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Recommended Citation
Metzger, Gillian , "Facial and As-Applied Challenges Under the Roberts Court" (2009). *Columbia Public Law & Legal Theory Working Papers.* Paper 09161.
http://lsr.nellco.org/columbia_pllt/09161

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FACIAL AND AS-APPLIED CHALLENGES UNDER THE ROBERTS COURT

Gillian E. Metzger*

One recurring theme of the early Roberts Court's jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation. On a number of occasions the Court has rejected facial constitutional challenges while reserving the possibility that narrower as-applied claims might succeed. According to the Court, such as-applied claims are "the basic building blocks of constitutional adjudication.'"[1] This preference for as-applied over facial challenges has surfaced with some frequency, across terms and in contexts involving different constitutional rights, at times garnering support from all the Justices on the Court. Moreover, the Roberts Court has advocated the as-applied approach in contexts in which facial challenges were previously the norm, suggesting that it intends to restrict the availability of facial challenges more than in the past.[2]

Unfortunately, the Roberts Court has not matched its consistency in preferring as-applied constitutional adjudication with clarity about what this preference means in practice. The Court itself has noted that it remains divided over the appropriate test to govern when facial challenges are available, with some justices arguing that facial challenges should succeed only where a challenged measure is "unconstitutional in all of its applications" and others insisting on a somewhat lower threshold.[3] Equally or more important, the Court has made little effort to describe the contours of as-applied litigation and has justified its preference for as-applied claims on diverse grounds that yield different implications for the types of as-applied claims litigants can bring. At times, the Court has invoked the current lack of evidence about how a measure will actually operate and the dangers of speculative adjudication, suggesting that it identifies as-

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[1] Gonzales v. Carhart, 550 U.S. 124, 127 S. Ct. 1610, 1639 (2007) (quoting Richard Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000)).

[2] Most notably, the Roberts Court has rejected facial challenges asserting violation of abortion and First Amendment rights, two contexts in which facial challenges were previously often accepted, see Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 269-72 (1993). In the later years of the Rehnquist Court, the propriety of facial versus as-applied challenges arose most prominently in the context of attacks on federal legislation as exceeding constitutional limits on congressional power. See generally Gillian Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873 (2005). So far, the Roberts Court has largely addressed the question in the context of individual rights litigation.

[3] Washington State Grange v. Washington State Republican Party, 128 S. Ct 1184, 1190, 1195 (2008); Gonzales, 127 S. Ct. at 1639.

applied challenges with post-enforcement actions. At others, the Court concludes that most of the time the challenged measure is plainly constitutional and reserves the as-applied option for the rare instances when constitutional issues might arise, implying that what differentiates an as-applied action is its narrow scope. The Roberts Court also appears to use as-applied challenges strategically, in particular as a device to evade recent precedent with which it disagrees, thereby raising a question about whether its employment of the facial/as-applied distinction has a principled core—and about whether its emphasis on this distinction will fade over time, as the Court gradually shapes the contours of governing constitutional law.

Assessing the practical import of the Roberts Court's facial/as-applied jurisprudence on constitutional litigation is therefore difficult. If the Court means to exclude pre-enforcement challenges or require that specific applications of a measure be challenged one at a time, its rejection of facial challenges in favor of as-applied claims will in practice raise substantial impediments to asserting constitutional rights in federal court. Such a restrictive approach to as-applied challenges would also mark a notable deviation from existing precedent. But an examination of the Roberts Court's recent decisions reveals they do not go so far, and do not require such a narrow reading of what constitutes an acceptable as-applied challenge. Instead, the Roberts Court's resistance to facial challenges is largely in keeping with longer-term trends in the Supreme Court's jurisprudence—with respect both to the Court's understanding of what constitutes an as-applied challenge, the scope of the Court's remedial authority to carve away a measure's unconstitutional dimensions, and strategic use of the facial versus as-applied distinction.

What sets the Roberts Court apart is its understanding of the substantive scope of particular constitutional rights. Not surprisingly, that substantive understanding plays a major role in determining the Court's rejection (and acceptance) of facial challenges in different contexts. As a result, to the extent these decisions signal greater obstacles to assertion of certain constitutional rights in the federal courts, those obstacles likely result as much, if not more, from retraction in the substantive scope of those rights as from general jurisdictional rules regarding the appropriate form of constitutional adjudication.

In what follows, I begin by giving an overview of the Roberts Court's jurisprudence on facial and as-applied challenges. I then turn to distilling the implications of these decisions for individual rights adjudication in the federal courts, focusing on the Court's understanding of as-applied challenges, its approach to severability and remedial authority, and the role played by substantive constitutional law.

I. AN OVERVIEW OF THE ROBERTS COURT'S FACIAL AND AS-APPLIED CASE LAW

In its now over-three-term existence, the Roberts Court has often invoked the terms facial or as-applied to describe its analysis, and these characterizations could be attached to many others. What follows is a description of a number of decisions, broken down by term, that I believe are making them of particular relevance to tracing the Court's approach to facial and as-applied challenges. For the most part, these are decisions in which the Court paid express

attention to the facial/as-applied distinction, usually arguing that the facial cast of a challenge was inappropriate. But it also includes a couple of instances in which the Court did not characterize its approach as falling within the facial or as-applied category, yet its analysis was notably facial or as-applied in tone, especially when considered against precedent in the area and claims raised in the case.

A. The 2005-2006 Term

The Roberts Court's preference for as applied over facial constitutional challenges became evident early on, in three decisions issued while Justice O'Connor was still a member of the Court: *United States v. Georgia*,[4] *Ayotte v. Planned Parenthood of Northern New England*,[5] and *Wisconsin Right-to-Life v. FCC* (*WRTL I*).[6] All three are notable primarily for their unanimity and brevity, notwithstanding the contentious issues they addressed—abortion rights, Congress's enforcement power under Section 5 of the Fourteenth Amendment, and campaign finance. The Court's decisions in *Georgia* and *WRTL I* indicated the potential advantages of as-applied challenges; in both, the as-applied nature of the claims being brought was central to the Court's willingness to allow the suits at issue to go forward.[7] Only in *Ayotte*, however, did the facial versus as-applied question get much sustained discussion, and there it arose in terms of the appropriateness of facial invalidation as a remedy rather than the availability of a facial challenge.

Ayotte involved an effort to have a newly-enacted New Hampshire parental consent statute declared facially unconstitutional because it did not allow a minor to obtain an abortion without prior notice to her parent when an immediate abortion was needed to preserve her health. Writing for a unanimous Court, Justice O'Connor had little trouble concluding that the failure to include a health exception was a constitutional violation, given evidence of medical risk and the

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[4]546 U.S. 151 (2006).

[5]546 U.S. 320 (2006).

[6]546 U.S. 410 (2006).

[7] In *WRTL I*, the Court held that its prior decision in *McConnell v. FEC*, 540 U.S. 93 (2003), sustaining the Bipartisan Campaign Reform Act of 2002 (BCRA) against facial challenge did not preclude subsequent as-applied challenges to BCRA's constitutionality. 546 U.S. at 411-12. In *Georgia* the Court did not expressly couch its analysis in as-applied terms, however the as-applied character of its approach was readily apparent. The Court there avoided questions about the scope of Congress's power to enforce the Fourteenth Amendment by emphasizing that the claims involved in the case alleged actual constitutional violations, which it held were plainly within Congress's enforcement power to remedy. 546 U.S. at 158-59.

Court's precedents emphasizing the need for such health exceptions in abortion restrictions.[8] But she emphasized that this constitutional infirmity need not lead to the statute's being "invalidated . . . wholesale," given that "[o]nly a few applications" of the statute that "would present a constitutional problem."[9] Identifying "'partial rather facial invalidation'" as "the 'normal rule,'" provided partial invalidation accorded with legislative preferences, the Court remanded for the appellate court to determine if "New Hampshire's legislature intended the statute to be susceptible to such a remedy."[10]

B. The 2006-2007 Term

All three of the decisions described above were issued in a period of transition—indeed, in Justice O'Connor's last month on the Court—raising the possibility that their as-applied focus was an interim phenomenon.[11] But the Robert Court's preference for as-applied analysis has continued to surface, albeit without the unanimity that marked these early decisions. Two prominent examples from the Roberts Court's second Term are *Gonzales v. Carhart* and *FEC v. Wisconsin Right to Life* (*WRTL II)*. *Gonzales* involved facial challenges to the constitutionality of the federal Partial-Birth Abortion Ban Act, which sought to prohibit intact dilation and evacuation (D & E) abortions, when the fetus is removed intact.[12] Seven years earlier, in *Stenberg v. Carhart*, the Court had sustained a facial challenge to a similar Nebraska measure, finding it unconstitutional on two fronts: first, because the Nebraska measure lacked a health exception; and second, because the Court concluded it could also apply to ordinary D& E abortions, the most common method used to perform second-trimester abortions, and therefore

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[8] According to the Court, New Hampshire did not seriously dispute that minors might need an immediate abortion for health reasons in rare cases, and the Court's precedents made clear that a state could not "restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Ayotte*, 546 U.S. at 327 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (internal quotations omitted)).

[9] Id at 331.

[10] Id at 329-31.

[11] See Edward A. Hartnett, Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts, 59 S.M. U. L . Rev. 1735, 1757 (2006); Posting of Richard Pildes to SCOTUSblog, http://www.scotusblog.com (Jan. 23, 2006, 17:48 EST) (arguing that Justice O'Connor's imminent retirement, mid-Term, shaped the narrow holdings in these cases).

[12] The *Stenberg* Court referred to intact D & E abortions as D &X abortions, short for dilation and extraction; the Nebraska and federal statutes refer to them as "partial-birth" abortions. For consistency, I use here simply "intact D & E," the term the Court opted for in *Gonzales*. 127 S. Ct. at 1621.

created an undue burden on women's access to abortion.[13] In a contentious 5-4 decision, the Court in *Gonzales* rejected a similar facial challenge. In his opinion for the majority, Justice Kennedy held that the federal ban was more carefully crafted than the Nebraska measure to apply only to intact D&E abortions, emphasizing in particular the federal statute's intent requirements.[14]

Harder to square with *Stenberg* was the Court's willingness to sustain the federal ban notwithstanding that it, too, lacked a health exception. In so ruling, Justice Kennedy underscored the existence of medical uncertainty regarding whether the intact D&E procedure might be needed to avoid a significant health risk to women. Although *Stenberg* had concluded that such uncertainty made a health exception necessary,[15] in *Gonzales* Justice Kennedy took the opposite view, concluding that medical uncertainty was sufficient to allow the federal ban to survive facial attack even absent a health exception.[16] Indeed, according to Justice Kennedy, "these facial attacks should not have been entertained in the first place," and instead an as-applied challenge was "the proper manner to protect the health of the woman if it could be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure . . . must be used."[17]

The decision in *WRTL II* is similarly hard to square with precedent. In *McConnell v. FEC*, a 2003 decision, the Court rejected a facial challenge to section 203 of the Bipartisan Campaign Reform Act (BCRA) alleging that the section violated First Amendment rights to engage in political speech.[18] Section 203 had extended the prohibition on use of corporate and union treasury funds to include all advertisements that refer to clearly identified federal candidates within sixty days of an election, and not simply advertisements expressly advocating the election or defeat of federal candidates.[19] But four years later, in *WRTL II*, the Court sustained an as-applied challenge raising a similar claim of section 203's unconstitutionality. The decision in *WRTL II* was badly fractured. Chief Justice Roberts, in an opinion joined in relevant part only by Justice Alito, held that section 203 was only constitutional as applied to

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[13] 530 U.S. 914, 937-38, 945-46 (2000).

[14] *Gonzales*, 127 S. Ct. at 1627-32.

[15] 530 U.S. at 937-38.

[16] 127 S. Ct. at 1636, 1638.

[17] Id. at 1638. In addition, Justice Kennedy noted that "no as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception." Id. at 1639.

[18] 540 U.S. 93, 206-209 (2003).

[19] 2 U.S.C. § 441b(b)(2); see *McConnell*, 540 U.S. at 204.

advertisements that were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[20] But the Chief Justice insisted that *McConnell* remained good law, invoking the distinction between facial and as applied challenges to justify the different results in the two cases. He argued that *McConnell* stood for the principle that the ban on use of corporate and union treasury funds could apply to advertisements that were express advocacy or its "functional equivalent," but had not defined what would qualify as the functional equivalent of express advocacy in an as-applied challenge.[21] By contrast, the other seven justices all concluded that *WRTL II* essentially overrode *McConnell*, disagreeing only about whether that was a good or bad thing.[22]

The fact that only two Justices signed onto the emphasis on facial versus as-applied challenges in *WRTL II* makes it hard to read the decision as a further signal of newfound affection for as-applied challenges on the Court as a whole. Indeed, viewed in its entirety, the different opinions in *WRTL II* demonstrate limits on the extent to which the Justices accord the facial versus as-applied distinction determinative significance. Nonetheless, the principal opinion's invocation of the distinction merits note. If nothing else, *WRTL II* stands as evidence—along with *Carhart*—that the facial versus as-applied distinction is being used by the Roberts Court to reach results more in keeping with the substantive views of the Court's new membership without expressly overruling recent precedent.[23] *WRTL II* is also interesting as an

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[20] *WRTL II*, 127 S.Ct 2652, 2667, 2673. As Nate Persily and Jennifer Rosenberg note, one peculiar aspect of *WRTL II* is that Chief Justice Roberts' opinion opted to adopt this language rather than the backup language actually contained in BCRA, in case the broad definition of prohibited electioneering communications were found unconstitutional. The back-up language provided that section 203's prohibition would apply only to communications that, in addition to either promoting or opposing a candidate for federal office, "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. § 434(f)(3)(A)(ii). This back-up definition was not even mentioned in Chief Justice Roberts' opinion, despite the close similarity to the standard his opinion adopted to govern future as-applied challenges. See 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, __ Minn. L. Rev. __ (unpublished manuscript at 17-18).

[21] 127 S. Ct., at 2663-65, 2674; see also id. at 2674 (Alito, J., concurring).

[22] Id. at 2683-84 & n.7 (Scalia, J., concurring in the judgment, joined by Kennedy and Thomas, JJ.); id. at 2699-700 (dissenting opinion of Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.); see also Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 Alb. Gov't L. Rev. 101, 102, 113-130 (2008) (describing why *McConnell* and *WRTL II* are incompatible incompatibility).

[23] See also Persily & Rosenberg, supra note 20, at 31 (characterizing *WRTL II* as an "exit strategy from disputed precedent"). This reluctance to overrule precedent has surfaced in other decisions not involving facial challenges. See *Hein v. Freedom from Religion Found.*, 127 S. Ct.

instance in which the promise of as-applied challenges translated into a vibrant protection for individual rights, notwithstanding failure of a facial challenge. The generalizability of this result is severely compromised, however, by the likelihood that the Roberts Court would have sustained the facial challenge of *McConnell*, if faced with such a challenge without precedent on point.

C. The 2008-2009 Term

The distinction between facial and as-applied challenges surfaced again last Term. Here two decisions, *Washington State Grange v. Washington State Republican Party*[24] and *Crawford v. Marion County Election Board*,[25] deserve special note because of the extent to which they emphasized the facial nature of the challenges before them. *Washington State Grange* and *Crawford* share many features. Both decisions arose in the election context, with *Washington State Grange* involving a facial challenge to a blanket primary system and *Crawford* involving a facial challenge to a voter ID law.[26] Both decisions rejected the facial challenges before them and did so because of a lack of evidence that the challenged measures would burden First and Fourteenth Amendment rights. Equally important, both tied this result to the fact that neither law had yet gone into effect and evidence of how they would operate in practice was lacking.[27] In *Washington State Grange*, Justice Thomas writing for the majority noted that an as-applied challenge might succeed in the future, were evidence of burden to become apparent once the primary system was operative.[28] In *Crawford*, Justice Stevens' principal opinion did not expressly mention the possibility of a future as-applied challenge, but its repeated emphasis on the weakness of the evidentiary record currently before the Court carried the same implication.[29]

2553, 2556-68, 2571-72 (2007) (restricting *Flast v. Cohen*'s provision of taxpayer standing to raise Establishment Clause challenges to challenges brought against congressional enactments and rejecting arguments that the suits should be viewed as-applied challenges to specific implementations of congressional statutes).

[24] 128 S. Ct. 1184 (2008).

[25] 128 S. Ct. 1610 (2008).

[26] For a discussion of the extent to which the Roberts Court is invoking the facial versus as-applied distinction in the election law context, see generally Persily & Rosenberg, supra note 20.

[27] *Washington Grange*, 128 S. Ct. at 1193-95; *Crawford*, 128 S. Ct. at 1622-23.

[28] *Washington Grange*, 128 S. Ct. at 1195.

[29] *Crawford*, 128 S. Ct. at 1622-23.

Yet notable differences between the two exist. In *Washington State Grange* the Court displayed some sympathy for the constitutional claim before it, and in dicta—supplemented further in Chief Justice Roberts' concurrence—indicated the limited ways in which Washington could implement the party preference statute without running afoul of the First Amendment.[30] In *Crawford*, by contrast, the lead opinion and concurrence were more receptive to the state interests at stake and doubtful that the measure would ever prove unconstitutional.[31] In addition, the two decisions are distinguished by the extent to which the Court as a whole perceived a meaningful difference between facial and as-applied challenges before it. Seven justices signed onto the majority opinion in *Washington State Grange*, whereas *Crawford*, like *WRTL II*, was far more fractured with respect to the relevance of the facial versus as-applied distinction, with a majority of the Justices concluding that further factual development should not make a difference, albeit for very different reasons.[32]

Last Term also stands out for the Court's willingness to sustain two facial constitutional challenges. The most prominent of these was *District of Columbia v. Heller*, a 5-4 decision in which the Court, in an opinion written by Justice Scalia, held that D.C.'s handgun ban violated the Second Amendment. *Heller* is a striking decision on many fronts, most notably its originalist methodology, revival of the Second Amendment, and efforts to exclude a variety of firearm restrictions from the scope of the Second Amendment it was reviving.[33] A less prominent feature

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[30] See 128 S. Ct. at 1194; *id*. at 1197.(Roberts, C.J., concurring).

[31] See 128 S. Ct. at 1616-20, 1623 & n.20; see also id. at 1624-25 (Scalia, J., concurring).

[32] Compare 128 S. Ct. at 1625 (Scalia, J., concurring in the judgment, joined by Alito and Thomas, JJ.) (arguing that individual burdens were not relevant in assessing the constitutionality of "a generally acceptable, nondiscriminatory voting regulation.") with ;id. at 1632 (Souter, J., dissenting, joined by Ginsburg, J.) (arguing the record contained sufficient evidence that the voter ID law threatened to impose serious burdens on the voting rights of a significant number of individuals) and id. at 1644 (Breyer, J., dissenting) (similarly arguing sufficient evidence of burden in record to sustain facial challenge).

[33] All of these features of *Heller* have received extended commentary elsewhere. *See, e.g.*, Randy E. Barnett, Op-Ed, News Flash: The Constitution Means What It Says, Wall St. J., June 27, 2008 ("Justice Scalia's opinion is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court."); Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 Harv. L. Rev. 191, 193-94 (2008) (outlining tensions in *Heller* from an originalist perspective and arguing that the decision reflects changed popular understandings about gun rights); Cass R. Sunstein, Second Amendment Minimalism: *Heller* as Griswold, 122 Harv. L. Rev. 246, 267-72 (2008) (emphasizing limited scope of the right identified in *Heller* and arguing that *Heller* is an instance of judicial minimalism); Postings of Jack M. Balkin to Balkinization, http://balkin.blogspot.com/(June 27, 2008 00:08 EST and July 2, 2008, 9:31 EST (arguing that *Heller* was possible due to gun-rights social movement and analyzing *Heller*'s originalist methodology).

of *Heller* is the facial nature of the claim the Court upheld. D.C. had prohibited all possession of handguns except if granted a license by the police,[34] and in addition provided that residents must keep lawful weapons in their homes unloaded or protected by a trigger lock.[35] The Court ruled not only that the Second Amendment protected an inherent right of self-defense, but further that the D.C. measure violated this right because it represented a total ban on handgun possession in the home. In so ruling, Justice Scalia dismissed the argument that whether the handgun ban ultimately violated individuals' Second Amendment right should turn on the extent to which D.C. residents could adequately protect their homes using other weapons.[36] Instead, although limited to the context of self-defense in the home, the *Heller* opinion treats handgun bans in that context as essentially facially unconstitutional.[37]

The second decision sustaining a facial challenge, *Davis v. FEC*,[38] was less remarkable, albeit important in its own right for its implications for campaign finance reform. At issue in *Davis* was section 319 of BCRA, part of the so-called millionaire's amendment. Section 319 tripled the federal campaign contribution ceilings for House candidates facing opponents who spent over a certain amount of their own funds on their own campaigns, while keeping the contribution limits on the self-financing candidate at the usual level. By a 5-4 vote, the Court held that such differential contribution limits unconstitutionally burdened self-financing candidates' First Amendment rights to spend their own funds on their campaigns.

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[34] More precisely, D.C. prohibited registration of handguns, but that translated into a ban on possession of handguns as carrying an unregistered firearm is crime under D.C. law. *See* D.C. Code §§ 7-2501.01912), 7-2502.01(a), 7502(a)(4) (2001). D.C. separately allowed carrying handgun under a 0ne-year license. §§ 22-4504(a), 22-4506 (no carrying of a handgun without a license); see generally *Heller*, 128 S. Ct. at 2788.

[35] D.C. Code § 7-2507.02 (2001)

[36] 128 S. Ct. at 2818-19.

[37] Id. at 2817-18. Equally notable is the opinion's refusal to adopt a narrowing construction that would carve out a self-defense exception to the relevant D.C. statutes mandating that weapons be kept unloaded and subject to trigger locks. Id. at 2818; see also id. at 2853-54 (Breyer, J., dissenting) (arguing that the Court should have adopted such a construction). While Justice Scalia justified that refusal on the grounds that the statute was not susceptible to such a reading, that leaves unexplained why the Court did not carve out such an exception as constitutionally mandated, as it has done in other contexts when a challenged statute has unconstitutional applications. See, e.g., United States v. Grace, 461 U.S. 171, 172-73, 183-84 (1983) (invalidating statute prohibiting display of flags, banners, or devices in the "Supreme Court building and on its grounds" only as applied to public sidewalks surrounding the Court, even though provision made no separate mention of sidewalks); see also Metzger, supra note 2, at 886 (discussing application severance).

[38] 128 S. Ct. 2759 (2008).

That the *Davis* Court found such differential contribution limits to violate the First Amendment is not surprising, given the direction of the Roberts Courts' prior campaign finance decisions and in particular its resistence to arguments regarding the need to limit expenditures.[39] Somewhat more surprising, in light of *Washington Grange* and *Crawford*, was the majority's willingness to invalidate section 319 on a facial challenge, rather than awaiting evidence that the section led a large number of self-financing candidates to curtail their expenditures. One difference is that *Davis* involved a post-enforcement facial challenge; Davis was a self-financing candidate who spent over section 319's threshold on his own campaign and who faced enforcement action by the FEC for failing to file disclosure statements required by section 319. Yet it seems unlikely that *Davis*' post-enforcement status mattered to the Court's willingness to entertain a facial challenge. Davis' opponent never sought to take advantage of section 319's differential contribution limits,[40] and as a result Davis' own experience provides little insight on how burdensome the section might prove in practice. Instead, the majority's willingness to sustain a facial challenge appears to reflect its view that tying contribution limits to self-financing candidates' expenditures categorically burdens the latter's First Amendment rights, whether or not this differential contribution scheme actually leads such candidates to curtail spending or allowed their opponents to seek bigger contributions. Given that such tying was a plain and uncontroverted feature of section 319, the Court would most likely have been willing to sustain a pre-enforcement facial challenge to the section as well.[41]

II. Implications of the Roberts Court Facial and As-Applied Jurisprudence for Constitutional Rights Litigation

This overview of the Roberts Courts' recent jurisprudence establishes both the frequency with which that Court has emphasized the distinction between facial and as-applied challenges and its preference for the latter as a mode for constitutional rights litigation. Lower courts have taken heed, with appellate decisions increasingly containing extensive discussion of the appropriateness of a facial versus as-applied approach.[42] As a result, the distinction between

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[39] See Randall v. Sorrell, 548 U.S. 230, 240, 250, 253 (2006) (invalidating Vermont's expenditure and contribution limits); see also text accompanying notes 18-22 (discussing Roberts Court's greater hostility to regulation of election communications). The resistance to expenditure limits and efforts to equalize spending is not an innovation of the Roberts Court, but instead dates back to Buckley v. Valeo, 424 U.S. 1, 52-54 (1976)(per curiam).

[40] *Davis*, 128 S. Ct. at 2767.

[41] Put differently, the restrictive *Salerno* standard for the availability of facial challenges—that there be no set of circumstances in which the challenged measure could constitutionally be applied,481 U.S. 739, 745 (1987)—was met here, because section 319's unconstitutional tying feature would necessarily be present whenever the section applied.

[42] See, e.g., Warshak v. United States, 532 F.3d 521, 528-531 (6th Cir. 2008) (discussing implications of Roberts Court's jurisprudence on facial and as-applied challenges for Fourth

facial and as-applied challenges seems likely to continue to be a prominent feature of constitutional litigation in the years to come.

Such attention to the facial/as-applied distinction is certainly not unique to the Roberts Court. On the contrary, the distinction surfaced repeatedly in the Rehnquist Court's jurisprudence and periodically arose in prior periods as well.[43] Rehnquist Court decisions often expressed similar disapproval of facial challenges, famously stating in *United States v. Salerno* that facial challenges should succeed only when "no set of circumstances exists under which the [challenged measure] would be valid."[44] In practice, however, the Rehnquist Court proved more willing to sustain facial challenges than the extreme *Salerno* standard would suggest, with the most well-known (but not only) exceptions involving the First Amendment and abortion rights.[45]

Whether the Roberts Court will similarly prove more willing to accept facial challenges in practice than its rhetoric to date would suggest is still very much an open question. Similarly unclear is whether the as-applied option will prove to be a real avenue for asserting constitutional rights or instead will exist more in theory than in practice. Part of the reason for this uncertainty is that the Roberts Court appears to invoke the facial/as-applied distinction to respond to diverse concerns—sometimes emphasizing institutional competency and limits on the judicial role, sometimes motivated by more strategic calculations—each of yields potentially different implications for when facial challenges would be available and whether the as-applied

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Amendment claim); Richmond Med. Ctr. v. Herring, 527 F.3d 128, 146-48 (4th Cir. 2008) (analyzing whether facial overbreadth claim can be brought to abortion statutes after *Gonzales*); North Car. Right to Life, Inc. v. Leake, 525 F.3d 274, 285-86, 300-01 (4th Cir. 2007) (justifying facial invalidation of state campaign finance regulation in light of Roberts Court's recent decisions); Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 333-35, 339-40 (6th Cir. 2007) (analyzing combined effect of *Ayotte*, *Gonzales*, and *Stenberg* on appropriateness of facial invalidation of Michigan abortion restriction);

[43] See Dorf, supra note 2, at 236-238 (describing disagreement on the Rehnquist Court about the appropriate standard to use to judge the availability of facial challenges in the abortion context); Metzger, supra note 2, at 875-76 (describing debate over availability of facial challenges in the Section 5 enforcement power context). Indeed, one of the most famous and invoked decisions cautioning against facial challenges dates back to 1960, United States v. Raines, 362 U.S. 17 (1960), and the issue also surfaces in early New Deal decisions, though generally discussed there in terms of severability, see, e.g., R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 361-62 (1935).

[44] 124 S. Ct. 739, 745 (1987).

[45] Dorf, supra note 2, at 271-76, 279-81; Fallon, supra note 1, at 1335-41; Metzger, supra note 2, at 878-79; compare City of Chicago v. Morales, 527 U.S. 41, 55 n. 22 (1999) (Stevens, J.) (plurality opinion) (stating that *Salerno* is not the governing standard for facial challenges) with id at 74-83 (Scalia, J., dissenting)(asserting that *Salerno* is the appropriate standard).

route is actually a meaningful option. Another contributing factor is the Roberts Court's failure to define what it means by an as-applied challenge. Such a challenge can take a variety of forms, some of which appear quite "facial" in that they target a statute's application to a range of cases.[46] As Richard Fallon has noted, "facial challenges are less categorically distinct from as-applied challenges than is often thought."[47] The extent to which the Roberts Court's preference for as-applied challenges significantly curtails constitutional rights litigation will turn on how restrictive a definition of as-applied challenges it adopts.

Nonetheless, these decisions yield some useful insights about the shape of constitutional rights litigation under the Roberts Court. First, despite its lack of clarity on the question, the Court occasionally has employed a quite broad understanding of what constitutes an as-applied challenge. In particular, the Court does not consistently restrict as-applied challenges to instances in which individuals solely target application of measures to themselves, or require as-applied challenges be raised post-enforcement. In addition, underlying the Robert Court's rejection of facial challenges is a capacious view of the Court's remedial authority to sever unconstitutional statutory applications and provisions. That suggests a willingness on the part of the Court to give real bite to as-applied challenges across a range of contexts, even if the effect of doing so is to dramatically transform the statutory scheme at issue. Yet the strategic cast of many of these decisions also raises the possibility that the as-applied options preserved by the Court are primarily included to reach a desired result in the case at hand and thus not intended to have lasting significance. Perhaps most important, these decisions reveal that both the availability of facial challenges and the viability of as-applied challenges turns ultimately on substantive constitutional law. As a result, the practical impact of the Court's approach cannot be accurately assessed at a macro level, and will instead turn on the particular substantive constitutional right at issue.

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[46] See Metzger, supra note 2, at 881-83.

[47] Fallon, supra note 1, at 1341.

A. *The Shape of As-Applied Challenges Under the Roberts Court*

Just as the Roberts Court is not unique in its frequently-voiced disaffection for facial challenges, so too it not alone in failing to offer a clear definition of what it understands the distinction between facial and as-applied challenges to be. As I have previously noted, over the years the governing understanding of what constitutes these two forms of challenges appears to have changed. Facial challenges were once understood to encompass any challenge that "puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves the facts only insofar as it is necessary to establish that the rule served as a basis for decision."[48] Under this definition, facial challenges could be limited to assertions of partial unconstitutionality and did not necessarily entail the claim that a measure was unconstitutional in all of its applications. As-applied challenges, by contrast, were defined in fairly narrow terms synonymous with privilege. Today, however, facial challenges are generally equated with claims of unconstitutionality in toto, in part the result of eliding the litigation form of a facial challenge with the remedial result of total invalidation.[49] This identification of facial challenges with total invalidation is often what underlies judicial condemnation of facial challenges.[50]

Such a narrowed understanding of what constitutes a facial challenge need not matter in practice, provided the definition of as-applied challenges is correspondingly expanded to include claims of unconstitutionality that go beyond a particular plaintiffs' claims of privilege and include claims alleging that a range of a statute's applications are unconstitutional.[51] If, however, as-applied challenges are limited to the plaintiff's specific situation or identical contexts, then prohibitions on facial challenges erect a more substantial barrier to successful assertion of constitutional rights. Many more suits might be required to trim away a challenged measure's unconstitutional application. Even if subsequent plaintiffs could claim the benefits or stare decisis or issue preclusion, they would still face the costs and burdens of litigation.[52]

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[48] Metzger, supra note 2, at 881 (quoting Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 662 (3d ed.1993)).

[49] See id. at 881-83.

[50] See, e.g., Washington State Grange, 128 S. Ct. at 1190-91; Crawford, 128 S. Ct. at 1622; Carhart, 127 S. Ct. at 1639.

[51] Metzger, supra note 2, at 882-83.

[52] See Persily & Rosenberg, supra note 20, at 5; David H. Gans, Strategic Facial Challenges, 85 B.U. L Rev 1333, 1336 (2005). Class actions are unlikely to serve as a means of alleviating this need for repeated litigation, because plaintiffs would be unlikely to be found representative of a class in a regime that required as-applied constitutional challenges to be narrowly tied to specific facts. Fed. R. Civ. P. 23(a).

The Roberts Court does not appear to be taking such a restrictive approach to as-applied litigation, but instead is adhering to the Rehnquist Court's practice of allowing as-applied challenges not limited to the specific parties at hand.[53] To the contrary, in *WRTL II* the Court demonstrated the extraordinary breadth of relief available under an as-applied challenge. There the Court rejected a case-by-case approach that would tie application of BCRA's section 203 to the intent and effect of particular advertisements, and instead crafted a standard that likely will serve to exempt most (if not all) non-express advertisements from the section's scope.[54] Although *WRTL II*'s approach to as-applied challenges is the broadest of the Robert Court's jurisprudence to date, its other decisions are similar in suggesting that as-applied litigation would not need to be case-specific but instead could raise claims against a statute in certain classes of contexts. For example, Justice Stevens' lead opinion in *Crawford* strongly suggests that as-applied litigation could be brought on behalf of "any class of voters" experiencing excessive burdens under Indiana's voter id law, rather than on a voter-by-voter basis.[55] *Washington State Grange* is more elliptical, but the majority's discussion of the degree of voter confusion associated with different ballots suggests that an as-applied suit could lead to invalidation of the method the state used to identify candidate party preferences on a ballot, and would not be limited to challenging the ballot as applied to a particular candidate or party.[56]

The decision most suggestive of a restrictive approach to as-applied challenges is *Gonzales*, with its statement that "[t]he [Federal Partial-Birth] Act is open to a proper as-applied

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[53] See, e.g., Tennessee v. Lane, 541 U.S. 509, 530-34 (2004)) (upholding Title II of the ADA as applied to enforcing the constitutional right of access to the Court, rather than as applied to the specific criminal defense and employment contexts of the plaintiffs); see Metzger, supra note ?, at 917 (discussing this feature of the Court's approach in *Lane*).

[54] See *WRTL*, 127 S. Ct. at 2665-66; see especially id. at 2666 ("A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."); see also Briffault, supra note 22, at 119-21 (describing this as the effect of *WRTL II*).

[55] 128 S. Ct. at 1623. Elsewhere, Justice Stevens' opinion discusses the burdens experienced by particular groups of voters—elderly persons born out-of-state, other persons who have difficulty obtaining required documentation , indent voters, homeless voters, and voters with religious objections to being photographed. See id. at 1621-23

[56] See, e.g., 128 S. Ct. at 1194; see also Persily & Rosenberg, supra note 20, at 22-23 (arguing that any subsequent relief would need to be broad).

challenge in a discrete case."[57] What the Court means by this is unclear,[58] and the reference to "discrete case" could be read to suggest that each woman in need of an intact D&E abortion must bring suit to challenge application of the statute as to her specifically. Such an approach would be quite extreme, however, and is inconsistent with other language in the decision stating that an as-applied challenge would provide an opportunity for plaintiffs to show that "in discrete and well-defined instances" particular conditions are likely to occur requiring the use of the intact D&E method.[59] Thus, *Gonzales* appears to contemplate that, at the least, as-applied suits could be brought on a condition-by-condition basis. Although this is itself a narrower approach to as-applied challenges than that suggested just the year before in *Ayotte*, which appeared to allow a court to essentially enjoin application of a challenged abortion regulation whenever the regulation would impose a "significant health risk" on women,[60] it is still broader that one requiring each woman facing medical risk to separately bring suit.

A requirement that litigants bring their constitutional challenges post-enforcement, or more extremely only once a measure had actually been applied to them, could also prove burdensome to effective constitutional rights litigation. Overbreadth doctrine has long justified facial challenges, particularly in the First Amendment context, on the concern that individuals will forego constitutionally protected activities out of fears of criminal or civil liability.[61] Requiring as-applied challenges be post-enforcement similarly might "chill" individuals' exercise of constitutional rights, and further forestall their ability to challenge putatively unconstitutional measures altogether because those complying with the measure may lack standing to sue. In addition, some individuals may be willing to bring a preenforcement action, but lack incentive to do so once they have suffered the injury a preenforcement suit would have

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[57] 127 S. Ct. at 1639; see also id. at 1638 ("discrete and well-defined instances"); id. at 1639 ("It is neither our nor within our traditional institutional role to resolve questions of constitutionality with respect to *each potential situation* that might develop.") (emphasis added).

[58] See id. at 1651 (Ginsburg, J., dissenting) ("[T]he Court offers no clue on what a 'proper' lawsuit might look like.").

[59] Id. at 1638.

[60] 546 U.S. at 328, 331; see also *Gonzales*, 127 S. Ct. at 1652 (Ginsburg, J., dissenting) ("Even if courts were able to carve-out exceptions through piecemeal litigation for 'discrete and well-defined instances," women whose circumstances have not been anticipated by prior litigation may well be left unprotected.")

[61] See, e.g., Virginia v. Hicks, 539 U.S. 113, 119 (2003); Broaderick v. Oklahoma, 413 U.S. 601, 611-13 (1973); see also Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L. J. 853, 867-77 (1991) (discussing prophylactic and rule of law bases for overbreadth doctrine).

forestalled.[62] The belief that individuals should not be forced to either subject themselves to potentially irreparable harm by violating a statute or comply and thereby cede their ability to challenge it underlies the Court's seminal decisions establishing the availability of preenforcement declaratory or injunctive relief.[63]

The Roberts Court's stance on whether as-applied challenges generally can be brought pre-enforcement is more ambiguous. In *Washington State Grange* and *Crawford* the Court appeared to equate as-applied challenges with post-enforcement suits, and its arguments against the appropriateness of facial challenges all rested on its conclusion that an insufficient record of burden existed prior to enforcement to support finding the challenges measures unconstitutional.[64] Yet in *Gonzales*, the Court explicitly noted that "pre-enforcement, as-applied challenges . . . can be maintained."[65] Similarly, the breadth of relief in *WRTL II* precludes any

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[62] Persily & Rosenberg, supra note 20, at 2 (noting lack of incentive to sue after election day).

[63] See, e.g., Abbott Labs v. Gardner, 387 U.S. 136, 152-53 (1967); ex parte Young, 209 U.S. 146-148; see also City of Lakewood v. Plain Dealer Co., 486 US 750, 770 n. 11 (1988) (rejecting suggestion that facial challenges must await enforcement).

[64] See *Crawford*, 128 S. Ct. at 1622-23 ; *Washington State Grange*, 128 S. Ct. at 1193-94.

[65] 127 S. Ct. at 1638. *Gonzales'* willingness to allow pre-enforcement suits makes its insistence on a subsequent as-applied challenge hard to understand; as Justice Ginsburg noted in dissent, the record in that case already contained substantial evidence addressing when intact D&E might better protect women's health, id. at 1652 (Ginsburg, J., dissenting), as well as evidence to the contrary from the opponents of the technique, id. at 1635-36 (documenting medical disagreement over need for intact D&E). Notwithstanding the majority's assertion to the contrary, id. at 1638-39, it is hard to imagine what additional evidence would be available in a pre-enforcement as-applied challenge, and the appropriate course under the Court's precedent would be to enjoin application of the ban on intact D&E in contexts where it posed a severe health risk rather than require an additional as-applied suit.

This might lead to skepticism regarding whether *Gonzales* meant what it said about the availability of pre-enforcement as-applied challenges. But denying pre-enforcement challenges here is tantamount to denying that women had a constitutional right not to be subjected to a health risk by abortion restrictions; as Justice Ginsburg noted in her dissent, "[a] woman suffering from medical complications needs access to the medical procedure at once and cannot wait for the judicial process to unfold." Id. at 1651-52 (Ginsburg, J., dissenting). To my mind the better explanation is that the *Gonzales* majority—or at least Justice Kennedy, the majority opinion's author—neither wanted to forestall pre-enforcement challenges nor to reverse its longstanding jurisprudence holding that women had a constitutional right to be free from significant health risks from abortion regulations, but also believed that intact D&E was never really medically necessary. Kennedy had previously rejected the medical necessity argument for intact D&E in his *Stenberg* dissent. Stenberg v. Carhart, 530 U.S. 914, 967 (2000) (Kennedy, J.

suggestion that an individual must actually face an enforcement action before as-applied relief would lie, and timing of suit plays little role in *Davis*.

As Nate Persily and Jennifer Rosenberg have noted, the Roberts Court in *Washington State Grange* and *Crawford* appears to be using the facial/as-applied distinction to address what are more commonly seen as ripeness and abstention concerns.[66] Although the Court previously has invoked factual uncertainty about how a measure will operate as grounds for rejecting a facial challenge, it usually has done so in the course of holding that the measure is plainly constitutional as applied in the case before the Court.[67] Insofar as *Washington State Grange* and *Crawford* argue for an as-applied approach because the constitutionality of the measures cannot be assessed prior to enforcement, they represent a newer use of as-applied challenges. Moreover, as Persily and Rosenberg maintain, using as-applied challenges in this way could lead to difficulty down the road, were the Court to conclude that in practice the measures prove to be unconstitutionally burdensome across-the-board and thus should actually be invalidated in toto.[68]

That very incongruity, however, suggests these decisions are not limited to holding simply that the records presented so far fail to prove the measures are broadly unconstitutional. Significantly, in these decisions the Court also appears to hold that both of the challenged measures have a range of potentially constitutional applications.[69] If so, the decisions are less anomalous than their rejection of facial challenges on ripeness grounds might otherwise suggest. Instead, on this view the Court was simply presuming that any applications of the statute shown to be unconstitutional in the future could be severed from its potential constitutional applications. As *Ayotte* noted and discussed further below, such presumptions of severability are the "normal rule," albeit less so in First Amendment contexts.

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dissenting). Yet evidence in the record of the potential health need for intact D&E was simply too great to dismiss the medical necessity claim altogether, leading Justice Kennedy to the solution of allowing pre-enforcement challenges but requiring plaintiffs to demonstrate the need for intact D&E as applied to specific contexts.

[66] Persily & Rosenberg, supra note 20, at 21, 29.

[67] See, e.g., United States v. Sabri, 541 U.S. 600, 608-10 (2004); Tennessee v. Lane, 541 U.S. 509, 530-34 (2004); United States v. Raines, 362 U.S. 17, 24-25 (1960); see also Fallon, supra note ,1 at 1329-31, 1342 (identifying the Court's view that "the meaning of [a] statute was not obvious, but needed to be *specified*, and . . . that specification would best occur through a series of fact-specific, case-by-case decisions" as underlying the rejection of facial challenges)

[68] See Persily & Rosenberg, supra note 20, at 21-22, 26-27

[69] In *Washington State Grange*, for example, the Court identifies several ways that the party affiliation statute could be constitutionally enforced, 128 S. Ct. at 1194-95, and in *Crawford* the Court's focus on particularly vulnerable groups of voters, 128 S. Ct. at 1620-21 strongly implies that it sees the voter ID statute as constitutional in general.

B. Severability under the Roberts Court

Academic commentators have often emphasized the central role severability plays in determining the availability of facial and as-applied challenges.[70] If unconstitutional applications or provisions of a challenged measure are not severable, then the measure is not a constitutionally valid rule and cannot be applied to anyone—in short, it is invalid in its entirety.[71] Hence, when the Court rejects a facial challenge to a statute in favor of an as-applied approach, it

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[70] The degree to which the Court's jurisprudence on facial and as-applied challenges turns on severability is a matter of academic debate. Marc Isserles and David Franklin have argued that severability is less important than other scholars (myself included) believe. Their argument is premised on a distinction between two types of facial challenges, overbreadth facial challenges and valid rule facial challenges. Overbreadth facial challenges, as they define them, involve a litigant against whom a statute can be constitutionally applied arguing that a court should facially invalidate it because the statute cannot be constitutionally applied to others, and those unconstitutional applications are either nonseverable or should be presumed to be nonseverable. Valid rule facial challenges, by contrast, focuses on the terms of the statute and argues that under governing constitutional law the statute is unconstitutional in its entirety; severability is not relevant here because there are no constitutional or unconstitutional applications to sever. See Marc Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 365-66, 387 (1998); David L. Franklin, Facial Challenges, Legislative Purpose, and the Commerce Clause, 92 Iowa L. Rev. 41, 59-60, 64-67 (2006).

My own view is that there may be less to this distinction between types of facial challenges than meets the eye. In part this is because I think instances in which measures are unconstitutional in their entirety, and this unconstitutionality is not curable through severance, are relatively (and appropriately) rare. Contra Franklin, supra, at 65 (arguing that valid rule facial challenges are ubiquitous); see also Metzger, supra, at 894-931 (arguing that such an all-or-nothing approach has not dominated and is not appropriate in federalism contexts). In addition, substantive constitutional law is the determinative factor in the success of both kinds of facial challenges, because a large part of whether an "overbreadth facial challenge" prevails depends on how broad is the range of unconstitutional applications, which in turn depends on substantive constitutional law.

Regardless, even Isserles and Franklin acknowledge the importance of severability to many facial challenges. See Franklin, supra, at 65; Isserles, supra, at 368. Moreover, the cases in which the Roberts Court has rejected a facial challenge appear to fall into the overbreadth category, in the Court's treatment at least, which further underscores the relevance of severability to the Roberts Court's facial-as applied jurisprudence.

[71] The valid rule requirement was famously posited by Henry Monaghan. See Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3.

is implicitly presuming that any unconstitutional applications or provisions can be severed.[72] Equally important, the possibility of severability means that a facial challenge need not lead to facial invalidation; instead, a Court potentially can respond to a facial challenge by trimming a measure's constitutionally problematic provisions or applications.

The Roberts Court acknowledged the centrality of severability in *Ayotte*. There, the Court stated that "[g]enerally speaking . . . we prefer to enjoin only the unconstitutional applications . . . or sever [only] its problematic portions."[73] Moreover, *Ayotte* also identified the principles that should guide courts in determining whether to sever. According to the Court "the touchstone for any decision about remedy is legislative intent," the question being "[w]ould the legislature have preferred what is left of its statute to no statute at all?"[74] In addition, the Court emphasized that its ability to craft partial remedies was limited by need to avoid "rewriting state law to conform it to constitutional requirements" and by the clarity of "the background constitutional rules at issue," with the latter affecting "how easily [a court] can articulate the remedy" and thus remove a statute's unconstitutional applications without too "serious [an] invasion of the legislative domain."[75] The Court also cautioned against the danger that legislatures might cast nets as wide as possible, relying on the courts to trim measures to constitutional proportions, arguing that such a situation "would, to some extent, substitute the judicial for the legislative department of the government."[76]

Although these principles guiding severability analysis were not new, *Ayotte*'s careful articulation of them in the context of rejecting a facial challenge was more unusual; the Court has not frequently acknowledged the important role played by severability, particularly application severability, in facial challenges.[77] What made this articulation even more striking is the lack of express discussion of these principles of severability analysis in the Roberts Court's subsequent decisions invoking as-applied challenges. In almost none did the Court discuss

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[72] See Metzger, supra note 2, at 883-90; see also Dorf, supra note 2, at 242-44, 249-51 (discussing the valid rule requirement and the implied presumption of severability); Fallon, supra note 1, at 1331-33 (same).

[73] 546 US 320, 329; see also id. ("the normal rule is that partial rather than facial, invalidation is the required course").

[74] Id. at 330.

[75] 546 US at 329-30.

[76] Id at 330.

[77] See Metzger, supra note 2, at 886-887, 891-92 (noting that the Court does not often discuss the relationship of severability and facial challenges and describing the rare debate over application severability that arose in *Booker*).

whether severing unconstitutional applications would accord with legislative intent or amount to judicial rewriting of a statute.[78]

WRTL II is perhaps the most extreme on this front, given that the principal opinion there inserted an entirely new test into the statute to identify those advertisements that corporate and union treasuries can fund. Such dramatic judicial recrafting of statutory language would seem to require some assessment of whether the new test accorded with congressional intent, all the more so given that the statute actually contained fallback language to use in the event that section 203 were held unconstitutional. Yet the Court nowhere examined whether its effort to carve section 203 to constitutional proportions was one that it could legitimately adopt. *Gonzales* is another instance in which some discussion of the *Ayotte* principles would seem to be in order before presuming that any unconstitutional applications of the statute would be severable. Not only did *Gonzales* involve exactly the same issue as *Ayotte* (the severability of applications of an abortion restriction that unconstitutionally burden women's health), but in addition the omission of a health exception from the Partial Birth Act was plainly intentional on Congress's part.[79] Consequently, as in *Ayotte*, surely "some dispute" existed "as to whether [Congress] intended the statute to be susceptible to such a remedy"[80] as well as whether severing unconstitutional applications here would be an institutionally appropriate action for the Court to take. Yet the *Gonzales* Court nowhere addressed the question in affirming the availability of as-applied challenges.

Washington State Grange is also interesting from a severability perspective. In the First Amendment context the Court has often taken a prophylactic approach and presumed that unconstitutional applications are not severable.[81] This nonseverability presumption, which underlies First Amendment overbreadth doctrine, has the side effect of requiring that any necessary trimming of state statutes to meet constitutional requirements ordinarily be done by state courts.[82] In *Washington State Grange*, the Court deviated on both fronts, in essence applying a presumption of severability in the face of a First Amendment challenge and further indicating quite clearly, notwithstanding the lack of any prior interpretation of the statute by the

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[78] Only in Crawford did the Court make a passing reference to severability, see 128 S. Ct. at 1623.

[79] See, e.g., Pub. L. 108-105, § 2, Nov. 5, 2003, 117 State. 1201 (18 U.S.C. 1531 (Supp. III 2003)).

[80] *Ayotte*, 546 US at 331.

[81] See Dorf, supra note 2, at 261, 264; Fallon, supra note 1, at 1346-47.

[82] See Monaghan, supra note , at 29-30; Virginia v. Black, 538 U.S. 343, 363-67 (2003) (plurality op.)(holding that interpretation of provision of cross-burning statute contained in jury instruction rendered statute facially invalid, but remanding for the Virginia Supreme Court to interpret provision in a way that adequately addresses First Amendment concerns).

Washington courts, the limited ways in which Washington could implement the statute without violating the Constitution.[83] *Crawford* and other Roberts Court decisions similarly presumed severability in the face of First Amendment challenges.[84] This suggests that the special First Amendment nonseverability presumption is currently endangered, if not extinguished, with the Roberts Court not receptive to overbreadth claims even in this context.

In short, despite its caveats in *Ayotte*, the Roberts Courts appears quite willing to engage in broad statutory severance and reconstruction when necessary to defeat a facial constitutional challenge, even of state measures. Interestingly, in asserting such broad remedial authority the Roberts Court is following in the footsteps of its predecessor. One of the most extreme recent assertions of power to recraft statutes to constitutional limits came in *United States v. Booker*, when the Rehnquist Court cured the Sixth Amendment violation created by the federal mandatory sentencing guidelines regime by making the guidelines advisory.[85] Far from repudiating *Booker* the Roberts Court has thrown itself into the task of devising the rules and

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[83] See 128 S. Ct. 1184, 1194-95; see also id. at 1197 (Roberts, C.J. concurring) (noting that "if the ballot merely lists the candidates' preferred parties next to the candidates' names, or otherwise fails clearly to convey that the parties and the candidates are note necessarily associated, the I-872 system would not survive a First Amendment challenge.")

[84] See *Crawford*, 128 S. Ct. at 1622-23; United States v. Williams, 128 S. Ct. 1830, 1838, 1844 (2008) (rejecting First Amendment challenge to child pornography conviction under the federal PROTECT Act and stating that any unconstitutional application of act could be the basis for an as-applied challenge); Davenport v. Washington Educ. Ass'n, 127 S. Ct. 2372, 2382-83 (2007) (upholding statutory requirement of affirmative authorization from nonmembers before union may spend agency-shop fees for election purposes against First Amendment challenge only as-applied to public sector union and reserving question of application to private sector unions, noting in part that no overbreadth challenge had been made brought). Such a pullback on overbreadth doctrine has been ongoing for a while, with the Court not only requiring that a measure be substantially overbroad "'judged in relation to its plainly legitimate sweep,'" but also overlooking state failures to narrow statutes to constitutional proportions. See, e.g., Virginia v. Hicks, 539 U.S. 113, 119 (2003) (quoting Broaderick v. Oklahoma, 413 U.S. 601, 615 (1973)).

[85] United States v. Booker, 543 U.S. 220, 245 (2005) ("[T]he provision of the federal sentencing statute that makes the Guidelines mandatory . . . [is] incompatible with today's constitutional holding. We conclude that this provision must be severed and excised. . . . So modified, the federal sentencing statute makes the Guidelines effectively advisory." (internal citations omitted)); see also, Metzger, supra note 2, at 890-93 (discussing *Booker*). Another example of this broad willingness to sever or presume severability under the Rehnquist Court was that Court's approach to Section 5 challenges in *Tennessee v. Lane*, 541 U.S. 509, 530 (limiting the analysis of whether Title II is a permissible use of Congress's Section 5 power to the statute's application in enforcing the right of access to the courts as opposed to guaranteeing access to a host of other public spaces and events that could also be viewed as covered by the statute).

doctrines needed for the new advisory system to work.[86] Indeed, the Roberts Court has assumed extensive remedial powers in some nonconstitutional contexts as well, at times reading statutes quite flexibly and creatively to achieve results that it believes best reflect congressional intent.[87]

The Court's assertion of broad remedial authority indicates that facial challenges will likely encounter an uphill battle, as the Court may feel competent to trim even substantially unconstitutional measures down to acceptable proportions. Yet at the same time, that the Court is not opposed to granting broad relief suggests that as-applied challenges could prove a viable mechanism for vindicating constitutional rights, as in *WRTL II*. Moreover, the Court's rejection of a facial challenge may have little substantive consequence if the Court justifies such rejection, as in *Washington State Grange*, by indicating a measure's possible constitutional applications and thereby sketching the constitutional parameters that govern its enforcement.

C. The Roberts Court's View of the Judicial Role

Another factor that may affect the Roberts Court's stance on facial and as-applied challenges is its understanding of the judicial role. Some have viewed the Court's recent emphasis on as-applied challenges as displaying a modest or minimalist approach to the judicial role,[88] in keeping with Chief Justice Roberts' own description of his judicial philosophy at his

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[86] See David H. Gans, Severability As Judicial Lawmaking, 76 Geo. Wash. L. Rev. 639, 665-66, 683-85 (2008).

[87] Dada v. Mukasey, 128 S. Ct. 2307, 2316-20 (2008) (arguing that conflict between right to file a motion to reopen and voluntary departure requirements in the immigration context requires allowing alien opportunity to withdraw voluntary departure motion, although not provided for in statute); Zuni Pub. School Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 127 S. Ct. 1534, 1543-46 (2007) (deferring to agency interpretation found to be more in keeping with congressional intent notwithstanding tension with literal language in statute). John Manning has argued that these decisions are more the exception than the rule, and that the Roberts Court has generally taken a more literal, less creative stance toward statutory text. John F. Manning, federalism and Constitutional Doctrine, forthcoming Harv. L. Rev. (unpublished manuscript at 4 n.12) ; see also Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 2366-67 (2007) (refusing to read equitable exception into jurisdictional statute to allow jurisdiction when petitioner filed an untimely notice of appeal in reliance on a district court order).

[88] See Hartnett, supra note 1111, at 1757-58 (arguing that early Roberts Court decisions "have the potential to stand as important markers on the road to a more modest judiciary"); Douglas W. Kmiec, Overview of the Term: The Rule of Law and Roberts's Revolution of Restraint, 34 Pepp. L. Rev. 495, 515-17 (2007) (characterizing Roberts Court's decision in *Ayotte* as an example of judicial restraint and as displaying a modest attitude); see also Nathaniel Persily, Reading Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions, 2008 Sup Ct Rev. __ (unpublished manuscript at 28) (arguing that the Court's as-applied election law decisions reflect an effort by Chief Justice Roberts to "proceed

confirmation hearings.[89] There are, to be sure, minimalist dimensions to these decisions, perhaps most clearly illuminated by contrasting the as-applied emphasis of *Washington State Grange* and *Crawford* with the opinions in those cases authored by Justice Scalia. In both, Scalia adopted a facial analysis, although in *Washington State Grange* he argued for facial invalidation whereas in *Crawford* he advocated for facial validation.[90] Either way, the constitutionality of the measure was definitively resolved, whereas the Court's approach left more room for incremental, fact-specific evolution of the constitutional principles at stake. Moreover, the Court frequently invokes institutional modesty in these decisions, cautioning that "[f]acial challenges . . . run contrary to the fundamental principle of judicial restraint" and "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."[91]

Yet that said, from other perspectives the Roberts Court's facial/as-applied jurisprudence is not particularly modest in approach. Although avoiding the need to invalidate legislative measures wholesale, the Court's willingness to expansively recraft statutes to meet constitutional requirements is arguably just as much or more of an intrusion into the legislative sphere.[92] In addition, these decisions are notable for their strategic aspect, with the Court using the facial/as-applied distinction as mechanism to avoid directly overruling recent precedent and achieve a majority or unity on a decision. *WRTL II* is the most obvious example, with the Court there manipulating the as-applied nature of the challenge as a means to undercut the precedential force of *McConnell* without direct overruling. In a similar vein, the Court's narrow as-applied

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incrementally" and "exude restraint and minimalism, while enuring (somewhat paradoxically) that courts will remain actively and intimately involved in the minutiae of election law."). For a definition of minimalism as emphasizing incrementalism and narrow decisions, see Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court ix-xi (1999).

[89] Confirmation Hearings on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States, 109th Cong. 158 (2005) (Justice Roberts said that he preferred, if anything, to be known as a "modest judge").

[90] Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1200-03 (Scalia, J. dissenting) (challenging majority's "wait-and-see approach" and arguing that the contested statute does not survive rationality review and is facially unconstitutional); Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1626-27 (Scalia, J. concurring) (arguing that the statute is facially valid and that the lead opinion's as-applied approach is inappropriate in "an area where the dos and don'ts need to be known in advance" and a case-by-case analysis "would prove especially disruptive")

[91] *Washington State Grange*, 128 S. Ct. at 1191.

[92] Indeed, some argue that such a broad remedial role is more of an intrusion. See Gans, supra note 86, at 643-44 (arguing that a generous severability doctrine results in "lawmaking with a democracy deficit" and "crates the wrong set of incentives for legislatures")..

approach in both *Ayotte* and *Georgia* seems motivated by a desire to achieve greater unanimity and avoid contentious decisions at a time of transition. Even *Gonzales*' invocation of as-applied challenges has a strategic edge; although the majority was willing to overrule some aspects of *Stenberg*, the possibility of subsequent as-applied challenges allowed the Court to avoid directly confronting precedent holding that abortion restrictions must contain medical necessity exceptions.

That the facial/as-applied distinction is employed to such strategic ends is nothing new.[93] But it suggests that the rejection of facial challenges in these decisions may be result-driven at root. Such doubts are reinforced by the fact that the Court in *Heller* and *Davis* sustained facial challenges without explaining why as-applied challenges were not more institutionally appropriate. This strategic dimension similarly raises questions about whether as-applied challenges will consistently provide a meaningful opportunity for asserting constitutional rights. Although in *WRTL II* an as-applied challenge yielded robust protection, it seems unlikely that the as-applied route preserved in *Gonzales* or *Crawford* will have the same effect, given the evidentiary burdens the Court imposes on such suits.[94]

As a result, it is hard to see the Court's emphasis on as-applied challenges as reflecting a deep-seated and transsubstantive view of the judicial role in constitutional adjudication, as opposed to considerations more closely tied to the specific decisions at hand. Indeed, it is not clear that a majority of the Roberts Court believes that an as-applied, incrementalist approach to constitutional litigation actually is generally the proper stance for the Court to take. Although all members of the Court have at times signed onto decisions emphasizing as-applied challenges, three justices—Justice Kennedy, Justice Alito, and Chief Justice Roberts—seem most enamored of the facial/as-applied distinction, while others are often far more skeptical.[95] On the other

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[93] See Metzger, supra note 2, at 879-80 (noting that different justices' stance on the availability of facial challenges appeared to depend on the result they favored in the case at hand and on the need to achieve a majority). Even the specific move of using the facial/as-applied distinction to evade recent precedent has arguably been done before. See Tennessee v. Lane, 541 U.S. 509, 551-52 (2004) (Rehnquist, C.J., dissenting) (contending that the majority's decision sustaining Title II of the Americans with Disabilities Act (ADA) as within Congress's power under Section 5 of the Fourteenth Amendment on an as-applied basis was inconsistent with the Court's recent Section 5 precedent).

[94] For a similar view of *Crawford*, see Persily, supra note 88 (unpublished manuscript at 8-9).

[95] See text accompanying note ? supra (discussing Justice Scalia's rejection of the as-applied approach in *Washington State Grange* and *Crawford*); see also *WRTL II*, 127. S. Ct. at 2683-84 & n.7 (Scalia, J., concurring in the judgment, joined by Kennedy and Thomas, JJ.) Gonzales, 127 S. Ct. at 1650-51 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.) (disagreeing with the majority's rejection of a facial challenge). Chief Justice Roberts either wrote, joined, or concurred fully in all of the decisions discussed here emphasizing the facial/as-

hand, given the importance of the votes of these three justices—especially Justice Kennedy—in contentious cases,[96] their greater affinity for as-applied challenges suggest that an emphasis on such challenges will continue to be a recurrent theme in the Roberts Court's jurisprudence.

D. The Importance of Substantive Constitutional Law

Perhaps above all else, these decisions demonstrate that substantive constitutional law drives the Court's approach to facial and as-applied challenges. That substantive constitutional law determines the availability of facial challenges has been long acknowledged, and again is not a new development with the Roberts Court.[97] What differentiates the Roberts Court's decisions, and what leads it to reject facial challenges in contexts when such challenges were previously sanctioned, is instead its view of the content of substantive constitutional doctrines involved.

The two decisions that best demonstrate the role played by the Roberts Court's changed constitutional understandings are *Heller* and *Gonzales*. *Heller*'s willingness to entertain a facial challenge is hard to understand absent the substantive conclusion that handgun bans are per se unconstitutional, no matter what other weapons are available for self-defense, and indeed the majority comes out as states as much.[98] So, too, *Gonzales*' rejection of the facial challenges turned centrally on the Court's substantive view that health exceptions are not constitutionally required when uncertainty exists about the likely impact of an abortion restriction on women's health.[99]

Moreover, both *Heller* and *Gonzales* represent instances in which the Court altered governing constitutional understandings in ways that transformed its receptivity to facial challenges. Second Amendment challenges had been routinely dismissed, without even as-applied caveats, for many decades prior to *Heller*, a result of governing doctrine that identified Second Amendment rights as not extending beyond the right to bear arms in conjunction with

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applied distinction, with Justices Kennedy and Alito following suit in all but one—*WRTL II* for Justice Kennedy, *Crawford* for Justice Alito.

[96] See Linda Greenhouse, On Court that Defied Labeling, Kennedy Made the Boldest Mark, N.Y.Times, June 29, 2008, at A1; SCOTUSblog Super StatPack - OT07 Term Recap at 3-6, available at http://www.scotusblog.com/wp/wp-content/uploads/2008/06/superstatpackot07.pdf.

[97] See, e.g., Dorf, supra note 2, at 251-64, 281-82; Fallon, supra note 1, at 1324, 1350-51; Metzger, supra note 2, at 888-89; Monaghan, supra note 71, at 24, 29.

[98] 128 S. Ct at 2818

[99] 127 S. Ct. at 1638.

militia service.[100] By contrast, *Gonzales*'s view on when medical necessity exceptions must be included in abortion restrictions represented a retraction from prior understandings, most recently evident in *Stenberg*, about the contexts to which such exceptions are constitutionally required. More generally, *Gonzales* displayed far greater sympathy for abortion regulation than was evident in either *Stenberg* or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the 1992 decision that established the Court's current undue burden analysis for assessing the constitutionality of abortion regulation.[101] It is no surprise, then, that the *Gonzales* majority disagreed with those decisions' willingness to entertain facial challenges.[102]

One consequence is that, as in the past, "the availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity."[103] It further follows that new limitations on the ability to successfully vindicate

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[100] See District of Columbia v. Heller, 128 S. Ct. 2783, 2823, n.2, 2844-46 (2008) (Stevens, J. dissenting) (discussing precedent limiting the Second Amendment right to bear arms to the context of militia service); Siegel, supra note 33, at 201-35 (describing the social forces driving the evolution of the Court's interpretation of the Second Amendment)

[101] This greater sympathy is most evident in the striking passage in which the majority argued that the government was justified in banning the intact D&E procedure to protect women's psychological health: "It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form." Gonzales, 127 S. Ct. at 1634. *Casey*, by contrast, expressed suspicion of paternalistic views of women in rejecting Pennsylvania's spousal notification requirement. 505 U.S. 833, 896-99 (1992). *Gonzales* also applied the undue burden test in a more lenient fashion, assessing the degree of burden imposed by the intact D&E ban for all women to whom it applied, 127 S.Ct. at 1639, whereas the *Casey* majority had insisted on assessing the degree of burden in regard to those women for whom the spousal notification requirement would be a restriction, 505 U.S. at 894 ("The analysis does not end with the one percent of women upon whom the statute operates; it begins there.")

[102] Id. at 1639. Changed constitutional understandings were also obviously central in the Court's willingness to uphold a broad as-applied challenge in *WRTL II*. See supra text accompanying notes 18-22. The emphasis on as-applied challenges in *Crawford* and *Washington State Grange* similarly appear to signal changed substantive understandings of the rights involved, though whether these decisions represent a new direction in governing constitutional law is more unclear. See Persily, supra note88, at 3, 9-10, 25.

[103] Fallon, supra note 1, at 1324. As Fallon insightfully noted, substantive constitutional law matters because governing constitutional law not only will determine if a challenged statute is unconstitutional in all or a large part of its applications, but in addition will control the degree to which the meaning of a statute "must be relatively fully specified at the time of its first

constitutional rights through facial challenges under the Roberts Court will, at root, reflect retraction in the scope of underlying substantive rights at issue. The different breadth of the as-applied option preserved in *WRTL II* and *Gonzales* similarly reinforces the conclusion that substantive constitutional law is the driving force here, not any general principles about the appropriate form for asserting constitutional claims.

CONCLUSION

Resistance to facial challenges is a recurring theme of the Roberts Court's early years. Yet close analysis of the Court's decisions suggests that its approach to facial and as-applied challenges is largely consistent with prior practice. Despite occasional description of as-applied challenges in narrow terms, it has expressly preserved the possibility that as-applied challenges could be brought pre-enforcement and allowed an as-applied challenge to be the vehicle for broad relief. It has also followed the Rehnquist Court in asserting wide remedial discretion to sever statutes to fit constitutional requirements, and even its strategic use of the facial/as-applied distinction is not new. Nor is the Roberts Court's resistance to facial challenges absolute; it has not only sustained some facial challenges, but done so without offering much explanation as to why an as-applied approach was not more appropriate. What has changed is the Court's understanding of substantive constitutional law, in some instances taking a narrower view of constitutional rights and in some offering more robust protection. And it is substantive constitutional law that determines not just the availability of facial challenges, but in addition whether as-applied challenges are meaningful mechanism for asserting constitutional rights. Hence, the practical impact of the Court's facial/as-applied jurisprudence can not be assessed at a general level, but must instead be approached on a doctrine- by-doctrine basis. The real question in the end is whether the Court is developing specific constitutional doctrines in ways that expand or contract the substantive scope of individual rights.

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application," thereby precluding case-by-case determination of the constitutionality of different applications. Id. at 1347.