny because it allows governmental entities to promulgate laws that will be in effect until a plaintiff can show the actual consequences of the law, which is usually possible only after at least one election under that regulation. As a result, voters and others may suffer an infringement of their rights.

My research shows the practical and adverse effects of the Court's recent approach in *Washington State Grange* and *Crawford*.²⁵¹ Persily and Rosenberg opine that the Court should relax the standard for facial challenges with the goal of facilitating clarity, acknowledging the irreparability of an injury that often occurs, and keeping in mind the costs to the individual when bringing a suit.²⁵² They suggest that courts should prefer facial challenges to as-applied challenges in election law and advocate "something akin to 'substantial overbreadth'" in the election law context.²⁵³ It was beyond the scope of their article, however, to describe in detail how a new overbreadth-type test might work. At a general level, they suggest that any remedy must include a greater ability for political actors to gain prospective relief so that they need not wait until a state actually implements an onerous election regulation to challenge that law.²⁵⁴

My solution is more drastic: The Court should eradicate any distinction between facial and as-applied challenges for election law.²⁵⁵

251. See *supra* Part IV.

252. Persily & Rosenberg, *supra* note 7, at 1672-73.

253. *Id.* at 1674.

254. See *id.* at 1672-74.

255. *But see* *United States v. Stewart*, 348 F.3d 1132, 1142 (9th Cir. 2003) (noting that "it is hard to believe the Court would ever eliminate as-applied challenges for one particular area of constitutional law"), *vacated and remanded by* *United States v. Stewart*, 545 U.S. 1112 (2005). Professor Fallon suggests that although courts almost always require as-applied challenges, the practical effect of the courts' decisions is to invalidate a law in its entirety. See Fallon, *supra* note 14, at 1327-28 ("In order to raise a constitutional objection to a statute, a litigant must always assert

The lens of facial or as-applied challenges has few practical advantages for election law cases; it does not assist courts in more easily disposing of election-related disputes or reduce election litigation. Instead, it makes it harder to glean clear rules about what types of electoral schemes are permissible and, practically speaking, forbids voters from achieving pre-election prospective relief. Accordingly, courts should simply determine whether a state's election practice—given the facts before the court—is permissible.

The Supreme Court has disfavored facial challenges for several reasons. First, “claims of facial invalidity often rest on speculation.”²⁵⁶ Second,

Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.²⁵⁷

Finally, “facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.”²⁵⁸

The importance of protecting the right to vote and encouraging political participation tempers these concerns in the election law context. If a plaintiff with standing is able to show that a law that affects voting rights is invalid with respect to either him- or herself *or* some other political actor, then there is no reason for the court to rubberstamp the law or pass on deciding its constitutionality. As Justice Scalia noted in his concurrence in *Crawford*, “[t]his is an area where the dos and don'ts need to be known in advance of the election.”²⁵⁹

that the statute's *application* to her case violates the Constitution. But when holding that a statute cannot be enforced against a particular litigant, a court will typically apply a general norm or test and, in doing so, may engage in reasoning that marks the statute as unenforceable in its totality. In a practical sense, doctrinal tests of constitutional validity can thus produce what are effectively facial challenges. Nonetheless, determinations that statutes are facially invalid properly occur only as logical outgrowths of rulings on whether statutes may be applied to particular litigants on particular facts.”); *see also* David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41 (2006) (examining the trend toward allowing only facial challenges for Commerce Clause cases); Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge “On Its Face”: Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161 (2004) (same).

256. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008).

257. *Id.* (internal quotation marks and citations omitted).

258. *Id.*

259. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring in the judgment). Of course, Justice Scalia made this statement in conjunction with his

Therefore, the Court should abolish the facial/as-applied distinction for these cases and, in its place, incorporate the First Amendment overbreadth doctrine into election law.²⁶⁰ The overbreadth doctrine allows a court to vindicate others' rights when the right is important enough to enjoy widespread and special protection. Facial overbreadth applies to speech because of the importance of free speech to our democracy.²⁶¹ A law is overbroad if it "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."²⁶² The Court has determined that protecting speech is so vital that we should allow a plaintiff to vindicate the free speech rights of others. The overbreadth doctrine also helps to ensure that laws will not have a chilling effect on expressive conduct.²⁶³

The right to vote, which is at the core of the political process, should similarly receive this special kind of protection. Self-governance begins at the voting booth; all citizens have a stake in ensuring that our democracy functions fairly. Given the importance of voting, we should be extremely concerned about the chilling effect of a law that suppresses political participation. For example, a person who might be exempted from showing a photo identification based upon the Court's reasoning in *Crawford* might choose not to go to the voting booth because he or she incorrectly believes that the law validly applies to all voters. The Court should not allow a state to infringe upon the rights of some voters simply because those voters have not brought suit; instead, the Court should determine which applications are permissible and strike down those applications that are unconstitutional. It follows that a plaintiff should be able to bring suit to vindicate all voters' rights to protect the foundation of the political process. That is, given the unique importance of the right to vote, courts should decide election law disputes without the guise of the facial or as-applied approach and instead should invoke the

argument that the Court should reject all challenges to the voter identification law and hold that it never can be invalid as applied. *See id.*

260. *See Gans, supra* note 13, at 1342-43, 1361 ("Courts . . . need not wait for the statute's first application to constitutionally protected speech to determine its facial validity. Courts will enjoin an overbroad law at the behest of the first challenger."); *see also Decker, supra* note 45, at 81-82 (suggesting that the Court implicitly used the overbreadth doctrine in at least one case involving the right to vote: *Louisiana v. United States*, 380 U.S. 145 (1965)); *id.* at 103-04 (advocating for the Court to adopt the overbreadth doctrine for all fundamental rights).

261. *See Dorf, supra* note 14, at 261-62.

262. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

263. *See id.*; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 402 (1992) (White, J., concurring in judgment).

overbreadth doctrine. As Professor Dorf explained, “the First Amendment is not alone in preserving an open democratic political regime.”²⁶⁴

An overbreadth doctrine for election law is not unprecedented. The Supreme Court implicitly invalidated the poll tax at issue in *Harper v. Virginia Board of Elections* by using an overbreadth analysis.²⁶⁵ That is, the Court struck down the law without inquiring into whether the plaintiffs themselves were able to pay the tax.²⁶⁶ As Professor Dorf observes, “[t]he *Harper* Court thereby implicitly extended overbreadth analysis to a non-First Amendment, nonlitigation right.”²⁶⁷

Similarly, in *Morse v. Republican Party of Virginia*,²⁶⁸ Justice Scalia argued in dissent that requiring a political party to “preclear” a change in the way it selected its nominees was an overbroad application of the Voting Rights Act.²⁶⁹ Instead of refusing to pass upon “hypothetical” situations, Justice Scalia asserted that the Court should determine whether applying Section Five of the Voting Rights Act to political parties infringed upon the right to freedom of association in a substantial number of other contexts not necessarily before the Court.²⁷⁰ Justice Scalia also has suggested overbreadth analysis for campaign finance regulations because those laws implicate First Amendment associative rights.²⁷¹

Of course, Justice Scalia’s “facial” approach to election laws is actually contrary to the protection of voters—as he demonstrated in *Crawford* when arguing that the Court should uphold the voter

264. Dorf, *supra* note 14, at 264.

265. 383 U.S. 663, 666 (1966).

266. Dorf, *supra* note 14, at 267-68.

267. *Id.* at 267. Professor Dorf goes on to consider and reject three possible objections to his analysis. First, he explains that the right to vote is not really a First Amendment right in this situation, so the Court was not simply applying traditional First Amendment overbreadth analysis. *Id.* Second, he rejects the contention that a plaintiff would have a personal stake in her ability to vote without a poll tax even if she could pay it and therefore would not need to bring an overbreadth challenge. *Id.* at 267-68. Finally, Dorf dismisses the argument that because the Court struck down the law in its entirety on equal protection grounds, the decision did not establish the validity of overbreadth challenges involving fundamental rights per se. *Id.* at 268. Dorf concludes, “In short, *Harper* can only be explained as an instance of overbreadth analysis outside the narrow context of free speech.” *Id.*

268. 517 U.S. 186 (1996).

269. *Id.* at 241-42 (Scalia, J., dissenting).

270. *Id.*

271. Fed. Election Comm’n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2683 (2007) (Scalia, J., concurring in part and concurring in the judgment) (“Indeed, any clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by § 203 that § 203 would be rendered substantially overbroad.”). Justice Kennedy and Justice Thomas joined Justice Scalia in this opinion. *See id.*

identification law in all of its applications.²⁷² Justice Scalia seems to have created a presumption in favor of the state and then solidified that presumption through facial validation, as opposed to protecting voters through facial invalidation. But he is correct that it is important to decide these issues before an election so that the rules are clear.²⁷³ It follows that, notwithstanding the manner in which Justice Scalia has applied this rule in election law cases, courts should extend the overbreadth doctrine to all laws that affect political participation. This will ensure that states cannot continue to infringe upon the right to vote in some situations simply because the affected political actor is not before the court, while also giving states clear rules before an election on what types of regulations are permissible. This approach also mitigates the chilling effect of an unconstitutional law. In sum, the Court should be proactive in providing a limiting construction or partial invalidation when an election law is overbroad so as to ensure protection of the right to vote and open the democratic process to all participants.²⁷⁴

There are sound practical reasons to extend the overbreadth rule to the election law setting. As one commentator has noted,

To assure vindication of not only one's personal rights but also the rights of others whose rights are *substantially* threatened but whose condition or circumstance does not permit their personal challenge, an overbreadth doctrine that reaches the contours of all fundamental rights is a necessity. . . . Human conditions or circumstances—indigence, ignorance, illness, disability, immaturity, old age, imprisonment, isolation, timidity, fear, and the like—often prevent a patently unconstitutional law from being challenged by one directly affected by the law. Third-party standing is the prophylactic that vindicates the rights of those not before the court. Simply put, the prophylactic minimizes application of enactments that do not measure up to a constitutionally valid rule of law but instead impede exercise of fundamental rights to a substantial degree.²⁷⁵

The right to vote certainly qualifies for this treatment. A rule in favor of resolving disputes can thus provide the focus for courts to be ever vigilant in ensuring that voting remains fair and unencumbered. The overbreadth doctrine can help to ensure that election laws do not chill

272. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring in the judgment).

273. *See id.* at 1626; *Wis. Right to Life*, 127 S. Ct. 2652 at 2682 n.5.

274. *See Morse*, 517 U.S. at 242 (Scalia, J., dissenting).

275. *Decker*, *supra* note 45, at 103-04 (footnotes omitted).

political participation. Accordingly, the overbreadth approach is a cogent substitute for the facial/as-applied distinction in election law cases.

To invalidate an election regulation, the plaintiff should not have to show that the law is unconstitutional in every instance or as applied to that specific plaintiff; the plaintiff should only need to show that the law is invalid as applied to some political actor, that is, that it is overbroad because it reaches a political actor's constitutionally protected conduct in a substantial number of contexts.²⁷⁶ This provides deference to those who seek to engage in the political process. It therefore uses a judicial rule to shift power away from the entrenched majority and vindicate the rights of everyone who participates in self-governance.²⁷⁷ This should be so: In a realm in which the right to vote is "preservative of all rights,"²⁷⁸ we should err on the side of more clear and less onerous election regulations.

Based on the overbreadth doctrine, the Court should sever an unconstitutional application of an election law even if those infringed are not before the court. Similar to the First Amendment context, a law that infringes upon any voters' rights is, by definition, overbroad.²⁷⁹ Unfettered political participation is too important to allow unconstitutional applications of an election law to go unaddressed. Concerns about open political participation and the possibility of chilling political expression through voting should outweigh the Court's typical

276. In some ways, this is similar to Professor Monaghan's "valid rule requirement," in which "everyone has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her." Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3; see also Fallon, *supra* note 14, at 1327; Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195.

277. See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. (forthcoming Dec. 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344476 (discussing the idea that courts should employ a canon of construction that favors voters in an election law dispute).

278. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

279. Several scholars have advocated for the Court to incorporate some aspect of First Amendment jurisprudence into election law. See, e.g., Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1215, 1255-62 (2003) (suggesting that the First Amendment should apply to questions of racial identity and associational rights); David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. L. REV. 1, 46-52 (2007) (suggesting that the Court should shift toward a First Amendment analysis for claims of partisan gerrymandering); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 334-41 (1993) (promulgating a First Amendment theory for the right to vote). Justice Kennedy has also opined that the First Amendment may be relevant in the political gerrymandering context. See *Vieth v. Jubelirer*, 541 U.S. 267, 314-15 (2004) (Kennedy, J., concurring in the judgment).

preference, through its as-applied jurisprudence, for constitutional avoidance.²⁸⁰

Of course, a plaintiff who has more concrete facts about how the election scheme burdens the right to vote for some political actors will be more likely to win. But if the political actor bringing suit shows that the state's election law unconstitutionally burdens the right to vote for someone engaged in the democratic process, then it should not matter if the law burdens the plaintiff's rights or someone else's rights. The rules of Article III standing will ensure that the courts are not overreaching in analyzing a law, because the plaintiff still must have a personal stake in the litigation to bring suit.²⁸¹ If a plaintiff with standing can show that the state is infringing upon the rights of another political actor, then this should be enough to invalidate at least the unconstitutional application of that election regulation even if the state can validly apply the law to the plaintiff who brought suit, much like in a First Amendment overbreadth setting.²⁸²

Here is how a challenge to the constitutionality of an election law would work without the initial gloss of the facial or as-applied standard: Suppose, as in *Crawford*, several plaintiffs challenge a law requiring a voter to show a photo identification to vote. Instead of asking whether the plaintiffs are challenging the law on its face or as applied, the court will simply determine whether the law—in any application—burdens voters' rights. More specifically, is the law overbroad in regulating the right to vote by reaching constitutionally protected activity in a substantial number of contexts? Does requiring photo identification impermissibly infringe upon the right to vote for any otherwise-eligible voters? If the law unconstitutionally burdens the plaintiffs themselves, then the court will invalidate the law for at least that application, because direct evidence of the infringement is before the court. If the plaintiffs cannot present enough evidence to show that the law unconstitutionally infringes upon the rights of any political actor, then the court will properly reject the plaintiffs' challenge, at least until the plaintiffs can come up with additional evidence.²⁸³ But if the plaintiffs—who have standing—demonstrate that the photo identification requirement

280. See Persily & Rosenberg, *supra* note 7, at 1652-54 (noting that concerns about a chilling effect on protected speech reverse the typical presumption of constitutional avoidance).

281. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

282. See Gans, *supra* note 13, at 1342-43.

283. In some ways, the requirement that the plaintiffs come forth with an appropriate amount of evidence mimics Chief Justice Roberts's approach in *Washington State Grange*. See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1196-97 (2008) (Roberts, C.J., concurring).

infringes upon the right to vote for another group or in a slightly different situation, or if the law chills political participation, then there is little benefit for having a procedure-type rule that allows only as-applied challenges.²⁸⁴ In that instance, the Court should be willing to strike down the unconstitutional applications of the law or at least interpret the statute so as to cure the constitutional defect.²⁸⁵

This approach does not require wholesale invalidation of an election law. In a recent case involving abortion rights, the Supreme Court recognized that a court need not invalidate an unconstitutional law in its entirety if it is possible to sever the invalid portions and stay faithful to legislative intent.²⁸⁶ Using the severability doctrine to cure the constitutional defect of an election law allows the Court to foster open democracy while at the same time protecting the ability of states to constitutionally regulate their elections. Of course, if it is not possible or would be contrary to legislative intent to sever the invalid portion, then the Court must strike down an overbroad election law in its entirety.²⁸⁷ If it is possible to sever the unconstitutional provision, however, then intertwining the overbreadth and severability doctrines in this way provides the most protection for voters without requiring states to rewrite every invalid election regulation. As noted above, another approach is to interpret the statute narrowly by excising invalid applications so as to cure the constitutional defect. Underlying these ideas is the concept that courts should actually decide election law disputes and proactively determine when states are infringing upon the right to vote instead of upholding the law on its face and waiting for an as-applied challenge to invalidate certain applications.

The reasons for abolishing the facial/as-applied distinction and adopting the overbreadth doctrine for election law cases are plentiful. First, it streamlines litigation and provides the most protection for the right to vote. Obtaining prospective relief before an election is particularly important, as the harms that occur if a state is allowed to enforce an unconstitutional law during an election are detrimental and irreversible: people will be denied their legitimate right to vote and may be chilled in exercising the franchise. If voting is “preservative of all rights,”²⁸⁸ then it should be paramount that voters are not denied that

284. In this vein, courts would be well-served to adopt Professor Hasen’s Democracy Canon. See Hasen, *supra* note 277.

285. See Persily & Rosenberg, *supra* note 7, at 1674.

286. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-31 (2006).

287. *See id.*

288. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

right, even for a single election. It also promotes the idea that voting is one of the most important—indeed, fundamental—rights in our democracy.²⁸⁹

Second, it ensures that unlikely plaintiffs—those who are less likely to challenge a law even though they suffer burdens under it—will benefit from a ruling that vindicates their rights.²⁹⁰ There are some voters who will find that the burdens of challenging a law far outweigh the benefits, even though a state’s election practice is infringing their rights.²⁹¹ We should care about those voters’ rights as much as every other voters’ rights, especially because a handful of votes can decide an election.²⁹² Therefore, as a normative matter, we should want every vote to count so as to effectuate the goals of self-governance. Requiring only as-applied challenges to election laws makes it less likely that courts will protect these voters rights, because courts will refuse to invalidate laws that might be unconstitutionally burdening these individuals until someone brings an as-applied lawsuit.²⁹³ The overbreadth doctrine allows courts to vindicate the rights of all potential voters who suffer an unconstitutional burden and helps to erase any chilling effect on political participation stemming from an onerous election law.

Third, eradicating the facial/as-applied rule will promote clarity in the election process.²⁹⁴ When courts actually decide what types of election regulations are permissible and what types are not, governmental entities and those in the political process know what to expect. For example, by rejecting the facial challenge to Indiana’s voter identification law but leaving open the possibility of as-applied challenges, the Supreme Court simply invited additional confusion and litigation.²⁹⁵ Can a state require an identification for elderly people who

289. See Douglas, *Right to Vote*, *supra* note 219, at 171-75.

290. See Persily & Rosenberg, *supra* note 7, at 1674.

291. See *id.*

292. Witness, for example, the 2000 presidential election, which came down to 537 votes in Florida, or the 2008 Senate election in Minnesota. See Federal Election Commission, 2000 Presidential General Election Results, <http://www.fec.gov/pubrec/2000presgeresults.htm>; Schwartz, *supra* note 8. The Minnesota Supreme Court only recently decided the ensuing litigation in favor of Al Franken. See *Sheehan v. Franken*, No. A09-697 (Minn. June 30, 2009) (per curiam), available at <http://www.mncourts.gov/opinions/sc/current/OPA090697-6030.pdf>.

293. See Nihal S. Patel, Note, *Weighty Considerations: Facial Challenges and the Right to Vote*, 104 NW. U. L. REV. (forthcoming 2009) (noting that the Court’s recent approach from *Washington State Grange* and *Crawford* “creates a situation in which states will be allowed to craft badly-flawed election laws that have potential—even probable—unconstitutional applications and still see them upheld on facial review”).

294. See Persily & Rosenberg, *supra* note 7, at 1672-73.

295. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008).

have a hard time obtaining one? Can a state mandate a photo identification for those who religiously object to having their pictures taken? The Court simply left these questions unanswered because it construed the plaintiffs' lawsuit as a facial challenge to the law, even though it recognized that there was at least some (albeit, according to the controlling opinion, insufficient) record evidence on the burdens that the law imposed.²⁹⁶ Perhaps the record was simply not developed enough to rule upon these issues, which is one benefit of leaving these questions for a specific as-applied challenge.²⁹⁷ But given the possibility of some voters suffering a constitutional violation in an upcoming election, ruling upon the legality of an election practice whenever practicable should outweigh the desire to develop a rich record. Accordingly, if there was enough evidence in *Crawford* of the burdens on certain voters (even without a fully developed record), and if the Court had not strictly applied the facial/as-applied rule, then it could have ruled upon the extent to which Indiana could enforce its photo identification law in many of the challenged settings.²⁹⁸ Instead, the Court used the guise of requiring as-applied challenges to punt on these issues, sacrificing clarity and fostering additional litigation in the process.

Closely aligned with these justifications for eliminating the requirement that plaintiffs bring only as-applied election law challenges are the goals of promoting equality and abolishing the stigma associated with burdensome election regulations.²⁹⁹ Perhaps the most prominent aspect of the right to vote is equality; ensuring that every vote counts

296. *Id.* at 1622-23.

297. *See, e.g.,* Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1191 (2008); *see also* Fallon, *supra* note 14, at 1330-31. Justice Souter's *Crawford* dissent, however, refuted the notion that there was insufficient evidence to strike down the law. *See Crawford*, 128 S. Ct. at 1628-31 (Souter, J., dissenting).

298. Indeed, the Court's decision in *Crawford* led to additional litigation on the merits of a voter identification requirement, including more litigation in Indiana. *See Stewart v. Marion County*, No. 1:08-CV-586, 2008 WL 4690984, at *3 (S.D. Ind. Oct. 21, 2008); *see also* Common Cause/Georgia v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009); Am. Civil Liberties Union of N.M. v. Santillanes, 546 F.3d 1313, 1316-17 (10th Cir. 2008); Baude v. Heath, 538 F.3d 608, 614 (7th Cir. 2008); Am. Ass'n of People With Disabilities v. Herrera, 580 F. Supp. 2d 1195, 1212-23 (D.N.M. 2008); Fla. State Conf. of the NAACP v. Browning, 569 F. Supp. 2d 1237, 1240, 1249 (N.D. Fla. 2008); Nader v. Cronin, No. 04-00611, 2008 WL 1932284 (D. Haw. May 1, 2008).

299. *See* Gans, *supra* note 13, at 1380-81 (noting that one reason to prefer facial challenges is to prevent a chilling effect on exercising constitutional rights and ensuring that there is not a stigma associated with engaging in protected activity). As Professor Gans states, "Case-by-case adjudication is likely to be too slow, requiring too many as-applied challenges to eliminate the stigma." *Id.*

equally is the cornerstone of democratic self-governance.³⁰⁰ Allowing a state to promulgate election laws that infringe upon that right for some people—even for a single election cycle—runs counter to this goal. Moreover, there is a societal stigma associated with being turned away from the polls because of purported ineligibility.³⁰¹ It is likely that those discouraged during the voting process may choose not to participate in the future. In that sense, allowing a state to run its election using a law that may be unconstitutional for some people increases the chilling effect of the law and enhances that stigma; the right to vote becomes less valued for these people, which is an unpalatable result—especially if courts are simply waiting for a valid as-applied challenge to the law. Consequently, case-by-case adjudication through as-applied challenges is too slow to vindicate these rights.³⁰²

The preceding analysis shows that the Court's pigeonholing of election law challenges into as-applied litigation has more than simply semantic effects. There are real, practical consequences of the Court's jurisprudence. The method by which a plaintiff can challenge an election law affects the likelihood of a court sustaining the government's approach to election regulation. This, in turn, impacts how people interact with the political process and gives greater power to those already in office to shape the rules of the game. Allowing only as-applied challenges in essence preserves the status quo, making it more difficult to challenge inequities in voting rights. The Court's approach shuts the courthouse door to many political actors who may wish to challenge the manner in which we elect our leaders. At its most practical level, then, the Court is simply protecting the government's electoral scheme through the guise of allowing only as-applied litigation—all at the expense of the vindication of voters' rights. *Washington State Grange* and *Crawford* demonstrate the Court's power in defining the meaning of the right to vote through procedural-type rules that have the effect of favoring the state's electoral scheme, even if that means that some political actors might suffer a violation of their constitutional rights in the process. The overbreadth doctrine can help to remedy the negative implications stemming from the rule in *Washington State Grange* and *Crawford*.

300. See Douglas, *Right to Vote*, *supra* note 219, at 179 (“Laws that draw distinctions between voters regarding the value of their votes thereby affect their individual rights and call into question the accuracy of the election results and the efficacy of self-governance.”).

301. See DENNIS J. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 25 (2004).

302. See Gans, *supra* note 13, at 1381.

VI. CONCLUSION

It is still too early to tell if Professor Hasen was entirely correct in predicting that the Supreme Court's rule rejecting facial challenges to election laws will cause short-term damage to minority voters,³⁰³ but the evidence at least preliminarily suggests that the Court's approach has already had an adverse effect on voters' rights. In *Washington State Grange* and *Crawford*, the Court pigeonholed election law litigation into as-applied challenges, which presents a significant hurdle for those seeking to invalidate a law. At a minimum, it requires the political actor to provide a complete data set on the actual effects of the law, which, in many cases, is impossible to gather unless the electorate endures at least one election under that regulation. More significantly, the Court has signaled that the balance of power in election law cases rests squarely with the states. This will have a disproportionate effect on minority voters and minor political parties, who are more likely to suffer burdens and challenge a law in the face of an entrenched majority. The Court provided an interpretative lens through which courts must now view election law challenges. Lower federal courts have taken notice and are more likely to uphold a state's election regulation or at least reject a broad constitutional challenge. Although none of the Justices indicated that this approach would have a significant impact on election law, the Court's decisions demonstrate its power to narrow the protections it provides for the right to vote, thereby impacting the substantive right involved. The Justices should be more careful in promulgating what seem to be procedural rules, as the decisions have a tremendous effect on shaping the political process. This analysis also demonstrates the importance of judicial decision-making in defining the meaning of political participation and the scope of the right to vote. Finally, at the most practical level, this discussion calls into question the propriety of the distinction between facial and as-applied challenges in election law and suggests that the Court's approach does more harm than good.

VII. EPILOGUE: *NAMUDNO*

Just before this Article went to print, the Supreme Court decided *Northwest Austin Municipal Utility District Number One v. Holder* ("*NAMUDNO*"),³⁰⁴ a challenge to Section Five of the Voting Rights

303. See *supra* notes 3-5 and accompanying text.

304. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (U.S. June 22, 2009).

Act.³⁰⁵ The political subdivision that brought suit, a water district in Travis County, Texas, challenged the requirement that it “preclear” any changes it made to its election rules with the Department of Justice or the D.C. district court.³⁰⁶ The water district alleged both that it should be allowed to “bail out” of the preclearance requirement and that Congress’s reauthorization of Section 5 in 2006 was unconstitutional.³⁰⁷

After oral argument, most observers believed that the Court would strike down Section 5 of the Voting Rights Act as unconstitutional.³⁰⁸ It appeared that at least five Justices would rule that Congress had not sufficiently justified its continued imposition of preclearance on covered jurisdictions. The commentators assumed that the bailout issue was a non-starter because the water district was ineligible for a bailout under the plain text of the Voting Rights Act and previous case law construing the definition of “political subdivision.”³⁰⁹ Rejecting the water district’s bailout argument would require the Court either to uphold or strike down the law on its face.³¹⁰ In short, the expectation was that Court would rule conclusively on the law’s constitutionality.

It surprised many, therefore, when the Court sidestepped the broad constitutional question and resolved the case solely on the narrower statutory bailout issue.³¹¹ The Court stretched the statutory language and discounted its prior case law to hold that the definition of “political subdivision” in Section 14 of the Voting Rights Act did not apply to the bailout provision in Section 4(b).³¹² The Court thus adopted an extremely broad definition of “political subdivision” for purposes of bailout and ignored the statutory definition to avoid the constitutional question in the case.³¹³

In light of the as-applied-only rule from *Washington State Grange* and *Crawford*, however, the Court’s resolution of *NAMUDNO* is hardly remarkable. The Court’s decision is entirely consistent with its recent approach to constitutional adjudication in this area, in which it avoids making sweeping pronouncements on the constitutionality of an election

305. 42 U. S. C. § 1973c(a).

306. *Nw. Austin Mun. Util. Dist. No. One*, No. 08-322, slip op. at 5-6.

307. *Id.*

308. See, e.g., Rick Hasen, *NAMUDNO: The Answer to My Question Appears to Be “Yes,”* Election Law Blog, Apr. 30, 2009, <http://electionlawblog.org/archives/013533.html>.

309. See, e.g., *United States v. Sheffield Bd. of Comm’rs*, 435 U. S. 110, 117-18 (1978).

310. See, e.g., Posting of Heather K. Gerken to Balkinization, <http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html> (June 22, 2009, 10:42 EST).

311. *Nw. Austin Mun. Util. Dist. No. One*, slip op. at 10-11.

312. *Id.* at 16.

313. *Id.*

law, instead preferring case-by-case interpretation. The water district's bailout argument was analogous to an as-applied challenge to Section 5, which the Court embraced to avoid analyzing the statute's facial validity. In essence, the Court ruled that Congress could not impose Section 5 as applied to the water district or any other political subdivision that successfully seeks a bailout. The law remains valid as to those who do not obtain a bailout. This conclusion necessarily pretermitted the need to rule upon the facial validity of the statute. The Court thus proved once again that it prefers to move slowly through constitutional issues in election law.

At first blush, the decision in *NAMUDNO* seems to fall within the previously identified worrisome trend stemming from *Washington State Grange* and *Crawford*. In recent election law cases, the Court has abdicated its role of providing clear guidance on the constitutionality of election laws by avoiding broad constitutional questions. This piecemeal approach leads to negative consequences for voters and other political actors, particularly given the chilling effect of an unconstitutional law that stays on the books during an election only because no one has brought an as-applied suit.

But the consequences of avoiding the constitutional issue in *NAMUDNO* are quite different because the law under review does not regulate voters or other political actors. The Voting Rights Act burdens not voters, candidates, or political parties but states and other covered jurisdictions, which promulgate the rules of an election. The typical concerns about a chilling effect on political participation are absent for Section 5, which targets the rulemakers themselves. There is less uneasiness surrounding the constitutional avoidance approach in *NAMUDNO* than there was for the rule stemming from *Washington State Grange* and *Crawford*, because failing to answer the tough constitutional question in *NAMUDNO* does not lead to the further infringement of voters' or others' rights. A minor burden on covered jurisdictions that do not successfully seek a bailout—having to preclear new election rules before implementing them—is wholly unlike the chilling effect of an invalid law on voters who have not yet brought a post-election as-applied challenge and who simply may decide not to participate in an election instead of resorting to litigation. Further, a covered jurisdiction will rarely choose not to make an election change simply because it must seek preclearance first, especially because the Department of Justice will approve a regulation that does not adversely impact minority voters. Thus, there is little concern about a chilling effect based on the “as-applied” approach in *NAMUDNO*.

The Court had powerful political and institutional incentives to wait on ruling upon the constitutionality of Section 5. By fashioning a narrow ruling that provided dicta on the constitutional problems with the law but resolved the case through statutory construction, the Court avoided striking down a bastion of the civil rights movement while at the same time providing Congress with a chance to fix the possible constitutional defects. This ruling protects minority voters, who benefit from a requirement that covered jurisdictions preclear any changes in voting practices. Section 5 requires preelection approval of a new election regulation to ensure that the change will not adversely affect voters or others—the same goals of a rule promoting preelection judicial resolution of a challenge to a State’s election practices. Constitutional avoidance in *NAMUDNO* therefore serves the goals of protecting voters and opening the political process.

NAMUDNO affirms the Court’s reluctance to invalidate an election law on its face. The consequences of this rule are not as stark for challenges to the Voting Rights Act as they are for challenges to state election statutes, because constitutional avoidance in *NAMUDNO* preserves federal government regulation of those who promulgate state electoral rules. But it does suggest that the Court is being extremely careful about ruling upon the constitutionality of a law that affects electoral rights. Once again, we see the Court viewing its role as giving deference to those who regulate the political process—in this case, Congress. The Court’s recent election law decisions demonstrate its willingness to preserve the status quo, providing only incremental relief to those who challenge an election law. Typically, the Court rubberstamps a state’s electoral practice even if it strikes down one application, potentially leading to the infringement of voters’ rights until those voters bring a post-election as-applied suit. Although the constitutional avoidance approach in *NAMUDNO* was largely the same as in *Washington State Grange* and *Crawford*, the consequences of *NAMUDNO* are quite different, because the Court’s decision preserved Congress’s regulation of those who create and enforce the rules—rules that the Court is now more likely to uphold in most settings based on its recent as-applied methodology.