NOTES

REELING IN THE OUTLIER: *GONZALES V. CARHART* AND THE END OF FACIAL CHALLENGES TO ABORTION STATUTES

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INTRODUCTION

Gonzales v. Carhart[1] marks a significant turning point in the Supreme Court's substantive abortion jurisprudence. The Court upheld the constitutionality of the Partial-Birth Abortion Ban Act of 2003 despite the fact

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[1] 127 S. Ct. 1610 (2007).

that the Act did not contain an exception for the health of the mother.[2] But the case is equally as important for its holding on a separate issue that has plagued the Court's opinions since *Roe v. Wade*: the appropriateness of facial versus as-applied challenges in the abortion context. Normally a plaintiff challenging the constitutionality of any statute must bring an as-applied challenge, meaning the plaintiff can claim only that the statute is invalid as applied to himself under his particular circumstances.[3] Even if the court finds the statute invalid, it will uphold the statute as it applies to all other persons not before the court nor in the same situation as the instant plaintiff.[4] If a plaintiff wishes to challenge the statute on its face, contending that the statute should be invalidated in its entirety, then he must satisfy the heavy burden of showing the statute cannot be constitutionally applied in any circumstance.[5] Facial challenges are looked at skeptically by the Court because such challenges require courts to consider hypothetical scenarios involving parties not before the court and to decipher the full meaning of a statute without a chance for its meaning to be developed on a case-by-case basis.[6] Instead, the Court prefers to decide discrete cases as applied to the particular parties at hand.[7] Hence, the burden for sustaining a facial challenge is extremely high.

There is an exception to the demanding rule for facial challenges in the context of the First Amendment. Using the overbreadth exception, a plaintiff challenging a statute as facially unconstitutional under the First Amendment can satisfy his burden by showing that even though the statute is constitutional as applied to him, the statute is substantially overbroad in regulating the protected speech of others.[8] Starting with *Roe* and continuing for the next three-and-a-half decades, the Court allowed plaintiffs to challenge an abortion statute on its face using the overbreadth exception.[9] Because the heavy

[2] *Id.* at 1627.

[3] United States v. Raines, 362 U.S. 17, 21 (1960).

[4] *Id.*

[5] United States v. Salerno, 481 U.S. 739, 745 (1987). Some members of the Court have criticized this standard. *See* Washington v. Glucksberg, 521 U.S. 702, 739-40 (1997) (Stevens, J., concurring in the judgments); *infra* notes 13, 25 and accompanying text.

[6] *See, e.g.*, Sabri v. United States, 541 U.S. 600, 609 (2004); *Raines*, 362 U.S. at 22 (suggesting that "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases" and that "premature interpretations of statutes" should be avoided).

[7] *Sabri*, 541 U.S. at 608 ("[F]acial challenges are best when infrequent.").

[8] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (explaining that in a First Amendment context, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

[9] *Sabri*, 541 U.S. at 609-10; Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 272 (1994). For a more detailed treatment of the Court's shifting standards to sustain a facial challenge to an abortion statute, see *infra* Part I.B.

demands of bringing facial challenges did not apply in the abortion context, the range of plaintiffs challenging abortion statutes grew wider and the ability of courts to invalidate abortion statutes in their entirety grew easier.[10] In 2007, the Supreme Court finally closed this loophole. *Gonzales* held that from this point forward, the Court will entertain only as-applied challenges to abortion statutes lacking a health exception.[11] Justice Kennedy devoted four short paragraphs at the end of his majority opinion to explain the Court's reasoning on this issue. This Note elaborates on the justifications for demanding as-applied challenges in the abortion context, and responds to critics' arguments that facial overbreadth challenges are both necessary in this context and have been endorsed by the Court in a wide array of contexts outside the First Amendment.

Part I of this Note begins with a general background on facial versus as-applied challenges. It then discusses those challenges more specifically in the abortion context and summarizes the Court's history of shifting standards to satisfy a facial challenge to an abortion statute. The Part concludes with an extensive discussion of the *Gonzales* opinion, which represents a significant turning point in the facial challenge debate. Part II attempts to prove that the Court's holding in *Gonzales* was justified by the traditional requirement of as-applied adjudication to which the Court has adhered in areas outside abortion and the First Amendment. This Part demonstrates that the justification for allowing facial overbreadth challenges to statutes regulating First Amendment rights does not translate to the abortion context. Finally, Part III responds to critics' arguments that the overbreadth doctrine has been expanded to reach many more areas than just the First Amendment. Supreme Court precedent dictates that the overbreadth doctrine is justified by, and limited to, the First Amendment, and the Court's holding in *Gonzales* was merely a principled attempt to bring abortion challenges back where they belong – into the mainstream of as-applied adjudication.

I. FACIAL VERSUS AS-APPLIED CHALLENGES IN THE ABORTION CONTEXT

In order to understand the significance of *Gonzales*'s holding that the Court will accept only as-applied challenges to abortion statutes, this Part will provide background on the distinction between facial and as-applied challenges. Additionally, it is important to be aware of the Court's shifting standards throughout the years regarding what a plaintiff must prove in order to satisfy a facial challenge to an abortion statute. There remains a continuing debate whether the no-set-of-circumstances test in *United States v. Salerno* or the large-fraction test in *Planned Parenthood of Southeastern Pennsylvania v.*

[10] Some commentators have referred to the Court's disregard of constitutional law principles when deciding abortion cases as the "abortion distortion." *See, e.g.*, Posting of Teresa Stanton Collett to SCOTUSblog, http://www.scotusblog.com/wp/gonzales-v-carhart-and-judge-easterbrooks-pickle/ (Apr. 19, 2007, 18:47).

[11] Gonzales v. Carhart, 127 S. Ct. 1610, 1638-39 (2007).

Casey governs facial challenges in the abortion context.[12] In an alternative dispute, Justice Stevens argues that the no-set-of-circumstances test adopted in *Salerno* is unprecedented dictum that has been ignored by subsequent case law.[13] The debate over the burden of sustaining a facial challenge was side-stepped in *Gonzales*, where the Court held that regardless of whether *Salerno* or *Casey* applies to facial challenges, from this point forward the Court will accept only as-applied challenges to statutes regulating abortion.[14]

A. *Facial Versus As-Applied Challenges in General*

Generally speaking, an as-applied challenge is "a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party."[15] This is the normal method by which a plaintiff must challenge a statute.[16] A plaintiff generally is required to bring an as-applied challenge because federal courts only have jurisdiction to rule on the "legal rights of litigants in actual controversies."[17] The origin of this requirement lies in Article III of the United States Constitution.[18] Under Article III, "a federal court must always begin with a case, framed by concrete facts including an allegation of harm to a specific plaintiff caused by an identified defendant."[19] A court thus has the power to address cases only as applied to the particular parties at hand.[20] Conversely, a court cannot adjudge the rights of a party not before the court.

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[12] *See infra* note 51 (illustrating the debate over whether the large-fraction test sub silentio overruled the no-set-of-circumstances framework).

[13] Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of the petition for certiorari). *But see id.* at 1178 n.3 (Scalia, J., dissenting from denial of certiorari) (citing several cases that follow the no-set-of-circumstances test set forth in *Salerno*).

[14] *Gonzales*, 127 S. Ct. at 1639.

[15] BLACK'S LAW DICTIONARY 244 (8th ed. 2004).

[16] United States v. Raines, 362 U.S. 17, 21 (1960).

[17] *Id.* (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

[18] U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ." (emphasis added)). A large faction of scholars disagree that the Court's power to create law is limited by Article III to deciding a series of discrete cases. Instead, these scholars argue that it is the Court's duty not "to resolve disputes between individuals, but rather to give meaning to our public values." Owen M. Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 36 (1979). While an extended discussion of this debate is beyond the scope of this Note, it is worth mentioning that this Note adopts the former view: the Court is given limited powers to decide discrete cases under Article III.

[19] Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1336-37 (2000).

[20] *Raines*, 362 U.S. at 21.

In contrast, a facial challenge is defined as "[a] claim that a statute is unconstitutional on its face – that is, that it always operates unconstitutionally."[21] Although cases should normally be decided only as applied to the parties before the court, there are times when a court, in the course of deciding an as-applied challenge, will invalidate a statute on its face, leaving the statute universally unenforceable.[22] Professor Richard Fallon posits that "facial challenges and invalidations are best conceptualized as incidents or outgrowths of as-applied litigation."[23] Where the Court holds a statute invalid on its face – meaning that the statute is unconstitutional in all its applications – the Court always requires the challenging party to claim the statute is unconstitutional *as applied to that party*.[24] It follows that a plaintiff must succeed on his as-applied challenge before he can be heard to challenge a statute on its face. Further, a statute will not be found invalid when challenged on its face merely because there are *some* circumstances in which the statute operates unconstitutionally.[25]

Whether a statute can be invalidated on its face, Professor Fallon argues, depends on the underlying doctrinal test upon which the claim is predicated.[26] The Court has allowed facial challenges under three types of doctrinal tests. The first is what Professor Dorf has termed the "underinclusiveness test," where statutes are challenged under the Equal Protection Clause as targeting a narrow, protected class.[27] The second test is the "purpose test," where the legislative purpose of a statute determines the statute's constitutional validity.[28] The third test, the First Amendment overbreadth doctrine, is the relevant test for the purpose of this Note because, starting with *Roe v. Wade* and continuing

[21] BLACK'S LAW DICTIONARY, *supra* note 15, at 244.

[22] *See* Fallon, *supra* note 19, at 1327.

[23] *Id.* at 1324.

[24] *See Raines*, 362 U.S. at 21; Fallon, *supra* note 19, at 1327.

[25] United States v. Salerno, 481 U.S. 739, 745 (1987) ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ."). Even Justice Stevens agrees with this portion of the *Salerno* opinion. *See* Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of the petition for certiorari).

[26] Fallon, *supra* note 19, at 1342. The Court favorably cited Professor Fallon's formulation in *Sabri v. United States*, 541 U.S. 600, 610 (2004).

[27] *See* Dorf, *supra* note 9, at 251-61; Fallon, *supra* note 19, at 1345-46.

[28] *See* Dorf, *supra* note 9, at 279-81 ("In a variety of contexts, the Court has held that statutes with an unconstitutional purpose may be found facially invalid."); Fallon, *supra* note 19, at 1345. These first two tests do not apply in the abortion context. The plaintiff's typical claim when challenging an abortion statute is not that the statute applies unequally to a protected class of women or that the legislature had an impermissible purpose in passing the statute, but that the statute places a substantial obstacle on a woman's qualified right to choose an abortion. The Court usually decides abortion cases on vagueness and overbreadth grounds. *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610, 1627 (2007); Stenberg v. Carhart, 520 U.S. 914, 938-46 (2000); Roe v. Wade, 410 U.S. 113, 164 (1973).

until 2007, the Court used the overbreadth exception to invalidate abortion statutes on their face.[29]

The First Amendment overbreadth doctrine is an exception to the general requirements of sustaining a facial challenge.[30] A plaintiff challenging the constitutionality of a statute under the First Amendment may rely on the overbreadth doctrine to show that even though the plaintiff's own conduct is not constitutionally protected (i.e., even though the statute is constitutional as applied to him), the statute infringes on the constitutionally protected conduct of others.[31] If a court finds that the statute is substantially overbroad, meaning it operates unconstitutionally in a substantial number of applications, the court will strike down the statute on its face.[32] If the statute is not substantially overbroad, any existing overbreadth should be cured through case-by-case analyses of the factual situations to which the statute may not be applied.[33]

B. *Shifting Standards: The Burden of Sustaining a Facial Challenge to an Abortion Statute*

Virtually all of the major abortions cases brought before the Supreme Court have involved facial challenges to state and federal abortion statutes.[34] The confusion in this area stems from the fact that different standards for sustaining a facial challenge have been adopted, approved, rejected, and ignored by the Court since it first decided *Roe*.[35] While some cases held that the plaintiff

[29] *See Sabri*, 541 U.S. at 609-10; Dorf, *supra* note 9, at 272.

[30] *See, e.g.*, *Salerno*, 481 U.S. at 745 ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); Schall v. Martin, 467 U.S. 253, 269 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad."); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice . . . ."); Gooding v. Wilson, 405 U.S. 518, 520-23 (1972) (recognizing the overbreadth doctrine for statutes restricting speech).

[31] *Broadrick*, 413 U.S. at 612.

[32] New York v. Ferber, 458 U.S. 747, 769 (1982).

[33] *Broadrick*, 413 U.S. at 615-16.

[34] *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610, 1619 (2007); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 324 (2006); Stenberg v. Carhart, 530 U.S. 914, 922 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845 (1992); Rust v. Sullivan, 500 U.S. 173, 183 (1991); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 509 (1990); Webster v. Reprod. Health Servs., 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring in part and concurring in the judgment); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 769 (1986), *overruled by Casey*, 505 U.S. 833; Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 440 (1983), *overruled by Casey*, 505 U.S. 833; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 82 (1976); Roe v. Wade, 410 U.S. 113, 120 (1973).

[35] *See* Janklow v. Planned Parenthood, 517 U.S. 1174, 1178 (1996) (Scalia, J., dissenting from denial of certiorari) (contrasting the difference between the overbreadth approach implicitly used in *Roe* and the explicit rejection of that standard in *Ohio v. Akron Center* and

facially challenging an abortion statute must show no set of circumstances exist under which the statute would operate constitutionally, other cases have not placed such a high burden on the plaintiff and have used a form of First Amendment overbreadth analysis to allow a plaintiff to succeed on his challenge.

In *Roe*, the Court struck down Texas's criminal abortion statute as facially invalid.[36] While the Court did not explicitly adopt a test for judging facial challenges to abortion statutes, it is well accepted that the Court impliedly used the "overbreadth" test to invalidate the statute on its face.[37] The Court held:

> [The state statute], in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," *sweeps too broadly*. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.[38]

It is questionable whether *Roe*'s use of the overbreadth doctrine was an anomaly or was actually meant to carve out a new exception for abortion challenges. However, the validity of the doctrine's application in the abortion context was heavily discounted several years later in *United States v. Salerno*.[39] Writing for the Court, Chief Justice Rehnquist summarized the general requirements for bringing a facial challenge:

> 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. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.[40]

Although *Salerno* did not involve a challenge to an abortion statute, the Court subsequently adopted the *Salerno* standard for abortion cases in *Ohio v.*

Rust v. Sullivan); Gary Lawson, *Making a Federal Case Out of It:* Sabri v. United States *and the Constitution of Leviathan*, 2003-2004 CATO SUP. CT. REV. 119, 127 n.34 (noting the Court's "wavering standards for judging and applying facial challenges").

[36] *Roe*, 410 U.S. at 164.

[37] *See* Ada v. Guam, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of certiorari) (stating that the *Roe* Court "seemingly employed an 'overbreadth' approach – though without mentioning the term and without analysis"); Dorf, *supra* note 9, at 272 ("*Roe v. Wade* exemplifies overbreadth analysis."); Fallon, *supra* note 19, at 1347 n.132.

[38] *Roe*, 410 U.S. at 164 (emphasis added).

[39] 481 U.S. 739 (1987).

[40] *Id.* at 745.

Akron Center for Reproductive Health.[41] In that case, a group of plaintiffs brought a facial challenge to an Ohio statute that required minors to notify their parents or seek a court order before obtaining an abortion.[42] The Court upheld the statute, declaring: "[B]ecause appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'"[43] The Court refused to overturn an abortion statute on a facial challenge "based on upon a worst-case analysis that may never occur."[44] In other words, the Court declined the invitation to decide the case based on extreme hypotheticals that were not present in the specific facts raised by the parties to the claim. A year later in *Rust v. Sullivan*,[45] plaintiffs challenged the facial validity of regulations promulgated under Title X of the Public Health Service Act.[46] The regulations mandated that federal funds for family-planning services shall not be used in programs where abortion is a method of family planning.[47] The Court again relied on *Salerno* in holding that the plaintiffs "face[d] a heavy burden in seeking to have the regulation invalidated as facially unconstitutional,"[48] as "the challenger must establish no set of circumstances exists under which the Act would be valid."[49] If the Court in *Roe* was ever intent on expanding the overbreadth doctrine to include abortion challenges, *Ohio v. Akron Center* and *Rust v. Sullivan* made clear that facial challenges in the abortion context would be subject to the same demands as in all other cases.

Just one year after *Rust v. Sullivan*, however, the Court again employed a form of overbreadth analysis to decide the constitutionality of an abortion statute. In *Casey*, the Court created a large-fraction test to decide whether the state's parental-notification provision posed an undue burden on a woman's right to obtain an abortion.[50] Whether the large-fraction test sub silentio overruled the no-set-of-circumstances framework set out in *Salerno* and

[41] 497 U.S. 502 (1990).

[42] *Id.* at 509.

[43] *Id.* at 514 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring)). Justice O'Connor was quoting the language of *Salerno* when she adopted the no-set-of-circumstances test in *Webster*. *See Webster*, 492 U.S. at 524.

[44] Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. at 514.

[45] 500 U.S. 173 (1991).

[46] 42 U.S.C. §§ 300 to 300a-41 (2000).

[47] *Rust*, 500 U.S. at 177-78.

[48] *Id.* at 183.

[49] *Id.* (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

[50] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) ("[I]n a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.").

adopted in *Ohio v. Akron Center* and *Rust v. Sullivan* is a question debated among lower courts and Supreme Court Justices alike.[51]

In *Casey*, a majority of the Justices invalidated the state's requirement that a married woman must notify her husband before having an abortion.[52] In response to the plaintiffs' claim that the notification statute would prevent women from seeking abortions because of spousal abuse, Pennsylvania argued that the statute affected only one percent of women who obtain abortions.[53] The State further argued that some of the women in that one percent category would not face dangerous consequences if they notified their husbands or would qualify for one of the exceptions to the notification provision, resulting in less than one percent of women adversely affected by the statute.[54] Thus, because the statute would operate unconstitutionally in only a tiny percentage of circumstances, the plaintiffs had not met their burden to satisfy a facial challenge.[55] Rather than accept this conclusion, however, the Court once again adopted a form of overbreadth analysis and facially invalidated the statute. The category for whom the provision was relevant, the Court declared, was not all women seeking abortions, but married women seeking abortions who did not wish to notify their husbands and who did not qualify for one of the statutory exceptions.[56] The Court held that because the statute would operate

[51] Justice Thomas, in his *Stenberg* dissent, provides a concise illustration of the tension between *Ohio v. Akron Center* and *Casey*. *See* Stenberg v. Carhart, 530 U.S. 914, 1018-20 (2000) (Thomas, J., dissenting); *see also* Janklow v. Planned Parenthood, 517 U.S. 1174, 1178-80 (1996) (Scalia, J., dissenting from denial of certiorari); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application and injunction). While the Fourth and Fifth Circuits continued to apply *Salerno*, several circuits held that *Casey*'s standard applied. *See, e.g.*, Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53, 58 (1st Cir. 2004), *vacated and remanded on other grounds sub nom.* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006); A Woman's Choice – E. Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003); Greenville Women's Clinic v. Bryant, 222 F.3d 157, 164-65 (4th Cir. 2000); Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 142-43 (3d Cir. 2000); Planned Parenthood of S. Ariz. v. Lawall, 180 F.3d 1022, 1025-26 (9th Cir. 1999), *amended on denial of rehearing*, 193 F.3d 1042 (9th Cir. 1999); Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 193-96 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998); Planned Parenthood v. Miller, 63 F.3d 1452, 1456-58 (8th Cir. 1995), *cert. denied sub nom. Janklow*, 517 U.S. 1174 (1996); Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992).

[52] *Casey*, 505 U.S. at 895.

[53] *Id.* at 894. Pennsylvania's argument that the spousal-notification provision imposed almost no burden at all for the vast majority of women seeking abortions rested on evidence that only twenty percent of those women are married and approximately ninety-five percent of those married women notify their husbands voluntarily, thus adding up to only one percent of women seeking abortions who are forced to comply with the provision. *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 895.

unconstitutionally as applied to a large fraction of women for whom the statute was "relevant," the statutory provision was unconstitutional in its entirety.[57]

Even assuming, under an overbreadth exception, that a court should be able to invalidate a statute on its face because the statute is unconstitutional in a large fraction of cases to which it is applied, *Casey*'s large-fraction test produces results that cannot satisfy this standard. Take the example in *Casey* itself: the spousal-notification provision required that every married woman seeking an abortion must notify her husband.[58] Logically, one would assume the statutory provision applies to all married women seeking an abortion, since all married women seeking an abortion must notify their husbands. Instead, the Court in *Casey* confined its frame of reference only to married women who sought abortions and *did not* wish to notify their husbands. The Court thus limited the size of the fraction's denominator to a small percentage of women to whom the statute actually applied.[59] The Court then speculatively assumed that within that small denominator, a "large fraction" of those women would face spousal abuse if they told their husbands about their intent to have an abortion. Assuming the statute would impose an undue burden in those cases was reason enough for the Court to invalidate the statute in its entirety. Not only is this analysis a far cry from what an accurate large-fraction test should look like,[60] but it also runs directly contrary to the well-established principle that "[t]he delicate power of pronouncing a[] [statute] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."[61]

The example becomes even more absurd in the context of a health exception, which was the issue in *Gonzales*. The Partial Birth Abortion Ban Act at issue in *Gonzales* applies in all cases in which the doctor proposes to perform a partial-birth abortion.[62] But under *Casey*'s large-fraction test, the statute is "relevant" only for women who require a partial-birth abortion because of a health risk. Further, the statute places an undue burden on all women who require a partial-birth abortion because of a health risk. Stated differently, "the absence of a health exception burdens *all* women for whom it is relevant."[63] Thus, as Justice Ginsburg noted in her dissent in *Gonzales*,

[57] *Id.*

[58] *Id.* at 887. The provision contained exceptions in cases of medical emergencies. *Id.*

[59] The State presented evidence in *Casey* that only five percent of married women did not voluntarily notify their husbands. *Id.* at 894.

[60] An accurate large-fraction test would look something like this: the statute applies to all married women seeking abortions. In ninety-five percent of those cases, a woman notifies her husband voluntarily of her intent to have an abortion. Thus, in a very large majority of cases, the statute would not impose an undue burden, so the statute is not invalid on its face.

[61] United States v. Raines, 362 U.S. 17, 22 (1960).

[62] This is not only the most logical conclusion but also the one adopted by the majority in *Gonzales*. Gonzales v. Carhart, 127 S. Ct. 1610, 1639 (2007) ("We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure . . . .").

[63] *Id.* at 1651 (Ginsburg, J., dissenting).

"[t]here is, in short, no fraction because the numerator and denominator are the same."[64] The large-fraction analysis thus is not really analysis at all, but merely a conclusory statement that the statute imposes an undue burden on all women for whom the statute imposes an undue burden. And even though the procedure may be necessary for the mother in only a small number of cases in which the doctor proposes to perform a partial-birth abortion (thus making the statute valid in a majority of its applications),[65] the large-fraction test mandates that the statute be invalidated on its face.

Instead of resolving the tension between the no-set-of-circumstances test and the large-fraction analysis, the Court in *Gonzales* held that challenges to abortion statutes must be brought only as applied to the particular parties at hand. The *Gonzales* Court's decision is fleshed out in more detail in the next Section.

C. Gonzales v. Carhart *and the Requirement of As-Applied Challenges*

The Court in *Gonzales* addressed the constitutional validity of the Partial-Birth Abortion Ban Act of 2003.[66] Although the Act was not signed into law until November 5, 2003, the plaintiffs in *Gonzales*, four doctors who performed second-trimester abortions and Planned Parenthood, brought facial challenges to the statute several months earlier, seeking a permanent injunction against the statute's enforcement.[67] Writing for the Court, Justice Kennedy stated that central to the holding in *Casey* was the premise "that the government has a legitimate and substantial interest in preserving and promoting fetal life," and that this premise "would be repudiated" if the Court found the Act unconstitutional.[68] Thus, the Court held that "the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."[69]

First, the Court addressed the plaintiffs' contention that the Act was unconstitutionally vague.[70] In order to satisfy the vagueness challenge, the plaintiffs had to prove the statute did not sufficiently define the criminal offense so that ordinary people could understand it, and that the statute encouraged arbitrary and discriminatory enforcement. The Court compared the federal statute to Nebraska's partial-birth abortion statute, which it invalidated seven years earlier in *Stenberg v. Carhart*.[71] Unlike the statute at

[64] *Id.* at 1651 n.10.

[65] The Court gave deference to the government's argument in *Gonzales* that a partial-birth abortion was never medically necessary for the health of the mother. *Id.* at 1637 (majority opinion).

[66] 18 U.S.C. § 1531 (2006); *Gonzales*, 127 S. Ct. at 1619.

[67] *Gonzales*, 127 S. Ct. at 1619.

[68] *Id.* at 1626.

[69] *Id.* at 1627.

[70] *Id.* at 1628.

[71] 530 U.S. 914 (2000).

issue in *Stenberg*, which prohibited abortions where a "substantial portion" of the fetus is delivered,[72] the statute in this case specifically defined partial-birth abortion as when the fetus's head is outside the mother or, in the case of breech presentation, when the fetus's trunk up to the navel is outside the mother.[73] Based on these clear criteria, a doctor would know when he is performing a prohibited partial-birth abortion. Additionally, because the plaintiffs in this case challenged the Act before it had an opportunity to be enforced, the plaintiffs could not prove the Act had been enforced in a discriminatory manner.[74] Thus, the Act was not vague on its face.

Second, the Court addressed the issue of whether the Act imposed an undue burden because its restrictions were overly broad.[75] If the Act was found to regulate the abortion procedure known as dilation and extraction ("D&E"), the Act would have imposed an undue burden because D&E is the most common second-trimester abortion procedure.[76] The Court held that unlike the statute at issue in *Stenberg*, the Act did not prohibit common D&E procedures – where the fetus is killed and then removed from the mother limb-by-limb – because the Act required that the fetus's head or trunk up to the navel be outside the mother before the doctor kills the fetus.[77] Further, the Court invoked the constitutional avoidance doctrine in holding the Act should be saved from unconstitutionality because the most reasonable interpretation was that the Act did not prohibit D&E procedures.[78]

Third, the Court held the Act did not need a health exception to be constitutional. The Court acknowledged that "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[79] The Court then cited a century of precedent for the principle that "state and federal legislatures [should have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[80] By holding that in the face of medical uncertainty the government is given discretion to decide whether the Act poses significant health risks, the Court gave legislatures the same power to make medical determinations in the abortion context that they have in every other medical context.[81] "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical

[72] *Id.* at 922.

[73] *Gonzales*, 127 S. Ct. at 1624, 1628.

[74] *Id.* at 1629.

[75] *Id.*

[76] *Id.* at 1627.

[77] *Id.* at 1624, 1629-31.

[78] *Id.* at 1631.

[79] *Id.* at 1636.

[80] *Id.*

[81] *Id.* at 1636-37.

community."[82] Where there were alternative safe abortion procedures, the Court held, the Act would not be invalidated on its face.[83]

Finally, after discussing at length why the Partial-Birth Abortion Ban Act was not void for vagueness, did not impose an undue burden on a woman's right to an abortion, and did not require a health exception, the Court stated succinctly in Part V of the opinion that "these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge."[84]

During Oral Argument, Justices Kennedy, Ginsburg, and Souter questioned Solicitor General Paul Clement on the efficacy of bringing an as-applied challenge to an abortion statute that lacks a health exception.[85] The issue concerning Justice Kennedy was that if a woman had a serious medical condition and her doctor advised that a previability partial-birth abortion procedure was medically necessary in her case, how could the woman challenge the Act as applied to her if the abortion had to be performed within a matter of days?[86] In other words, how could the woman and her doctor challenge the constitutionality of the Act before the emergency partial-birth abortion took place? In response to Justice Kennedy's question, Clement suggested that a pre-enforcement challenge be allowed, in which a doctor would claim that, in his experience, a partial-birth abortion procedure is necessary for women with specific medical conditions, such as preeclampsia or placental previa.[87] In that instance, the Act would be invalid in its future application to that category of women, but constitutional as applied to everyone else. The Court in *Gonzales* adopted this approach.[88] It held that in a pre-enforcement as-applied challenge, the plaintiff must show that "in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."[89]

Further, the Court held that the First Amendment overbreadth exception for bringing a facial challenge to a statute, which was used by the Court to entertain facial challenges in *Roe*, *Casey*, and *Stenberg*, no longer applied in the abortion context.[90] As for the dispute over whether *Salerno* or *Casey* controls the approach for deciding facial challenges to abortion statutes, the

[82] *Id.* at 1636.

[83] *Id.* at 1638.

[84] *Id.*

[85] Transcript of Oral Argument at 21-25, *Gonzales*, 127 S. Ct. 1610 (No. 05-380).

[86] *Id.* at 21-22.

[87] *Id.* at 22.

[88] *Gonzales*, 127 S. Ct. at 1638-39.

[89] *Id.*

[90] *Id.* at 1639 ("The latitude given facial challenges in the First Amendment context is inapplicable here.").

Court dismissively remarked: "We need not resolve that debate."[91] Because the Act would be constitutional either in at least one circumstance (taking the *Salerno* and *Ohio v. Akron Center* approach) or in a large fraction of them (using *Casey*'s criteria), the Court held that respondents failed to overcome their burden in challenging the Act on its face.[92] Moreover, the Court held that facial challenges in this area were inappropriate, for it is not the Court's role "to resolve questions of constitutionality with respect to each potential situation that might develop."[93] From this point forward, the Court held, it would entertain only as-applied challenges to abortion statutes in discrete cases.

II. JUSTIFICATION FOR THE *GONZALES* COURT'S HOLDING

The *Gonzales* Court's holding that only as-applied challenges to abortion statutes will be entertained represents a major shift from prior abortion jurisprudence.[94] But is this change just a shift back to how abortion cases should have been decided all along? The *Gonzales* decision raises important questions as to the justification for the Court's holding. While many commentators attribute the decision to the recent change in membership on the Court,[95] this Note argues that the Court's holding is justified by the fundamental constitutional proposition that facial challenges should be the exception rather than the rule[96] and that constitutional values are best served by

[91] *Id.*

[92] *Id.* Notice that for purposes of the large-fraction test, the category of cases the Court defined as relevant were "all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications." *Id.* As discussed above, *see supra* notes 52-65 and accompanying text, this is a more expansive (and more accurate) version of the test than as initially adopted in *Casey*, where the Court held relevant the narrow class of "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992). In *Casey*, the Court held that the government's suggested relevant class – women who wish to obtain abortions – was too broad. *Id.* at 894-95.

[93] *Gonzales*, 127 S. Ct. at 1639 (citing United States v. Raines, 362 U.S. 17, 21 (1960)).

[94] *See id.* at 1650-51 (Ginsburg, J., dissenting) (citing Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859 n.29 (1991) [hereinafter Fallon, *Overbreadth*]) ("[V]irtually all of the abortion cases reaching the Supreme Court since [*Roe*] have involved facial attacks on state statutes, and the Court, whether accepting or rejecting the challenges on the merits, has typically accepted this framing of the question presented.").

[95] *See, e.g.*, Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 425 (2007) ("The key to [*Gonzales*] was . . . Justice Alito having replaced Justice O'Connor.").

[96] *See* Fallon, *supra* note 19, at 1321, 1352, 1354, 1358. Even though this position has been under attack, Fallon maintains that substantive constitutional doctrines such as the overbreadth doctrine, which require facial invalidity of challenged statutes, "should be the

as-applied litigation.[97] In holding that abortion cases must be decided as applied to the particular facts of the case, the *Gonzales* Court brought abortion challenges back where they belong into the mainstream of constitutional adjudication.

A. *Abortion Challenges Under the As-Applied Umbrella*

As discussed in Part I, as-applied challenges are the normal method by which courts decide cases involving constitutional challenges to statutes.[98] One of the seminal cases elaborating upon this principle is *United States v. Raines*,[99] a unanimous opinion authored by Justice Brennan. This Section will attempt to show that the as-applied principles set forth in *Raines* are also applicable in the abortion context. As demonstrated by the Court in *Gonzales*, abortion challenges are conducive to as-applied adjudication.

According to Professor Fallon and his interpretation of *Raines*, there are three reasons underlying the Court's demand for as-applied claims.[100] The first reason is to avoid "unnecessary or premature decisions of constitutional issues."[101] In *Raines*, the Court recognized that the judiciary, in exercising jurisdiction under Article III, is bound by the rule that it must "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it."[102] Under the constitutional avoidance doctrine, if the Court can reasonably construe a statute in such a way that its application is constitutional, then it is required to uphold the statute.[103] As demonstrated in *Gonzales*, this doctrine is equally applicable in the abortion context. The Court employed the constitutional avoidance doctrine when it addressed the plaintiffs' argument that the Partial-Birth Abortion Ban Act was overbroad. The plaintiffs argued the Act should be construed as prohibiting D&E abortion procedures.[104] If that were so, the Act would be unconstitutional because D&E is the most common

exception, not the rule." *Id.* at 1354. For the opposite proposition, see Dorf, *supra* note 9, at 294 ("[T]he subconstitutional policy of constitutional avoidance must give way to more fundamental substantive and institutional constitutional norms.").

[97] *See* Fallon, *supra* note 19, at 1354 ("[D]octrines requiring [facial invalidity] of statutes that fail the applicable test, are not closely tailored to the constitutional values that they aim to protect.").

[98] Or, to put it more eloquently: "As-applied challenges are the basic building blocks of constitutional adjudication." *Id.* at 1328.

[99] 362 U.S. 17, 22 (1960).

[100] *See* Fallon, *supra* note 19, at 1330.

[101] *Id.*

[102] *Raines*, 362 U.S. at 21.

[103] *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting Hooper v. California, 155 U.S. 648, 657 (1895))).

[104] Gonzales v. Carhart, 127 S. Ct. 1610, 1629-31 (2007).

second-trimester abortion procedure,[105] and prohibiting it would place a substantial obstacle on women seeking pre-viability abortions.

Under the constitutional avoidance doctrine, however, it was the Court's duty to construe the Act so as not to include constitutionally protected conduct. The Act defined partial-birth abortion as requiring delivery to an anatomical landmark followed by a distinct overt act that kills the fetus.[106] In contrast, standard D&E does not involve delivery followed by a fatal act, but instead requires "the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix."[107] Moreover, a doctor must have the requisite intent to perform a partial-birth abortion, and could not be prosecuted under the Act if he intended only to perform a standard D&E at the outset of the procedure.[108] In light of this information, the Court held that "interpreting the Act so that is does not prohibit standard D & E is the most reasonable reading and understanding of its terms."[109] The application of the constitutional avoidance doctrine thus required the Court to uphold the Act.

The second reason for demanding an as-applied challenge is that the "*full* legal meaning of a challenged statute is often uncertain."[110] This rationale directly relates to the first, which counsels against premature decisions of constitutional issues. If the meaning of a statute is not obvious, then in order to avoid questions of constitutionality, courts should specify the statute's meaning over time through "a series of fact-specific, case-by-case decisions."[111] The statute's meaning narrows as the Court applies it to a number of concrete factual scenarios adjudicated by the parties before it.[112] *Raines* explicitly rejected the approach of allowing the Court to consider hypothetical cases in order to judge the constitutionality of a statute.[113]

This rationale also applies in the abortion context. As was the case in *Gonzales*, organizations such as Planned Parenthood bring suit challenging

[105] *Id.* at 1627.

[106] 18 U.S.C. § 1531 (2006) (requiring deliberate and intentional vaginal delivery of a living fetus until the entire head (in the case of a head-first presentation) or navel (in the case of a breech presentation) is outside the mother, followed by an "overt act . . . that kills the partially delivered living fetus"); *Gonzales*, 127 S. Ct. at 1629-31.

[107] *Gonzales*, 127 S. Ct. at 1630.

[108] *Id.* at 1631-32 ("If a doctor's intent at the outset is to perform a D & E in which the fetus would not be delivered to either of the Act's anatomical landmarks, but the fetus nonetheless is delivered past one of those points, the requisite and prohibited scienter is not present.").

[109] *Id.* at 1631.

[110] Fallon, *supra* note 19, at 1330.

[111] *Id.* at 1331.

[112] *Id.*

[113] United States v. Raines, 362 U.S. 17, 21 (1960) ("Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.'" (quoting Barrows v. Jackson, 346 U.S. 249, 256 (1953))).

abortion statutes before the government even signs the statutes into law. The full legal meaning of the statute certainly is subject to speculation at this stage because the government has not yet enforced it. For this very reason, the Court in *Gonzales* refused to rule that the Act was vague on discriminatory enforcement grounds. As the Court stated, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement."[114] Because the plaintiffs in *Gonzales* challenged the Act before it was signed into law, "no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]."[115]

Further, *Casey*'s flawed large-fraction analysis runs contrary to the *Raines* case-by-case approach. The large-fraction test requires the Court to adjudge the constitutionality of a statute as it applies to a class of women who are not before the Court and to situations that have not yet occurred, inevitably encouraging the hypothetical speculation against which *Raines* counseled.[116] In *Gonzales*, the Court invoked *Raines* in recognizing "[i]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation."[117] The appropriate method of challenging an abortion statute, then, is as applied to the particular parties at hand under the specific facts of the case, where "the medical risk can be better quantified and balanced than in a facial attack."[118]

The third reason for requiring as-applied claims, not directly recognized in *Raines* but otherwise acknowledged by the Court,[119] involves the doctrine of severability: even if a court holds one application of a statute constitutionally unenforceable, the rest of the statute may still be severed from the invalid application and upheld.[120] Because "statutory meaning often emerges through application,"[121] saving the valid construction of the statute will allow the Court to apply the statute in future cases where its application remains constitutional.

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[114] *Gonzales*, 127 S. Ct. at 1628 (quoting Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994); Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[115] *Id.* at 1629 (alteration in original) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503 (1982)).

[116] *Raines*, 362 U.S. at 21.

[117] *Gonzales*, 127 S. Ct. at 1639 (citing *Raines*, 362 U.S. at 21).

[118] *Id.*

[119] *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329-30 (2006).

[120] *Id.* (calling "axiomatic" the fact that a statute may be unconstitutional as applied to some, but not all, and requiring severability of the unconstitutional portion because judges should "try not to nullify more of a legislature's work than is necessary"); *see* Fallon, *supra* note 19, at 1331 & n.55 ("The severability question asks whether a court's holding that part of a statute is invalid causes the remainder of the statute to be invalidated as well." (quoting John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 207 (1993))).

[121] Fallon, *supra* note 19, at 1333.

Judicial precedent acknowledges, however, that a federal court may sever a statute "only if the statute is 'readily susceptible' to such a construction."[122] The purpose of this limitation is to prohibit courts from engaging in judicial legislation by rewriting a statute in order to save it from unconstitutionality.[123] A unanimous Court in *Ayotte v. Planned Parenthood of Northern New England* confirmed that the doctrine of severability applies to abortion statutes, such that a court need not invalidate an abortion statute on its face where the court can sever the unconstitutional portion from the rest of the statute.[124]

B. *Why Abortion Challenges Do Not Fit into the Overbreadth Exception*

The previous Section sought to demonstrate that the three major justifications underlying the *Raines* as-applied approach to deciding cases are equally appropriate in the abortion context. This Section addresses the question of whether abortion challenges fit better under the overbreadth exception, which before *Gonzales* was the method adopted by the Court for deciding challenges to abortion statutes.[125] One faction of scholars, led by Professor Dorf, argues that the First Amendment overbreadth doctrine should extend to all challenges involving non-litigation fundamental rights, including the right to have an abortion.[126] Professor Fallon frames the issue in narrower terms. Fallon argues that whether the overbreadth doctrine should expand to other fundamental rights depends on the constitutional values promoted by the underlying substantive right.[127] Presented in these terms, the issue becomes whether the First Amendment overbreadth doctrine "is well crafted to promote the constitutional values underlying the abortion right without excessive costs

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[122] Reno v. ACLU, 521 U.S. 844, 884 (1997) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

[123] Fallon, *supra* note 19, at 1333-34 & n.67 (citing cases in which the Supreme Court refused to rewrite a challenged statute in order to avoid judicial legislation).

[124] *Ayotte*, 546 U.S. at 329-31 (calling the "wholesale" invalidation of a parental notification statute "the most blunt remedy" because "[o]nly a few applications . . . would present a constitutional problem").

[125] *See supra* notes 50-57 and accompanying text (describing the Court's large-fraction test, a version of the overbreadth doctrine).

[126] *See Dorf*, *supra* note 9, at 265 (arguing that the justification for the First Amendment overbreadth doctrine "may justify a special overbreadth doctrine for all fundamental rights"). Professor Dorf tailors his intended expansion to *non-litigation* fundamental rights because litigation rights (or trial rights) "have meaning only within the context of an adversarial proceeding," whereas non-litigation fundamental rights protect "primary conduct" against governmental interference. *Id.*

[127] Fallon, *supra* note 19, at 1355-56, 1369 ("[T]he much controverted question whether 'overbreadth' doctrine should extend beyond the First Amendment is not a single question, but a series of questions about which other constitutional values, if any, should be afforded the type of protection that overbreadth doctrine currently provides to First Amendment values.").

to other constitutional values."[128] This Note argues that the rationales underlying the First Amendment overbreadth doctrine are ill suited for the abortion context, and are insufficient justifications for permitting facial invalidity of statutes restricting abortion.

The First Amendment overbreadth doctrine permits facial invalidation for two reasons: (1) the test precludes development of statutory meaning through case-by-case analysis; and (2) invalid applications of the statute cannot be separated from the valid ones, leaving the statute unenforceable in its totality.[129] In the abortion context, *Ayotte v. Planned Parenthood of Northern New England* dispelled the second concern by holding that invalid applications of abortion statutes can in fact be severed from the rest of the statute, which remains constitutionally upheld.[130] *Gonzales* decided the first concern in favor of the *Raines* approach, ruling that it is not the Court's obligation "to resolve questions of constitutionality with respect to each potential situation that might develop,"[131] leaving these questions to be resolved over time through case-by-case analysis.[132] Once the argument in favor of facial challenges collapses, the result is that courts should treat challenges to abortion statutes like all other challenges using an as-applied approach.

1. *Ayotte v. Planned Parenthood* and the Severability Doctrine

As discussed above, the overbreadth doctrine allows facial challenges where a court finds one application of the statute unconstitutional because the remaining constitutional applications are difficult to sever from the invalid one.[133] Thus, a court must hold that the statute is unenforceable in its totality, even though there are some constitutional ways the statute applies to the claimant or to other classes of individuals. *Ayotte* rejected this logic in the abortion context. The case addressed the issue of whether facial invalidation of an entire statute regulating access to abortion is required when the Court finds that the statute is constitutionally unenforceable in medical emergencies for lack of a health exception.[134] Justice O'Connor, backed by a unanimous Court, held that "invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."[135]

[128] *Id.* at 1356.

[129] *Id.* at 1342.

[130] Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 323 (2006).

[131] Gonzales v. Carhart, 127 S. Ct. 1610, 1639 (2007).

[132] *Id.*

[133] *See supra* note 129 and accompanying text.

[134] *Ayotte*, 546 U.S. at 326.

[135] *Id.* at 323.

Ayotte concerned the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act,[136] which prohibited physicians from performing an abortion on a minor until forty-eight hours after the minor's parent receives written notice of the pending abortion.[137] The Act contained three exceptions to the parental notification requirement: if the abortion is necessary to prevent the minor's death and there is insufficient time to provide notice; if the parent certifies that he has already been notified; and a judicial bypass exception.[138] The claimants, an abortion doctor and three abortion clinics, alleged that the Act was unconstitutional because it did not provide an exception if the forty-eight-hour delay endangered the minor's health.[139] The United States District Court for the District of New Hampshire held that the Act was invalid "for failure 'on its face [to] comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception.'"[140] The Supreme Court remanded the case back to the district court, holding that facial invalidation of the entire statute was not constitutionally necessary merely because application of the statute is unconstitutional where the minor's health is endangered.[141]

The Court framed the issue as one of remedies: "When a statute restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief?"[142] Citing *Raines*, the Court stated: "We prefer . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact."[143] In other words, the Court refused to enjoin the entire statute merely because one of its applications was unconstitutional. Thus, the Court demonstrated that the severability doctrine may be properly applied in the abortion context. As support for its holding, the Court

[136] *Id.* at 323-25. The Act was formerly codified at N.H. REV. STAT. ANN. §§ 132:24 to :28 (2005) but was repealed by 2007 N.H. Laws 265.

[137] *Ayotte*, 546 U.S. at 323-24.

[138] *Id.* at 324.

[139] *Id.* at 324-25.

[140] *Id.* at 325 (alteration in original) (quoting Planned Parenthood of N. New Eng. v. Heed, 296 F. Supp. 2d 59, 65 (D.N.H. 2003)). *Gonzales* subsequently eliminated the requirement that an abortion statute must provide a health exception, finding that a health exception to the Federal Partial-Birth Abortion Ban Act of 2003 was not constitutionally required. Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (2007).

[141] *Ayotte*, 546 U.S. at 331 ("[W]e agree with New Hampshire that the lower courts need not have invalidated the law wholesale. . . . Only a few applications of New Hampshire's parental notification statute would present a constitutional problem."). The Court remanded the case to let the district court decide between partial injunction prohibiting unconstitutional applications, or total invalidation if enforcing the remaining applications of the statute would be inconsistent with legislative intent. *Id.*

[142] *Id.* at 328.

[143] *Id.* at 328-29 (alteration in original) (citing United States v. Raines, 362 U.S. 17 (1960)).

emphasized the fundamental principle of judicial restraint when addressing the constitutional validity of a statute.[144] When invalidating a portion of a statute, the Court should not "nullify more of a legislature's work than is necessary," else it frustrate legislative intent.[145] Signifying its favor for an as-applied approach, the Court confirmed:

> [A] statute may be invalid as applied to one state of facts and yet valid as applied to another. Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute . . . may be declared invalid to the extent that it reaches too far, but otherwise left intact.[146]

The significance of the Court's holding and rationale cannot be understated, for its adoption of the severability doctrine in the abortion context eliminated one of the two main arguments justifying facial invalidation of abortion statutes under the overbreadth exception. The remaining argument is the focus of the next Subsection, where this Note demonstrates that the *Gonzales* Court's adoption of the *Raines* approach – the approach the Court similarly adopted in *Ayotte* – undermines any remaining justification for allowing facial overbreadth challenges to abortion statutes.

2. *Gonzales v. Carhart* and Case-by-Case Analysis

This Subsection addresses the first of Fallon's two requirements for allowing a facial challenge exception under the overbreadth doctrine. While *Ayotte* eliminated the severability concern, *Gonzales* addressed the first rationale: the underlying doctrinal test does not permit statutory meaning to emerge on a case-by-case basis.[147] This is true under the First Amendment overbreadth exception, where the Court requires that the meaning of the statute "must be relatively fully specified at the time of the test's application."[148] If the statute restricting speech is found to infringe the First Amendment rights of third parties, even though the challenged statute could be constitutionally enforced against the plaintiff, the statute is deemed overly broad and thus

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[144] *Id.* at 329 ("[W]e restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it." (second alteration in original) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988))).

[145] *Id.*

[146] *Id.* (second alteration in original) (citations omitted). The Court also stated that "[a]fter finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* at 330. If enforcing the remaining applications of the statute would be inconsistent with legislative intent, then a court should declare the entire statute unenforceable. The normal rule, however, is that partial invalidation is sufficient to prevent the statute from being unconstitutionally enforced. *Id.* at 329.

[147] Fallon, *supra* note 19, at 1346.

[148] *Id.*

facially invalid.[149] There is no opportunity to develop the full meaning of the statute through a series of discrete cases.

The First Amendment overbreadth doctrine is a limited exception to the general *Raines* approach.[150] The view modeled in *Raines* is that "full specification of the statute's meaning require[s] a series of judgments concerning . . . how [the statute] would apply to the gamut of imaginable fact situations. . . . [S]pecification would be 'premature' without concrete facts to anchor the interpretive enterprise."[151] Thus, under the *Raines* model, statutory meaning is permitted to develop through a series of cases, each applying the statute to the particular facts of the case, and deciding the case based only on those facts without reference to hypothetical scenarios. In the context of the First Amendment, however, the Court has permitted the overbreadth doctrine to depart from the general *Raines* approach because of factors that are *unique* to statutes regulating speech and expression.[152] As this Note explains, the justification supporting the overbreadth doctrine as an exception to the *Raines* model in the context of the First Amendment cannot be carried over to the abortion context. Statutes regulating abortion are best suited for the normal case-by-case development of statutory meaning.

a. *Chilling Effect*

The primary rationale for allowing facial challenges to statutes that regulate speech or conduct is the *chilling effect* those statutes have on free expression.[153] If only certain applications of a statute regulating speech were invalidated under the case-by-case approach, then a person whose expression is

[149] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984); Fallon, *supra* note 19, at 1347.

[150] New York v. Ferber, 458 U.S. 747, 768 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[151] Fallon, *supra* note 19, at 1331.

[152] *See* Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173, 200 (1999) ("[T]he justification for First Amendment overbreadth doctrine must lie in the nature of the First Amendment.").

[153] *Taxpayers for Vincent*, 466 U.S. at 798-99 (justifying the First Amendment overbreadth doctrine on the premise that some statutes should be held facially invalid because they "have such a deterrent effect on free expression"); *Ferber*, 458 U.S. at 768-69 ("The doctrine is predicated on the sensitive nature of protected expression . . . ."); *Broadrick*, 413 U.S. at 612 (permitting facial challenges under the First Amendment doctrine "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); Dorf, *supra* note 9, at 261 (acknowledging the view that "because overbroad laws have a chilling effect on the expressive rights of parties not directly threatened by coercive action, litigants should have special standing to assert third parties' rights"); Fallon, *supra* note 19, at 1352 (recognizing that the overbreadth doctrine is most appropriate "when a constitutional provision . . . affords protection to speech or conduct that is especially prone to 'chill'").

constitutionally protected under the First Amendment might refrain from exercising his right to speak because he is unsure whether the valid applications of the statute could still be applied to regulate his speech.[154] Thus, persons will censor themselves from exercising their constitutionally protected rights.[155] In this context, the *Raines* case-by-case approach would chill, rather than protect, the exercise of First Amendment rights.[156] To prevent the chilling effect on free expression, the overbreadth doctrine gives third parties an opportunity to challenge statutes which regulate the constitutionally protected rights of others, even though the plaintiff's own speech is not protected.[157]

It is important to recognize, however, that the danger of a chilling effect is unique to cases where First Amendment rights are involved "because the frequency and informality of speech make it impracticable to verify beforehand whether particular utterances are legal."[158] In contrast, the chilling effect is absent where statutes regulate abortion procedures.[159] First, unlike speech, a woman has ample resources "to obtain accurate legal information from a confidential, reliable, and sympathetic source" such as Planned Parenthood before deciding whether to have an abortion.[160] Consultation with a health clinic provides an intermediary step that is not available in the context of informal speech.[161] The woman who seeks an abortion can verify with the

[154] *See* Gooding v. Wilson, 405 U.S. 518, 521 (1972) (allowing the overbreadth doctrine in the context of the First Amendment because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression").

[155] Dorf, *supra* note 9, at 262; Martin, *supra* note 152, at 205.

[156] *See* Dorf, *supra* note 9, at 262 & n.97 ("[G]radually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case . . . does not respond sufficiently to the peculiarly vulnerable character of activities protected by the first amendment." (alterations in original) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-27, at 1023 (2d ed. 1988))).

[157] *Broadrick*, 413 U.S. at 612.

[158] Martin, *supra* note 152, at 205 (explaining that because of this impracticability, the danger of self-censoring "is thought not capable of being avoided through the process of case-by-case narrowing of a statute's scope").

[159] *See id.* at 210.

[160] *Id.* at 212. Planned Parenthood advertises such services on their website: "If you are trying to decide if abortion is right for you, you probably have many things to think about. . . . A staff member at your local Planned Parenthood health center can discuss abortion and all of your options with you and help you find the services you need." Abortion – Planned Parenthood (Feb. 8, 2008), http://www.plannedparenthood.org/health-topics/abortion-4260.htm. Planned Parenthood also offers information directly on their website. In-Clinic Abortion Procedures – Planned Parenthood (Feb. 8, 2008), http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.htm.

[161] *See* Martin, *supra* note 152, at 211-12 ("[U]nlike in the speech context, it would not be impracticable for a woman to ask about the legality of her obtaining each abortion she might seek. This situation is in contrast to that of speech, the volume and typical

clinic whether or not the abortion would be legal at this stage in her pregnancy. Thus, the woman does not have to engage in self-censorship for fear that her conduct might be subject to regulation.

Second, abortion statutes impose criminal sanctions not on the women that seek abortions, but on the doctors performing the procedure.[162] Thus, the doctors, and not the women, are the potential subjects of the chilling effect. This concern is cured, however, by the availability of pre-enforcement challenges, of which the Court explicitly approved in *Gonzales*.[163] In a pre-enforcement challenge, a doctor may claim that the abortion statute prohibits a type of abortion procedure which, in the doctor's experience, is necessary for women with certain medical risks.[164] If the doctor's claim proves successful, the Court would invalidate the statute as it applies to all women with that particular medical risk who seek abortions. Under such an as-applied approach, "the nature of the medical risk can be better quantified and balanced than in a facial attack."[165] Further, by declaring a particular application of the statute unconstitutional through a pre-enforcement challenge, a court "could decide all legal issues before an individual woman must contemplate facing enforcement."[166] The availability of a pre-enforcement challenge would ensure that doctors do not censor themselves from constitutionally protected conduct by refusing to perform abortions on women with certain medical risks. Thus, the absence of a chilling effect undermines support for the overbreadth doctrine in the context of abortion challenges. A pre-enforcement, case-by-case approach adequately protects a woman's qualified constitutional right to choose an abortion.

b. *Fundamental to Democracy*

In addition to chilling effects, the First Amendment overbreadth doctrine is justified by the importance of freedom of expression to a democratic form of government. "The First Amendment, more even than other constitutional provisions conferring fundamental rights, contributes vitally to the preservation of an open, democratic political regime, at the same time as it secures rights of high importance to particular individuals."[167] As discussed above, if a statute

informality of which would make prior investigation into the legality an extreme burden on most people.").

[162] Luke M. Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process*, 87 B.U. L. REV. 1177, 1190-91 & n.61 (2007) (demonstrating that most fetal-homicide laws exempt the mother from prosecution for illegal abortions).

[163] Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (2007).

[164] Doctors are permitted to assert their patients' rights in actions challenging abortion restrictions. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 193 (4th ed. 1996).

[165] *Gonzales*, 127 S. Ct. at 1639.

[166] Martin, *supra* note 152, at 212-13.

[167] Fallon, *Overbreadth*, *supra* note 94, at 884 n.192.

regulating speech is allowed to be specified over time on a case-by-case basis, then citizens will engage in self-censoring: they may assume that the statute prohibits certain forms of speech that have not yet been challenged in court, but which are in fact constitutionally protected under the First Amendment. The incentive to self-censor constitutionally protected forms of expression undermines our democratic form of government because freedom of expression is crucial to the success of democracy. In contrast, a substantial reduction in the number of abortions would not undermine our democratic form of government. Even assuming the right to have an abortion is fundamental to particular individuals,[168] the abortion right is not fundamental *to democracy*.[169] Tellingly, the Court has never justified a constitutional right to abortion based on its importance to democracy as it has with free speech.[170]

Further, application of the normal *Raines* model in the context of abortion imposes no detriment to democracy because case-by-case specification of abortion statutes does not chill the exercise of constitutionally protected rights. As demonstrated above, the formal nature of the abortion procedure and the

[168] Whether abortion is still a fundamental right after *Casey* is a question left open for debate. Although *Roe* declared "fundamental" the right to have an abortion as a justification for applying strict scrutiny review, Roe v. Wade, 410 U.S. 113, 155 (1973), *Casey* overturned the application of strict scrutiny review. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (adopting the undue burden test for abortion-restrictive statutes). Further, not once in the opinion did the *Casey* Court use the word "fundamental" to describe the right to have an abortion. *See* Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 101 (2005) ("Since *Akron* [*v. Akron Center for Reproductive Health*], the Court has never referred to abortion as a fundamental right."). Professor Dorf argues, however, that because *Casey* purported to reaffirm the central holding of *Roe*, it is clear that "a woman's right to choose to have an abortion retains a preferred status under the Constitution." Dorf, *supra* note 9, at 272 n.153.

[169] *Cf.* Martin, *supra* note 152, at 201-03 ("As opposed to . . . due process rights, which were labeled fundamental to get them protected in the first place, the Court has referred to the already protected free speech right of the First Amendment as 'fundamental' because it is *essential* to an open, democratic regime.").

[170] *Compare Roe*, 410 U.S. at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."), *with* Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("The safeguarding of these [First Amendment] rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government."). Despite the Court's reluctance to extend the "fundamental to democracy" rationale to the abortion context, some scholars have boldly attempted the argument. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 123 (1993); JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 92, 94-97 (2006) (arguing that the right to abortion is a basic liberty essential to deliberative autonomy, which itself is a fundamental commitment of American constitutional democracy).

opportunity for consultation and pre-enforcement challenges negate the fear of a chilling effect on women's exercise of their qualified constitutional right to have an abortion. Thus, the two main justifications for the First Amendment overbreadth doctrine's requirement of full specification – the chilling effect and the fact that free speech is fundamental to democracy – do not comport well in the abortion context. As such, abortion statutes are best left under the *Raines* model to be specified over time on a case-by-case basis.

III. REELING IN THE OUTLIER: ABORTION CASES IN THE OVERALL CONTEXT OF FACIAL CHALLENGES AND THE OVERBREADTH EXCEPTION

Although the two main justifications underlying the First Amendment overbreadth exception are inapplicable in the abortion context, many commentators have argued that the overbreadth doctrine is not really limited to and justified by substantive First Amendment law, but has been used by the Supreme Court in a wide range of cases.[171] Are facial challenges brought under the overbreadth doctrine really an exception, or have they become the rule? The purpose of this Part is to show that abortion cases have been an outlier in Supreme Court case law on facial overbreadth challenges. In all other areas of law, the Court has applied the overbreadth doctrine sparingly, and has not allowed the doctrine to swallow the normal as-applied approach to adjudicating the constitutionality of statutes. Thus, the holding in *Gonzales* does not seem so "perplexing"[172] when discussed not just in the context of the Court's abortion jurisprudence, but rather in the context of the Supreme Court's general attitude toward facial challenges and the overbreadth doctrine.

Historically, facial challenges alleging overbreadth were entertained solely in the context of the First Amendment.[173] Even when the Court began allowing facial challenges to proceed in the major abortion cases such as *Roe*, *Casey*, and *Stenberg*, in other areas of law the Court highlighted the rarity of

[171] Professor Dorf argues that the reasons for allowing the First Amendment overbreadth doctrine apply equally to abortion cases and other cases involving fundamental, non-litigation rights. Dorf, *supra* note 9, at 270-71. The only other example offered by Professor Dorf besides abortion for his proposition that the overbreadth doctrine extends to fundamental, non-litigation rights is *Harper v. Virginia Board of Elections*, a case involving the right to vote. *Id.* at 266-67. But the Court decided that case on equal protection grounds, not overbreadth. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."); Martin, *supra* note 152, at 207 & n.195.

[172] Gonzales v. Carhart, 127 S. Ct. 1610, 1651 (2007) (Ginsburg, J., dissenting).

[173] The overbreadth doctrine originated in *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940), and was later clarified in subsequent cases, most notably in the 1970s and 1980s. *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798-801 (1984); New York v. Ferber, 458 U.S. 747, 768-73 (1982); Parker v. Levy, 417 U.S. 733, 758-61 (1974); Broadrick v. Oklahoma 413 U.S. 601, 610-16 (1973); Gooding v. Wilson, 405 U.S. 518, 519, 521-28 (1972).

allowing a claimant to bring a facial overbreadth challenge. For example, in 1973, the same Term the Court decided *Roe*, it handed down *Broadrick v. Oklahoma*.[174] The plaintiffs in *Broadrick* were similar to the plaintiffs in *Roe* in that both parties challenged the constitutional validity of state statutes on their face.[175] While in *Roe* the Court allowed the facial challenge on overbreadth grounds without even referencing the overbreadth exception, in *Broadrick* the Court rejected the plaintiff's facial overbreadth challenge and upheld the state statute.[176] The Court in *Broadrick* made clear that "embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court."[177] In other words, normally courts must decide a question of constitutionality only as applied to the particular parties at hand. According to the *Broadrick* Court, "facial overbreadth adjudication is an exception to our traditional rules of practice,"[178] and is limited strictly to cases involving the First Amendment.[179] Why then, did the Court allow an overbreadth challenge to proceed in *Roe* during the same year that it made such strict pronouncements about those types of challenges in *Broadrick*? Justice Scalia's answer, articulated several years later in *City of Chicago v. Morales*, is simply that the Court wanted to rule on the constitutionality of statutes concerning "hot-button social issues" and had no means of deciding these cases without an exception to the normal criteria for entertaining facial challenges.[180]

In the past several decades, the Court has continuously reaffirmed the proposition that the overbreadth doctrine is limited to the First Amendment context and is based on the peculiar nature of the right to free expression. In 1982, the Court stated in *New York v. Ferber* that "[t]he scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted."[181] The Court warned that "the overbreadth doctrine is 'strong medicine'" which should be employed "with

[174] 413 U.S. 601 (1973).

[175] *Id.* at 610.

[176] *Id.* at 602 (allowing a prohibition on partisan political activities by certain state employees).

[177] *Id.* at 610.

[178] *Id.* at 615.

[179] *Id.* at 611-12; *see also* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 24 (explaining that overbreadth is a function of substantive First Amendment law).

[180] City of Chicago v. Morales, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting); *see also* Lawson, *supra* note 35, at 129 (alleging that the Court allows overbreadth challenges if it "really, really wants to make a broad constitutional pronouncement about a 'hot button' issue such as abortion").

[181] New York v. Ferber, 458 U.S. 747, 769 (1982).

hesitation, and then 'only as a last resort.'"[182] The justification for the overbreadth exception as tied to free speech was reiterated in *Massachusetts v. Oakes* in 1989, where the Court explained that the overbreadth doctrine "is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions."[183] Similarly in 2003, the Court in *Virginia v. Hicks* expanded upon the rationale for the overbreadth exception as unique to cases involving the First Amendment: "Many persons, rather than undertake the considerable burden . . . of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."[184] As the previous Part demonstrates, concerns about chilling expression have no place in the Court's abortion jurisprudence.

The Court has continually distinguished between the limited nature of the overbreadth exception and the heavy burden normally required for a facial challenge. The Court's decision in *Members of City Council v. Taxpayers for Vincent* in 1984 provides such an example.[185] According to the Court, a plaintiff must usually show that the statute "is unconstitutional in every conceivable application" before he can challenge the statute on its face.[186] The overbreadth exception, in contrast, is limited to cases involving free expression.[187] A few years later, a unanimous Court elaborated upon this distinction in *New York State Club Ass'n v. City of New York*.[188] The Court explained that normally a facial challenge will not succeed unless the plaintiff demonstrates that the statute "could never be applied in a valid manner,"[189] and that the overbreadth exception "is justified only by the recognition that free expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that power."[190]

Outside the context of the First Amendment and abortion, the Court has been adverse to facial challenges. For example, in *Schall v. Martin*, a case decided in 1984, the plaintiff brought a facial challenge under the Due Process Clause of the Fourteenth Amendment to a state statute authorizing pretrial detention of accused juvenile delinquents.[191] The Court noted that "outside the limited First Amendment context, a criminal statute may not be attacked as

[182] *Id.* (quoting *Broadrick*, 413 U.S. at 613).

[183] Massachusetts v. Oakes, 491 U.S. 576, 581 (1989).

[184] Virginia v. Hicks, 539 U.S. 113, 119 (2003) (citation omitted).

[185] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984).

[186] *Id.*

[187] *Id.* at 798-99.

[188] 487 U.S. 1 (1988).

[189] *Id.* at 11 (quoting *Taxpayers for Vincent*, 466 U.S. at 798).

[190] *Id.* (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

[191] Schall v. Martin, 467 U.S. 253, 255-56 (1984).

overbroad."[192] According to the Court, challenges to criminal statutes "must be made on a case-by-case basis" under normal as-applied adjudication principles.[193] Likewise, the Court imposed a much higher standard on the plaintiffs in *Reno v. Flores*[194] than it did to the plaintiffs in *Casey*, even though it decided the cases just one year apart. The plaintiffs in *Flores* brought a facial challenge under the Due Process Clause to a regulation which provided for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances.[195] The Court held that because this was a facial challenge to the regulation, the respondents had to "establish that no set of circumstances exist[ed] under which the [regulation] would be valid."[196] In *Casey*, by contrast, the Court invalidated the spousal-notification provision of an abortion statute because it posed a substantial obstacle on a "large fraction" of women for whom the statute was deemed "relevant."[197]

The Court's generally unfavorable attitude to facial challenges and the overbreadth doctrine was displayed most recently in two cases: *Sabri v. United States*[198] and *Washington State Grange v. Washington State Republican Party*.[199] *Sabri*, a unanimous decision authored by Justice Souter in 2004, involved a facial challenge to a federal criminal statute prohibiting bribery of officials whose agencies receive a certain amount of federal funding.[200] After upholding the statute as constitutional, the Court devoted an entire part of its opinion to explaining its approach to entertaining facial challenges. According to the Court, "facial challenges are best when infrequent."[201] The Court went on to describe the dangers and risks inherent in such challenges, including the "promise of 'premature interpretatio[n] of statutes' on the basis of factually barebones records."[202] Moreover, the Court specifically took on the role of the overbreadth doctrine, stating:

> Facial challenges of this sort are especially to be discouraged. Not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth

[192] *Id.* at 269 n.18.

[193] *Id.*

[194] 507 U.S. 292 (1993).

[195] *Id.* at 299-300.

[196] *Id.* at 301 (second alteration in original) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

[197] Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 895 (1992).

[198] 541 U.S. 600 (2004).

[199] 128 S. Ct. 1184 (2008).

[200] *Sabri*, 541 U.S. at 603. For a more detailed account of the *Sabri* litigation, see generally Lawson, *supra* note 35.

[201] *Sabri*, 541 U.S. at 608 (citing United States v. Raines, 362 U.S. 17, 22 (1960); Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912)).

[202] *Id.* at 609 (alteration in original) (quoting *Raines*, 362 U.S. at 22).

> challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand. Accordingly, we have recognized the validity of facial attacks alleging overbreadth . . . in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence.[203]

Thus, the Court made clear that overbreadth challenges are a rare species and are recognized in only a few categories of cases. The *Sabri* Court limited those categories to free speech, the right to travel, abortion, and legislation under the Section Five Enforcement Clause of the Fourteenth Amendment.[204] The Court made clear that "[o]utside these limited settings, and absent a good reason, we do not extend an invitation to bring overbreadth claims."[205] While free speech cases are the obvious candidate for overbreadth challenges, the rationale for allowing overbreadth claims in cases involving the right to travel and legislation under Section Five of the Fourteenth Amendment may at first glance appear to be less clear. The Court in *Sabri* cited *Aptheker v. Secretary of State* for the proposition that the overbreadth doctrine has been applied to cases involving the right to travel.[206] The *Aptheker* Court, in turn, specifically stated that "freedom of travel is a constitutional liberty closely related to rights of free speech and association."[207] In other words, it is because the right to travel is akin to First Amendment rights that the Court decided the case on overbreadth grounds. The fact that the overbreadth doctrine applies to right-to-travel cases is not really an extension of the First Amendment overbreadth doctrine to other areas of law, and certainly does not justify the doctrine's extension to other categories of cases such as abortion.

The *Sabri* Court also mentioned that overbreadth analysis applies to challenges to congressional legislation enacted under Section Five of the Fourteenth Amendment, citing *City of Boerne v. Flores*[208] for this proposition.[209] Petitioners in *City of Boerne* challenged the ability of Congress to pass the Religious Freedom of Restoration Act ("RFRA"), which was designed to prevent state legislation from interfering with the free exercise of religion guaranteed under the First Amendment and enforced by Congress under Section Five of the Fourteenth Amendment. The Court in *City of Boerne* specifically recognized the well-established principle that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of

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[203] *Id.* at 609-10 (citations omitted).

[204] *Id.* Because this case was decided a few years before *Gonzales*, the Court included abortion as a category of cases subject to overbreadth analysis.

[205] *Id.*

[206] *Id.* (citing Aptheker v. Secretary of State, 378 U.S. 500 (1964)).

[207] *Aptheker*, 378 U.S. at 517.

[208] 521 U.S. 507 (1997).

[209] *Sabri*, 541 U.S. at 610 (citing *City of Boerne*, 521 U.S. at 532-35).

Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."[210] In other words, the Court will not invalidate legislation enacted under Section Five on its face just because the legislation itself sweeps too broadly.

More fundamentally, overbreadth analysis in this area of the law is an entirely different animal than in the First Amendment and abortion contexts. Judicial review of legislation passed under Section Five deals with the ability of Congress to *enforce* constitutional protections, not the ability of Congress to pass laws which *encroach* on constitutional rights. Here, we are not so much concerned with the judiciary's power to review legislative enactments which may run afoul of individuals' constitutional rights as we are concerned with the scope of Congress's power to "intrude[] into 'legislative spheres of autonomy previously reserved to the States'"[211] by enforcing prohibitions on state legislation which interferes with constitutional guarantees. Thus, overbreadth analysis in this context is used not as an exception to the judiciary's power to entertain a facial challenge, but as a check on Congress's power to enforce the Fourteenth Amendment.[212] By employing a form of overbreadth analysis, the Court in *City of Boerne* simply meant to demonstrate that "there must be a congruence between the means used and the ends to be achieved" in order for the congressional legislation to be classified as an appropriate remedial measure under Section Five.[213] The Court held that RFRA could not be considered remedial legislation but "appears, instead, to attempt a substantive change in constitutional protections,"[214] and "is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[215] Because the use of overbreadth here has little to do with the judiciary's ability to entertain a facial challenge, it should not be a basis for arguing that the overbreadth doctrine is justified in the abortion context.

The Court once again took the opportunity to elaborate on its general disfavor of facial challenges and the dangers which accompany them in *Washington State Grange*, an opinion authored by Justice Thomas in 2008. The Court first explained that "claims of facial invalidity often rest on

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[210] *City of Boerne*, 521 U.S. at 518.

[211] *Id.* (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[212] The Court made clear that congressional legislation in this area can only be remedial, not substantive. In other words, Congress has the power to enforce the Constitution as it is interpreted by the judiciary, but does not have the power to interpret the meaning of the Constitution itself. *Id.* at 516-29 (finding that if Congress had a substantive or interpretive power, it would be "difficult to conceive of a principle that would limit congressional power").

[213] *Id.* at 530. Congressional legislation under Section Five cannot be "broader than is appropriate . . . to prevent and remedy constitutional violations." *Id.* at 535.

[214] *Id.* at 532.

[215] *Id.* at 534.

speculation."[216] Second, facial challenges "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.'"[217] 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,"[218] because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[219] Within this discussion, the Court took note of the overbreadth doctrine as a type of facial challenge limited to the First Amendment context.[220]

The Court in *Washington State Grange* also emphasized that because of the timing of the facial challenge, the state "had no opportunity to implement [the law], 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."[221] Similar to the Court in *Gonzales*, the Court in *Washington State Grange* was skeptical of facial challenges brought before implementation of the relevant statute because the full meaning of the statute could not yet be ascertained. The *Washington State Grange* Court thus mirrored *Raines* in cautioning against premature decisions of constitutionality.[222]

These recent decisions clearly indicate that outside the First Amendment context, facial overbreadth challenges should be a rare exception to the Court's traditional requirements of as-applied adjudication. In holding that the overbreadth exception is no longer applicable to abortion challenges, *Gonzales* is consistent with this approach.

CONCLUSION

The Court's jurisprudence on facial challenges has been far from straightforward, especially when it comes to abortion. *Gonzales* signifies a bold attempt by the Roberts Court to restore established as-applied norms to this area of the law. While for decades the Court was willing to relax as-applied requirements in order to assert jurisdiction over this controversial topic, the Court has since recognized the adjudicatory limits of its power. Its recent attempt to limit facial challenges in the abortion context is also part of a much more general effort to clean up its jurisprudence on facial versus as-

[216] Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1191 (2008).

[217] *Id.* (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-47 (1936)).

[218] *Id.*

[219] *Id.* (alteration in original) (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006)).

[220] *Id.* at 1991 n.6.

[221] *Id.* at 1190.

[222] *See* United States v. Raines, 362 U.S. 17, 21 (1960).

applied challenges, as evidenced by recent decisions such as *Sabri* and *Washington State Grange*.

As for the practical implications of *Gonzales*, the decision will significantly change the way in which challenges to abortion statutes are brought in court. Over the past three-and-a-half decades, organizations such as Planned Parenthood played a major role in sustaining facial challenges to state abortion regulations before states even had a chance to implement them. Courts relied heavily on the discretion of abortion doctors to determine what procedures were safest for women.[223] Now, courts will entertain challenges to abortion regulations only in discrete cases. A doctor will have to show not just that a faction of the medical community believes one procedure is generally safer than another, but that in specific instances the existence a particular medical condition requires that the doctor perform a partial-birth abortion for a well-defined class of women whose health is otherwise in danger.[224] Without this showing, and in the face of scientific and medical uncertainty, state legislatures will have discretion to regulate abortion procedures occurring at these late stages of pregnancy.

While future advances in scientific and medical technology will eventually shed more light on prenatal life and the effects of abortion on women, for now the Court must grapple with these issues in the dark. Under these circumstances, it "would indeed be undesirable for [the] Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive litigation."[225] The *Gonzales* Court is right to retreat from premature decisions of constitutional questions and instead exercise its limited jurisdictional power to "adjudge the legal rights of litigants in actual controversies."[226] Such are the demands of as-applied challenges: "the basic building blocks of constitutional adjudication."[227]

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[223] Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (sustaining a facial challenge where "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health").

[224] Gonzales v. Carhart, 127 S. Ct. 1610, 1639 (2007).

[225] *Raines*, 362 U.S. at 21 (quoting Barrows v. Jackson, 346 U.S. 249, 256 (1953)).

[226] *Id.* (quoting Liverpool, N.Y., and Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1884)).

[227] Fallon, *supra* note 19, at 1328.