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A RADICALLY IMMODEST JUDICIAL
MODESTY:
THE END OF FACIAL CHALLENGES TO
ABORTION REGULATIONS AND THE
FUTURE OF THE HEALTH EXCEPTION
IN THE ROBERTS ERA

B. Jessie Hill[†]

“This faux judicial restraint is judicial obfuscation.”¹

INTRODUCTION

If there is anything as strongly associated in the public mind with Chief Justice John Roberts as his black robe and judicial temperament, it is surely his claim to judicial modesty. In his confirmation hearings, the Chief Justice expressed his desire “to be known as a modest judge,” and several witnesses testified that he exhibited such humility.² Of course, it is still early to assess whether

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¹ *FEC v. Wis. Right to Life (WRTL II)*, 551 U.S. 449, 474 n.7 (2007) (Scalia, J. concurring in the judgment).

² *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) [hereinafter *Roberts Confirmation Hearing*]; see also Teresa Stanton Collett, *Judicial Modesty and Abortion*, 59 S.C. L. REV. 701, 703 (2008) (suggesting that the Roberts Court’s two abortion decisions “appear to foreshadow greater judicial restraint when reviewing abortion-related legislation”); Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251, 1253–56 (2008) (discussing the claims about Chief Justice Roberts’s judicial modesty, specifically in the form of his respect for precedent); Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1374 (2008) (“On

the Chief Justice, and the Supreme Court as a whole, have followed the Chief Justice's professed imperative. But some commentators have already begun to suggest that, at least so far, there are signs of newfound judicial restraint in the Roberts Court.³ One example is the Roberts Court's expressed preference for narrower, as-applied decisionmaking in constitutional cases, as opposed to striking down statutes on their face.

And indeed, the Supreme Court has turned away facial challenges or otherwise expressed a preference for making decisions on an as-applied basis in a number of cases since Chief Justice Roberts joined the body.⁴ Examples range across a wide spectrum of subject matter, including voting rights cases,⁵ an Americans with Disabilities Act case,⁶ and—somewhat more surprisingly, given the Supreme Court's traditional solicitude for facial challenges in these contexts—First Amendment and abortion cases.⁷ Of course, if this series of Roberts Court cases indicates a trend, it is not an entirely new one. At least since *United States v. Salerno*,⁸ the 1987 case in which the Court seemingly held that a statute should not be struck down on its face unless “no set of circumstances exists under which the Act would be valid,”⁹ and arguably for some time before that, the Supreme Court has expressed a preference for as-applied adjudication.¹⁰

a number of occasions, Chief Justice Roberts has expressed a strong desire for the Court to decide cases narrowly and unanimously.”); *cf. Roberts Confirmation Hearing*, *supra*, at 55 (asserting that judges should act with “a certain humility”).

³ See, e.g., Collett, *supra* note 2, at 703 (noting a growing sense of judicial restraint in abortion-related cases); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1756–57 (2006) (noting the Roberts Court's favoritism toward as-applied challenges across a broad range of cases).

⁴ Other commentators have remarked upon this phenomenon as well. See, e.g., Hartnett, *supra* note 3, at 1756–57; Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 773 (2009). A recent issue of the *Hastings Constitutional Law Quarterly* is dedicated to facial challenges and the Roberts Court.

⁵ *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).

⁶ *United States v. Georgia*, 546 U.S. 151 (2006).

⁷ *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410 (2006); *cf. Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006). Both *Ayotte* and *United States v. Georgia* were decided after Chief Justice Roberts had joined the Court but before Justice Alito replaced Justice O'Connor in early 2006.

⁸ 481 U.S. 739 (1987).

⁹ *Id.* at 745; see also *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (holding, in a First Amendment case, that because “facial overbreadth adjudication is an exception to our traditional rules of practice,” such challenges should succeed only when the overbreadth is “not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep”). There is some debate over whether the *Salerno* Court's language was ever meant to be taken at face value. *Compare Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175–76 (1996)

But perhaps one of the most radical and important instances of the Court's rejection of a facial challenge was in *Gonzales v. Carhart*,¹¹ the federal "partial-birth" abortion ban case. The Court's decision in that case was highly unsettling with respect to prior precedent. It upheld a criminal abortion statute that lacked an exception for cases of medical necessity, despite the fact that the Court had consistently emphasized the need for such an exception since *Roe v. Wade*.¹² Further, the *Gonzales* decision may have truly sweeping implications for the future of substantive abortion doctrine. In this essay, I therefore focus specifically on what the Roberts Court did in *Gonzales v. Carhart*, as well as in its predecessor *Ayotte v. Planned Parenthood of Northern New England*,¹³ in order to consider the meaning and impact of the Roberts Court's preference for as-applied adjudication in one specific area—abortion jurisprudence. Moreover, I evaluate the likely impact of these rulings in light of Chief Justice Roberts's expressed preference for judicially modest rulings.

Of course, the expression "judicial modesty," like its opposite "judicial activism," is a term that can mean many things to many people—and consequently may not mean much at all.¹⁴ As used in connection with Chief Justice Roberts, however, it nonetheless seems to have certain definable qualities. It appears to refer to a preference for narrow, incremental rulings that do not overstep appropriate

(mem. of Stevens, J., on denial of cert.) (shedding doubt on the validity of *Salerno's* "no set of circumstances" language), *with id.* at 1178 (Scalia, J., dissenting from denial of cert.) (describing the *Salerno* rule as "a long established principle of our jurisprudence" and asserting that it applies even in abortion cases), and *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011 (1992) (Scalia, J., dissenting from denial of cert.). *See generally* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 364 (1998) (arguing that *Salerno's* "no set of circumstances" language should be understood simply as "a descriptive claim about a statute whose terms state an invalid rule of law").

¹⁰ *E.g.*, *Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912); *accord In re Wellington*, 33 Mass. (16 Pick.) 87, 96 (1834) ("[W]hether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected."); *see also* OLIVER P. FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* 6–8 (Da Capo Press 1971) (1935) (discussing the phenomenon of "case-to-case" unconstitutionality or "partial unconstitutionality," which is essentially the same as as-applied unconstitutionality).

¹¹ 550 U.S. 124 (2007).

¹² *Id.* at 168; *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (reaffirming the Court's holding in *Roe* and *Planned Parenthood v. Casey* that a health exception is required for both previability and postviability abortion regulations).

¹³ 546 U.S. 320 (2006).

¹⁴ *See, e.g.*, Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 52 (2007) ("[J]udicial modesty is no better than judicial activism—they may be political slogans to defend decisions with which one agrees or to attack the decisions with which one disagrees.").

judicial bounds or decide unnecessary questions, but rather respect the roles of the other branches of government and adhere to precedent.¹⁵ It is in this sense that I am using the term “judicial modesty.”

Using this definition of judicial modesty, I argue that *Ayotte* and *Gonzales*, which on their surface appear to indicate a preference for modest, narrow rulings, are anything but modest in their implications. These decisions call for federal judges to re-write legislation and to make judgments in areas in which they have little expertise. They thus assure continuing federal court involvement in micro-legislating the scope of abortion rights. In addition, I argue that the holdings in *Gonzales* and *Ayotte*, which ostensibly turn on the appropriateness of facial challenges, are really about re-shaping the underlying substantive constitutional law pertaining to abortion rights. As such, they represent an instance of the remedial tail wagging the substantive dog—a case of the proper remedy, as determined by the Supreme Court, shaping the underlying right. In this sense, these cases form a stark contrast with prior judicial practice, in which the availability of facial invalidation depended at least in part on the nature of the underlying substantive constitutional doctrine, rather than vice versa.¹⁶ Thus, although on the surface, the procedural aspects of *Gonzales* and *Ayotte* raise concerns about the effect on plaintiffs’ access to courts to challenge abortion statutes, perhaps the more important and far-reaching concern is how they will affect the future nature of the abortion right itself.

In Part I of this essay, I set forth the difference between facial and as-applied challenges and briefly summarize the scholarship concerning the availability of facial challenges. I also note the relationship between the facial/as-applied distinction and other concepts such as standing, severability, and remedies, and I discuss the history of facial challenges in the abortion context specifically. In Part II, I describe the Supreme Court’s decisions in *Ayotte* and *Gonzales*. Finally, in Part III, I explain why the Roberts Court’s stated preference for as-applied challenges, at least as it has been presented in the abortion cases, does not serve the end of judicial modesty. In fact, those cases have far-reaching implications for substantive abortion doctrine and promise to continue to

¹⁵ *Id.* at 37–38; see also Cross, *supra* note 2, at 1252.

¹⁶ See, e.g., Isserles, *supra* note 9, at 438–51 (explaining how certain doctrinal tests call for a remedy of facial invalidation, such as tests forbidding laws enacted with a particular legislative purpose; tests forbidding laws with certain content, such as voting restrictions based on wealth or laws vesting excessive discretion in executive officials; and tests that “render statutes making certain classifications or distinctions presumptively invalid”).

embroil the federal courts intimately in future disputes over the contours of the abortion right.

I. FACIAL AND AS-APPLIED CHALLENGES

Perhaps the only ground of agreement among scholars and jurists with respect to facial and as-applied challenges is that the doctrine is hopelessly muddled.¹⁷ Debate has centered on the question of when a facial challenge may be entertained as well as on the meaning of the distinction—if any—itsself. This confusion is further intensified by the fact that the facial/as-applied distinction intersects and overlaps with several other concepts, including standing, severability, and courts' remedial powers. Moreover, there are multiple understandings of the purposes behind the distinction and therefore multiple views about the issue of when facial challenges should be available. This Part nonetheless takes on the daunting task of explaining concisely the main features of facial and as-applied challenges and of the scholarly debate about their appropriateness.

A. *The Meaning of "Facial" and "As-Applied" Challenges*

A facial challenge is generally understood to be a challenge to a law in all its applications; it is also often a claim that a law's unconstitutionality can be determined simply by looking at its statutory language, independent of any particular set of facts or litigants.¹⁸ As-applied challenges, by contrast, involve the assertion that a law is unconstitutional only in a specific circumstance or set of circumstances, or with respect to a particular individual or group of individuals.¹⁹ However, even the description of the difference

¹⁷ See, e.g., Caitlin E. Borgmann, *Holding Legislatures Accountable Through Facial Challenges*, 36 *Hastings Const. L.Q.* 563, 569 (2009) (agreeing with one commentator that "the 'facial' and 'as-applied' terminology is more confusing than helpful"); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 *COLUM. L. REV.* 873, 878-80 (2005).

¹⁸ Metzger, *supra* note 17, at 881. Professor Metzger notes that this definition of facial challenges is derived from *Salerno*, but that prior to *Salerno*, a broader definition of facial challenges was in common use—one that assumed a facial challenge to a statute could nonetheless assert unconstitutionality "in a particular range of applications" but still depended primarily on the language of the law itself, rather than any particular set of facts. *Id.* at 881. Such challenges may be considered synonymous with overbreadth challenges, although the term "overbreadth challenge" usually refers only to those cases in which the unconstitutional applications affect persons *not* before the court. See generally Isserles, *supra* note 9, at 366 (describing an overbreadth challenge as one in which "[a] litigant, against whom a particular law can be constitutionally applied, argues that because distinct applications of the law to parties not before the court would be unconstitutional, the court should facially invalidate the law and deem it unenforceable against all parties").

¹⁹ Again, Professor Metzger distinguishes between the pre-*Salerno* view of as-applied challenges, which "were defined in fairly narrow terms synonymous with claims of privilege," from the broader post-*Salerno* view, which essentially considers an as-applied challenge to be a

between facial and as-applied challenges is subject to dispute. Moreover, it is doubtful whether the principles governing the appropriateness and availability of facial challenges can be described in any trans-substantive manner; rather, it seems that the shape, meaning, and appropriateness of facial and as-applied challenges differs depending on the specific constitutional doctrine under which a given law is challenged.²⁰ This Part therefore briefly reviews the broad contours of the scholarly debate over the meaning and appropriateness of facial challenges and notes the relationship of this doctrine to other doctrines such as standing, severability, and remedies. It then describes the use, meaning, and importance of facial challenges in one specific doctrinal context—the abortion context.

Some scholars have asserted that the very distinction between facial and as-applied challenges is meaningless. Professor Richard Fallon, for example, claims that every constitutional challenge is actually an as-applied challenge because of the longstanding rule that “[i]n order to raise a constitutional objection to a statute, a litigant must always assert that the statute’s *application* to her case violates the Constitution.”²¹ In his view, facial invalidation of a law often occurs simply as a consequence of the particular substantive doctrinal test applied by the court.²² To the extent that courts appear to “invalidate” statutes on their face, however, such invalidation is not actually within the power of courts to effect; rather, in the course of ruling on an as-applied challenge, a court will often make pronouncements that, through the mechanisms of preclusion doctrine and *stare decisis*, have the effect of rendering a law unenforceable—or at least unenforced—in all its applications.²³

Professor Matthew Adler, by contrast, has argued that all constitutional challenges are facial challenges, in the sense that they all vindicate a constitutional right against a certain kind of rule.²⁴ Constitutional law protects individuals against government adoption of rules “with the wrong predicate or history”; thus the challenged rule is in some sense always judged on its face (for example, in terms of its purpose or its mode of drawing classifications) and without

claim of partial invalidity. Metzger, *supra* note 17, at 881.

²⁰ Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 294 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1351, 1369 (2000).

²¹ Fallon, Jr., *supra* note 20, at 1327.

²² *Id.* at 1336–39.

²³ *Id.* at 1339–40.

²⁴ Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13–34 (1998).

reference to the specific facts at hand.²⁵ As a result, he contends that the doctrine of facial and as-applied challenges is simply a doctrine of remedies “and no more than that. It is a doctrine that answers the question: Where a rule is constitutionally invalid, should the reviewing court *repeal* the invalid rule, or should the court instead *amend* the rule in some way?”²⁶

Finally, Professor Michael Dorf argues that “[t]he distinction between as-applied and facial challenges may confuse more than it illuminates” and that “[i]n some sense, any constitutional challenge to a statute is both as-applied,” in the sense that it must be applied to the litigant in the case for standing purposes, “and facial,” in the sense that “it attacks the statute that authorized the contested government action.”²⁷ Thus, he, like Professor Fallon, argues that the “proper approach to a constitutional case typically turns on the applicable substantive constitutional doctrine,” as well as institutional considerations such as whether the court is dealing with a challenge to a state or federal statute.²⁸

As the views of these commentators suggest, the doctrine of facial and as-applied challenges intersects and overlaps with several other doctrines, including standing, severability, and judicial power to shape equitable remedies, as well as the underlying substantive constitutional doctrines in the case at hand. For example, the availability of facial challenges is considered by some to be an exception to traditional standing rules, according to which individuals may assert their own rights and injuries but may not raise the rights of those who are not before the court.²⁹ In a facial challenge, the litigant is almost by definition challenging not only the statute’s application to her particular factual circumstances but also the statute’s application to everyone else not before the court to whom the statute might be applied.³⁰ This is particularly true of so-called “overbreadth” challenges—which are most prominent in the First Amendment free speech context but also appear in the abortion

²⁵ *Id.* at 14.

²⁶ *Id.* at 158.

²⁷ Dorf, *supra* note 20, at 294.

²⁸ *Id.*

²⁹ *See, e.g.,* City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) (“When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution.”); Henry Paul Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 277 (1984).

³⁰ *But see* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3–4 (arguing that overbreadth doctrine is more concerned with an individual’s right to be subjected only to constitutionally valid rules than with standing to assert the rights of others).

context³¹—whereby even a plaintiff whose conduct could constitutionally be proscribed may raise the rights of third parties not before the court if the challenged laws impinge on those third parties' rights.³² For this reason, some consider facial challenges to involve a species of third-party standing, in which one individual who is injured by a law raises the rights of persons not before the court in order to achieve invalidation of the law.³³ Relatedly, Professor Gene Nichol has demonstrated that facial challenges, especially those of the preenforcement variety, are often in tension with the related justiciability doctrine of ripeness, because no obvious present, concrete harm usually exists in such preenforcement situations.³⁴

In addition, the terms “facial challenges” and “as-applied challenges” appear to refer to something that plaintiffs do on the “front end” of a lawsuit—that is, how the lawsuit is pleaded and the case argued. Yet several commentators have reached the conclusion that the doctrines of facial and as-applied challenges actually have just as much or more to do with what happens on the “back end” of the suit—that is, in the remedies phase. Thus, Professor Gillian Metzger has said that “facial and as-applied challenges are . . . differentiated by their effects. A successful facial challenge means that the ‘state may not enforce [a statute] under any circumstances . . . ’; a successful as-applied challenge still allows the state to ‘enforce the statute in different circumstances.’”³⁵ In essence, the viability of a facial challenge turns on the availability of statutory severance,³⁶

³¹ See Dorf, *supra* note 20, at 261; see also RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 195 (5th ed. 2003) (citing Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859 n.29 (1991)); Fallon, *supra* note 20, at 1355–56 (noting that scholars debate whether *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), stands for the proposition that overbreadth challenges are allowed “under a uniform standard in all fundamental rights cases”); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 55 & nn. 67–68 (2006) (observing that “the Court has sometimes applied a species of overbreadth doctrine” in cases other than First Amendment cases, including abortion cases).

³² See FALLON ET AL., *supra* note 31, at 190–91; Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 675–76 (2006) (noting that the First Amendment overbreadth doctrine is an exception to the presumption of separability that normally prevents challenges to a statute on the basis that it is unconstitutionally applied to others).

³³ See, e.g., *Morales*, 527 U.S. at 55 n.22. See generally FALLON ET AL., *supra* note 31, at 187–95 (describing third-party standing doctrine). But see Monaghan, *supra* note 29, at 282–86 (distinguishing overbreadth from third-party standing).

³⁴ Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 164–70 (1987).

³⁵ Metzger, *supra* note 17, at 880–81 (quoting Dorf, *supra* note 20, at 236) (first alteration in original).

³⁶ *Id.* at 885–89; Metzger, *supra* note 4, at 791–92.

which in turn often depends on state severability law and determinations of a legislature's intent.³⁷

B. The Expressed Preference for As-Applied Adjudication

Despite the widespread availability of facial invalidation in at least certain types of cases, the Supreme Court has repeatedly stated that as-applied challenges are to be preferred. This preference has been particularly pronounced in the Roberts Court. Thus, the Court has pointed out that as-applied challenges serve the interests of judicial modesty and separation of powers in many ways, including that as-applied challenges do not require courts to interpret statutes without a concrete fact scenario;³⁸ they prevent courts from making unnecessary constitutional decisions;³⁹ and, by invalidating as little of the law as possible, they minimize the degree to which a ruling of unconstitutionality frustrates the will of the people as embodied in the actions of the legislative branch.⁴⁰

At the same time, facial invalidation can serve important purposes. Most obviously, facial challenges better protect constitutional rights, in that they save individuals from having to go through costly and time-consuming litigation to challenge each potentially unconstitutional application of a statute.⁴¹ By allowing parties to raise the rights of others not before the court, they also minimize the chilling effect of those statutes on individuals who might be

³⁷ See, e.g., *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (“Severability is of course a question of state law”); *Brockett v. Spokane Arcades*, 472 U.S. 491, 506 & n.15 (1985) (noting the importance of legislative intent in state and federal severability decisions).

³⁸ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (“[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.” (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)) (alteration in original)).

³⁹ Cf. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (noting that when the Court uses judicial restraint in a facial challenge, the Court can avoid unnecessarily and prematurely deciding a constitutional issue).

⁴⁰ *Id.* at 1191 (“[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that “[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.”” (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion))); cf. Metzger, *supra* note 4, at 774 (noting that the Roberts Court “has justified its preference for as-applied claims on diverse grounds,” including “the current lack of evidence about how a measure will actually operate and the dangers of speculative adjudication,” the desire for narrower rulings when a statute is constitutional in most of its applications, and perhaps to avoid the applicability of precedent with which the Court disagrees).

⁴¹ See, e.g., Borgmann, *supra* note 17, at 593–94 (describing the impracticality of case-specific as-applied challenges); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1334–35 (2005) (discussing the differences between facial and as-applied challenges, noting that facial challenges can be more efficient and less costly).

unwilling, or simply lack the incentive, to challenge the law themselves.⁴² Moreover, some substantive constitutional doctrines seem to mandate facial invalidation, because there is no way to sever the unconstitutional parts of a statute. This would be the case with respect to laws motivated by an unconstitutional purpose, for example, or laws that are vague on their face.⁴³

C. Facial Challenges in Abortion Jurisprudence

Facial challenges have long been of central importance in the abortion context.⁴⁴ The seminal abortion case, *Roe v. Wade*,⁴⁵ was a facial challenge to Texas's criminal abortion statutes. The pseudonymous Jane Roe, the only plaintiff found to have standing, was described by the Court as an unmarried, pregnant woman who wished to have an abortion but was unable to do so under Texas law, because her life was not threatened by the pregnancy and she could not afford to travel to a state with more liberal criminal abortion laws.⁴⁶ Yet the Court held the Texas law unconstitutional as applied not just to her but in its entirety, and it set out a "trimester" framework for abortion regulations that in many respects had nothing to do with Jane Roe's situation.⁴⁷ For example, the Court held in *Roe* that states could outlaw abortions in the third trimester but had to provide exceptions allowing abortions when the woman's health or

⁴² See Borgmann, *supra* note 17, at 597; Gans, *supra* note 41, at 1353–64 (arguing that "courts invalidate statutes on their face to protect absent third parties from the chilling effect that results from the threat of sanctions under the challenged statute").

⁴³ See Fallon, *supra* note 20, at 1342–56; Gans, *supra* note 41, at 1356–87 (discussing facial invalidation of vague laws); Isserles, *supra* note 9, at 387, 400 (discussing "valid rule" facial challenges); Note, *After Ayotte: The Need to Defend Abortion Rights with Renewed Purpose*, 119 HARV. L. REV. 2552, 2569–70 (2006); cf. Borgmann, *supra* note 17, at 598–609 (arguing that facial challenges are particularly appropriate "where legislatures either ignore clear constitutional rulings protecting individual rights or where they ... base statutes on a questionable factual foundation," in part because such actions may indicate improper legislative purpose).

⁴⁴ See Borgmann, *supra* note 17, at 597–98.

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ *Id.* at 120. Other plaintiffs had joined Roe initially, including a physician who had been arrested for violating the Texas laws and a married couple who had been advised to avoid childbirth due to the wife's health problems. *Id.* at 120–22. Interestingly, Norma McCorvey, the individual who sued pseudonymously as Jane Roe, initially asserted to her lawyers that the pregnancy was the result of rape, but the attorneys decided not to press this allegation in court, partly due to strategic considerations about the sort of relief they wanted to obtain. As Sarah Weddington, lead counsel for Jane Roe, explained, "[W]e did not want the Texas law changed only to allow abortion in cases of rape. We wanted a decision that abortion was covered by the right of privacy." Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 HASTINGS L.J. 779, 794 (1996) (quoting SARAH WEDDINGTON, A QUESTION OF CHOICE 52–53 (1992)).

⁴⁷ See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN L. REV. 953, 1078–84 (2005).

life was in danger.⁴⁸ Had the Court not entertained Jane Roe's claims as a facial challenge, it is unclear how she could have had standing to challenge the Texas act's postviability applications. Roe was not claiming a medical need for her procedure. She therefore would not have been entitled to an injunction prohibiting the law's enforcement in such postviability circumstances if the Court had limited Roe's challenge to the statute as it applied to her.⁴⁹

Subsequent to *Roe*, most challenges to abortion restrictions have been brought as facial challenges—often pre-enforcement facial challenges—by clinics or individual abortion providers rather than individual women seeking abortions.⁵⁰ Thus, clinics or providers, asserting third-party standing to vindicate the rights of the women they serve, file suit in advance of the law's effective date against state executive officials charged with criminal enforcement of the laws.⁵¹ Because those providers usually perform an array of abortion procedures for various reasons to women in various circumstances and at various stages of pregnancy, this litigation structure allows for a broad-based attack on criminal abortion statutes. Such laws may be attacked as imposing an unconstitutional undue burden on a particular class of women, for example; a wide range of evidence may then be introduced to demonstrate the effects of the law on particular groups.⁵² Or the laws may be attacked as unconstitutional for lack of a health exception, in which case a large amount of scientific evidence pertaining to the wide variety of medical conditions necessitating an abortion can be introduced.⁵³ The nature of the plaintiffs and their claims thus allows a broad range of relevant medical and social science evidence to come before the courts, which

⁴⁸ *Roe*, 410 U.S. at 164–65.

⁴⁹ Roe did purport to sue “on behalf of herself and all others similarly situated,” *Roe v. Wade*, 314 F. Supp. 1217, 1219 n.1 (D. Tex. 1970), but the Supreme Court did not explore the “class aspects” of the case and therefore apparently did not rely on that language when deciding the case, *Roe*, 410 U.S. at 124.

⁵⁰ Major abortion cases litigated in this manner include *Gonzales v. Carhart*, 550 U.S. 124 (2007), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), and *Thonburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), among others.

⁵¹ See sources cited *supra* note 50. Of course, this litigation posture does not work well for laws that simply authorize civil suits against abortion providers rather than criminal sanctions, because there is no defendant charged with enforcement of the law and no immediate threat of sanctions. See, e.g., *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 1999) (en banc) (turning away a challenge to such a law). See generally Caitlin Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 758–72 (2006) (discussing legislatures' use of tort law to evade constitutional mandates).

⁵² See, e.g., *Planned Parenthood of Se. Pa.*, 505 U.S. at 887–95.

⁵³ *Stenberg*, 530 U.S. at 923–29.

in turn permits evaluation of the law's constitutionality in a broad range of circumstances and applications.⁵⁴

Courts have shown an abiding willingness to accept facial challenges in abortion cases since *Roe* while also finding exceptions to traditional rules pertaining to mootness and the prudential bar on third-party standing.⁵⁵ This exceptional treatment of abortion cases is justified in large part by the reasons that usually ground courts' acceptance of facial challenges. First, if piecemeal litigation by individual women were required in every case, it is highly unlikely that the underlying constitutional right would be sufficiently protected. Due to the inherent time limitations, as well as the intensely private nature of the issue, it is unlikely that individual women would possess sufficient incentive to go to court to vindicate their rights. Although mootness doctrine does not apply to bar suits by pregnant women, the likelihood is great that any individual plaintiff would be well beyond the time limit for obtaining a previability abortion by the time the court issued even preliminary relief.⁵⁶ For this reason, challenges are often instead brought by clinics or physicians, who are themselves subject to penalties under the challenged abortion laws but who are actually asserting the substantive due process rights of their patients. As noted above, this litigation structure in turn lends itself to challenging laws in all, or virtually all, of their applications.

Moreover, easy availability of facial challenges in the abortion context may be justified by concerns about the chilling effect of the abortion restrictions, and in particular those that carry criminal penalties. It is fair to surmise that physicians as a whole are a risk-averse group, and they by and large do not wish to wait until they have been criminally prosecuted under a statute to challenge it. If a criminal abortion restriction is in place and its enforceability or even the extent of its applicability is unclear, there is a danger that physicians will steer far clear of the prohibited practice, even if legal opinion indicates that the prohibition is likely unconstitutional. As such, facial challenges—especially the pre-enforcement variety—are necessary to avoid overdeterrence of doctors. Indeed,

⁵⁴ Cf. Borgmann, *supra* note 17, at 596 (noting that in some constitutional cases, "[t]he legal standards themselves generally call for a broader examination of social facts").

⁵⁵ See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Singleton v. Wulff*, 428 U.S. 106, 112–18 (1976). *But see* *Ada v. Guam Soc'y of Obstetricians & Gynecol.*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of certiorari) (arguing that a facial challenge to a criminal abortion statute should not have been permitted).

⁵⁶ See, e.g., *Roe v. Wade*, 410 U.S. 113, 124–25 (1973) (noting that the plaintiff Jane Roe was no longer pregnant and that the usual pregnancy would rarely last beyond the trial phase of a lawsuit).

the fact that an abortion can only be carried out with the aid of a third party—typically a doctor—renders the right to choose an abortion particularly susceptible to a chilling effect. To exercise her right of choice, both the pregnant woman *and* the necessary medical personnel must have sufficient courage to disregard the chilling effect of potential state sanctions.⁵⁷

II. *AYOTTE* AND *GONZALES*

Without paying much heed to the reasons supporting the widespread acceptance of facial challenges in abortion litigation, the Roberts Court, in two separate cases, appeared to herald the end of such challenges and a newfound enthusiasm for as-applied abortion litigation. In *Ayotte v. Planned Parenthood of Northern New England*, the Court vacated and remanded for a determination of whether a narrower remedy than total invalidation of a parental notification law would be appropriate.⁵⁸ And in *Gonzales v. Carhart*, the Court simply turned away a facial challenge to the federal Partial Birth Abortion Ban Act while leaving the door open to an as-applied challenge.⁵⁹ This section discusses each of these cases in turn.

Ayotte was a challenge to a New Hampshire law requiring physicians to notify a parent or legal guardian of any pregnant minor seeking an abortion at least forty-eight hours before the procedure is performed.⁶⁰ Although parental notification laws are generally constitutional,⁶¹ this law was alleged to be unconstitutional because it lacked a health exception—an exception allowing the procedure to be performed without meeting the notice requirement in cases of medical emergency.⁶² Both the district court and the First Circuit Court of Appeals had held the law unconstitutional.

⁵⁷ Dorf, *supra* note 20, at 271 (footnote omitted).

⁵⁸ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331–32 (2006).

⁵⁹ *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007).

⁶⁰ *Ayotte*, 546 U.S. at 323–24.

⁶¹ *Hodgson v. Minnesota*, 497 U.S. 417, 422–23 (1990) (plurality opinion) (upholding constitutionality of Minnesota parental notification requirement for minors seeking abortions, as long as certain minors have the opportunity to obtain a court order allowing them to avoid the notification requirement); *Bellotti v. Baird*, 442 U.S. 622, 647–48 (1979) (plurality opinion) (holding Massachusetts' parental consent law unconstitutional but affirming that states may require parental involvement in the abortion decision in certain circumstances).

⁶² *Ayotte*, 546 U.S. at 326. The plaintiffs had also challenged the New Hampshire law's lack of confidentiality for minors seeking to bypass the notification requirement, but the district court did not rule on this claim, and therefore neither the court of appeals nor the Supreme Court addressed it. *Planned Parenthood of N. New Eng. v. Heed*, 390 F.3d 53, 56–57 (2004).

Before the Supreme Court, the state had apparently conceded that “it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks,” thus allowing the Court to avoid the substantive constitutional issues.⁶³ Instead, in a brief unanimous opinion,⁶⁴ the Court focused primarily on the question of remedy and held that, while a parental notification statute may be unconstitutional without a health exception because it may subject at least some minors to serious risks to their health, it was not clearly necessary for the Court to invalidate the statute in its entirety.⁶⁵ The Court therefore sent the case back to the court of appeals to decide whether a more “modest remedy” might be available, such as invalidating only the law’s unconstitutional applications.⁶⁶ The Court noted that this inquiry turned on “legislative intent,” and therefore encouraged the lower court to avoid wholly invalidating a statute if the legislature would not have wanted that result.⁶⁷ At the same time, the Court emphasized that legislatures should not be given an incentive to write overly broad statutes and leave it to the courts to separate the constitutional applications from the unconstitutional ones.⁶⁸ However, the Court did not give much guidance as to how lower courts are to exercise their discretion or balance those competing considerations in crafting remedies in such cases, aside from its citation to a number of cases involving severance of state or federal statutes.⁶⁹

In *Carhart v. Gonzales*, the Roberts Court turned away a facial challenge to the federal Partial Birth Abortion Ban Act (“PBABA”), which outlaws a particular second-trimester abortion procedure known as “D&X” or “intact D&E.”⁷⁰ There were two primary grounds of attack on the statute. The first attack was that the PBABA was both unconstitutionally vague and so broadly written as to sweep in other, more common abortion procedures (including those used early in pregnancy) and therefore constituted an undue burden on the

⁶³ *Ayotte*, 546 U.S. at 328.

⁶⁴ The opinion was Justice O’Connor’s last.

⁶⁵ *Ayotte*, 546 U.S. at 331.

⁶⁶ *Id.*

⁶⁷ *Id.* at 330–31.

⁶⁸ *Id.*

⁶⁹ *Id.* at 330 (citing *United States v. Booker*, 543 U.S. 220, 227 (2005); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932); *The Employers’ Liability Cases*, 207 U.S. 463, 501 (1908); *Allen v. Louisiana*, 103 U.S. 80, 83–84 (1880); *Trade-Mark Cases*, 100 U.S. 82, 97–98 (1879)). In the wake of the *Ayotte* decision, New Hampshire repealed the parental notification statute. 2007 N.H. Laws 265.

⁷⁰ 550 U.S. 124, 166–67 (2007).

abortion right.⁷¹ This was one ground on which the plaintiffs had prevailed in the 2000 case *Stenberg v. Carhart*,⁷² in which the Supreme Court struck down Nebraska's "partial-birth" abortion ban.⁷³ The second ground of attack was that the statute lacked a health exception allowing the procedure to be performed when necessary to preserve the health of the woman.⁷⁴

Because the federal statute was more clearly aimed at one particular abortion procedure than the Nebraska statute that the Court had struck down in *Stenberg*, the Court rejected that basis for challenging the statute.⁷⁵ With respect to the health exception issue, however, the Court did an odd thing. The statute appeared to directly contravene the Supreme Court's holding in *Stenberg*, which stated that a D&X ban had to have a health exception to be constitutional.⁷⁶ Indeed, that health exception requirement had been in place since *Roe v. Wade* itself.⁷⁷ In the place of a health exception, Congress had included in the PBABA a series of dubious factual findings, declaring that a health exception was unnecessary and that the courts were required to defer to its factual findings.⁷⁸ The Court in *Gonzales* nonetheless upheld the statute against a facial challenge, largely because in the Court's view there was a dispute of medical fact over whether a health exception is necessary in a D&X ban—that is, whether the procedure is ever medically necessary.⁷⁹ Moreover, while the Court noted that it normally defers to legislative judgment on disputed questions of scientific fact, in this case it had reason to doubt the quality of Congress's factfinding (such as the fact that many of those found "facts" were demonstrably false), and so it declined to defer to—or at least to place "dispositive weight" on—Congress's findings.⁸⁰ It nonetheless asserted that factual disputes—such as the dispute over the circumstances, if any, in which D&X is medically required to avoid serious health risks—are best worked out in the

⁷¹ *Id.* at 146–47, 150.

⁷² 530 U.S. 914 (2000).

⁷³ *Id.* at 939–40.

⁷⁴ *Gonzales*, 550 U.S. at 161. The statute did contain a life exception, allowing life-saving abortions. *Id.* at 141–42 (citing 18 U.S.C. § 1531(a) (2000 & Supp. IV 2006)).

⁷⁵ *Id.* at 147–56.

⁷⁶ *Id.* at 166 (citing *Stenberg*, 530 U.S. at 938).

⁷⁷ 410 U.S. 113, 164–65 (1973) (holding that, post-viability, "the State . . . may . . . regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

⁷⁸ Congressional Findings (5)–(14), in notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769.

⁷⁹ *Gonzales*, 550 U.S. at 166–67 ("The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.").

⁸⁰ *Id.* at 165.

context of an as-applied challenge, not a facial challenge, and primarily for that reason the Court turned away the facial challenge.⁸¹

The Court's decision in *Gonzales* was surprising in a number of respects, but for purposes of this essay, I shall describe only a few of them. First, based on a record that was no less favorable to the plaintiffs than the record before the Court in *Stenberg*, the Supreme Court reached an essentially opposite result; yet it never claimed to be overruling *Stenberg*.⁸² The only meaningful differences between the facts of *Stenberg* and *Gonzales* are that, in *Gonzales*, there were explicit factual findings to support the Government's view, as opposed to mere state legislative history supporting the state's view in *Stenberg*, and that *Gonzales* dealt with a federal statute, whereas *Stenberg* dealt with a state statute.⁸³ But the *Gonzales* Court made it fairly clear that neither of these differences accounted for the differing results; instead, the Court disavowed the notion that any necessity of deferring to explicit legislative findings of fact played a dispositive role in its decision.⁸⁴ Indeed, the Court went so far as to assert that it "retains an independent constitutional duty to review factual findings where constitutional rights are at stake."⁸⁵ Moreover, the Court did not suggest that federalism concerns—such as a desire to defer more to Congress, a coordinate branch of the federal government, than to state legislatures—played any role in its differing treatment of the two statutes.⁸⁶

Yet, in the end, the Court turned away a facial challenge in a case almost identical to one in which the Court had previously emphatically sustained one. It seems that the only way to understand the Court's decision to reject a facial challenge in *Gonzales* that it had embraced in *Stenberg* comes from *Ayotte*, in which the Court observed that "the parties in *Stenberg* did not ask for, and [the Court] did not contemplate, relief more finely drawn."⁸⁷ In other words, the

⁸¹ *Id.* at 167.

⁸² *Id.* at 177–80 (Ginsburg, J., dissenting) (discussing the evidence before the trial courts in the cases at bar and noting the "undisguised conflict with *Stenberg*").

⁸³ *Id.* at 132 (majority op.); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

⁸⁴ *Gonzales*, 550 U.S. at 165–66 (stating that "[u]ncritical deference to Congress' factual findings . . . is inappropriate" and that the Court would not place "dispositive weight" on them).

⁸⁵ *Id.* at 165 (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932)).

⁸⁶ Some commentators have observed that, in general, the Roberts Court does not seem as interested in or sympathetic to federalism concerns as the Rehnquist Court was. *See, e.g.*, David Franklin, *The Roberts Court, the 2008 Election & the Future of the Judiciary*, 6 DEPAUL BUS. & COMM. L.J. 513, 518–20 (2008); Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1, 30–31 (2006).

⁸⁷ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331 (2006). At least one commentator has suggested that the disjunction between the results in *Gonzales* and *Stenberg* suggests that the Court is using its stated preference for as-applied adjudication strategically, in

Government in *Gonzales*, unlike the State of Nebraska in *Stenberg*, requested, *inter alia*, a more limited remedy than facial invalidation.⁸⁸ The Court thus suggested that it would have granted a more limited remedy in *Stenberg* if the state had asked for it.

A second unusual feature of the Supreme Court's decision is that it left the door open to a "preenforcement, as-applied challenge[]" to the PBABA.⁸⁹ In such a challenge, the Court explained, plaintiffs would have to 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."⁹⁰ The Court suggested that in such a context, "the nature of the medical risk can be better quantified and balanced than in a facial attack."⁹¹ The Court's statement almost certainly assumes that, as in *Stenberg* and *Gonzales*, the challenge would be brought by abortion providers asserting third-party standing on behalf of their patients, since it is hard to imagine any individual woman who would have standing to bring such a challenge, much less the desire to do so. In order to have standing, the woman would presumably have to argue that she was going to become pregnant and face a health-threatening (but not life-threatening) condition that required use of the D&X procedure in particular. What is strange about the Court's openness to a pre-enforcement as-applied challenge in such a case, then, is that the challenge would be functionally identical to what the plaintiffs in *Gonzales* in fact did. As Justice Ginsburg pointed out in her dissent, "the record already include[d] hundreds and hundreds of pages of testimony identifying 'discrete and well-defined instances' in which recourse to an intact D & E would better protect the health of women with particular conditions."⁹² The existence of such conditions was one of the principal issues around which the three lengthy bench trials on the constitutionality of the PBABA turned.⁹³

order to avoid precedent with which it disagrees. Metzger, *supra* note 4, at 774, 800.

⁸⁸ Brief for the Petitioners, *Gonzales v. Carhart* (Nos. 05-380, 05-1382), 2006 WL 228212, at 40-47; Brief for Petitioner, *Ayotte v. Planned Parenthood of N. New Eng.* (No. 04-1144), 2005 WL 1920929, at 43-46; Brief of Petitioners, *Stenberg v. Carhart* (No. 99-830), 2000 WL 228615.

⁸⁹ *Gonzales*, 550 U.S. at 167.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 189-90 (Ginsburg, J., dissenting).

⁹³ *Id.* at 161-63 (majority op.) (reciting lower court evidence pertaining to the safety and medical necessity of intact D&E). Indeed, one commentator has referred to the Court's allusion to a future as-applied challenge as a "[f]alse [p]romise." Borgmann, *supra* note 17, at 593.

* * * *

In both *Ayotte* and *Gonzales*, the Court talked the talk of judicial modesty when declining to uphold facial invalidations. In *Ayotte*, the Court described more limited invalidation of the New Hampshire law as “narrow” and “modest” but also expressed concern for the limitations of both its “constitutional mandate and institutional competence” should it wade too far into the task of re-writing a state statute.⁹⁴ In *Gonzales*, the Court similarly expressed concern about its “obligation [and] institutional role” if it were to “resolve questions of constitutionality with respect to . . . ‘every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.’”⁹⁵ I nonetheless argue, in the remainder of this essay, that there is almost nothing modest about what the Court did in *Ayotte* and *Gonzales*. On the contrary, those decisions threaten separation of powers, require judges to remain embroiled in the abortion controversy and decide issues arguably well beyond their competency, and—even more dramatically—appear to be a step toward reshaping a major facet of abortion jurisprudence that has been in place since *Roe v. Wade*—namely, the health exception.

III. AN IMMODEST MODESTY

Before explaining the ways in which the Court’s decisions in *Ayotte* and *Gonzales* were far more radical than modest in their future implications, I wish first to set out my view of the Court’s actual intention in *Gonzales*, and particularly of its decision to turn away a facial challenge while accepting the possibility of a future pre-enforcement as-applied challenge. I believe that *Gonzales* can only be understood in light of *Ayotte* as an attempt to finish what *Ayotte* started. Since the Court in *Gonzales* accepted the future possibility of an as-applied challenge that would be the same in virtually all respects as the facial challenge it rejected, it seems that it must have been ultimately concerned neither with the way in which the challenge to the PBABA was structured nor with the kind of evidence presented to the lower courts but rather with the remedy the plaintiffs ultimately achieved. Had the Court in *Gonzales* wanted to require that future challenges to abortion regulations be brought by individual women currently seeking the procedure—a requirement that would essentially mean the end of, or at least a sharp reduction

⁹⁴ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329, 331 (2006).

⁹⁵ *Gonzales*, 550 U.S. at 168 (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)).

in, constitutional challenges to abortion restrictions⁹⁶—it certainly would not have spoken in terms of “pre-enforcement” as-applied challenges. Rather, it must have assumed that a future pre-enforcement as-applied challenge would very much resemble the challenge currently before the Court but that—as in *Ayotte*—the remedy would not be facial invalidation.

Of course, the Court’s decision to reject the constitutional challenge altogether in *Gonzales*, rather than to remand the cases for the lower courts to shape a more precise remedy, was puzzling.⁹⁷ But this decision could be understood either as a political move—so that the Court was not seen as agreeing with the lower courts’ decision to strike down the PBABA⁹⁸—or as an attempt to send a particularly strong message to future plaintiffs that they must not, in the future, seek facial invalidation of abortion regulations whose only flaw is the lack of a health exception. In other words, the Court established in *Ayotte* that a more limited remedy than facial invalidation was appropriate in health-exception cases; in *Gonzales*, it made good on that claim by demonstrating that in the future, inappropriate facial challenges could properly be turned away, without an opportunity for the plaintiffs to seek their second-choice form of relief—partial invalidation.

This section therefore proceeds on the assumption that the primary significance of the Court’s decision to turn away the facial challenge in *Gonzales* has to do with the shape and scope of the injunction against enforcement of the law that district courts will have to issue in

⁹⁶ See *id.* at 189 (Ginsburg, J., dissenting) (“Surely the Court cannot mean that no suit may be brought until a woman’s health is immediately jeopardized by the ban on intact D&E. A woman ‘suffer[ing] from medical complications’ needs access to the medical procedure at once and cannot wait for the judicial process to unfold.” (citation omitted) (alteration in original)). Some challenges to restrictive abortion policies do continue to be brought by individual women seeking abortions, particularly in the prison context. See, e.g., *Roe v. Crawford*, 514 F.3d 789 (8th Cir.) (upholding a challenge by an inmate to a corrections department policy of essentially prohibiting nontherapeutic abortions for prisoners), *cert. denied*, 129 S. Ct. 109 (2008); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004) (rejecting an individual inmate’s challenge to a prison policy requiring inmates to get a court order before obtaining nontherapeutic abortions). As discussed above, however, most challenges are by clinics or physicians or both.

⁹⁷ Cf. *Gonzales*, 550 U.S. at 189 (Ginsburg, J., dissenting) (noting that the Court does not “explain why the injunctions ordered by the District Courts should not remain in place, trimmed only to exclude instances in which another procedure would safeguard a woman’s health at least equally well”); see also Maya Manian, *Rights, Remedies, and Facial Challenges*, 36 HASTINGS CONST. L.Q. 611, 618–19 (2009) (noting that “[i]f total invalidation of the federal ban seemed too sweeping for the Court, it could have followed the approach taken in *Ayotte* and remanded for consideration of a more limited injunction”).

⁹⁸ Cf. Metzger, *supra* note 4, at 774 (suggesting that the Roberts Court has shown a preference for as-applied litigation and turned away facial challenges in some instances strategically, as a way of avoiding precedent with which the Court disagrees).

future abortion cases.⁹⁹ This conclusion roughly accords with the views of the few lower courts that have dealt with challenges to abortion statutes that lack health exceptions in the wake of *Ayotte* and *Gonzales*.¹⁰⁰ Moreover, this understanding should not come as a surprise, given that many commentators have observed that the doctrine of facial and as-applied challenges is primarily a doctrine concerning remedies.¹⁰¹ Nonetheless, I argue in this final section that none of the pronounced rationales for preferring as-applied litigation over facial challenges justifies the Court's approach in *Ayotte* and *Gonzales* and that the Court has not only put modesty aside but also threatened to radically reshape substantive abortion doctrine with its decisions in those cases.

First, to the extent that the Court's desire not to nullify more of a law than is absolutely necessary indicates solicitude for legislative prerogative and legislative intent, it must be acknowledged that this solicitude is not necessarily well served by a preference for partial invalidation of state laws. Indeed, shifting the focus of health-exception jurisprudence from constitutional doctrine to the issue of remedy instead encourages federal courts to exercise enormous discretion and to make judgments about legislators' intent in a highly unguided way. As David Gans has recently pointed out, severability doctrine confers on judges the responsibility of "[a]ggressive [j]udicial [l]awmaking," especially since "[l]egislative

⁹⁹ Professor Michael Dorf seems to reject this understanding of *Gonzales*, as he suggests that reading the case to take seriously the possibility of future pre-enforcement as-applied challenges by doctors asserting the rights of their patients under a theory of third-party standing would mean "that exception swallows the holding of the case." Michael C. Dorf, *Abortion Rights*, 23 *TOURO L. REV.* 815, 825 (2008).

¹⁰⁰ In neither *Ayotte* nor *Gonzales* have the parties litigated the scope of the injunction to a final conclusion after remand. Only two federal appellate cases have grappled significantly with the impact of *Gonzales*' and *Ayotte*'s holdings with respect to facial challenges. In *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), the Sixth Circuit observed *Gonzales* appeared to suggest that "facial challenges are not the preferred mechanism for challenges pertaining to health exceptions to prohibitions on the D & X procedure," but that the scope of *Gonzales*' applicability was unclear in the case at bar. *Id.* at 340. It then discussed *Ayotte* when deciding on the scope of the injunction to be issued against Michigan's Legal Birth Definition Act and held that the Act could nonetheless be enjoined in its entirety because it was broad enough to sweep other procedures besides D&X within its prohibitions. *Id.* at 333–37. Similarly, the Fourth Circuit in *Richmond Medical Center for Women v. Herring*, 527 F.3d 128 (4th Cir. 2008), vacated, 570 F.3d 165 (2009) (en banc), asserted that *Gonzales* did not "question the established validity of facial challenges to abortion statutes" outside the health-exception context, and then cited *Ayotte* in the course of determining the extent of the proper injunction invalidating Virginia's "Partial Birth Infanticide" Act. *Id.* at 146, 149. The subsequent opinion by the en banc Fourth Circuit followed the route of *Gonzales* more closely, however, in determining that the plaintiff's facial challenge would fail and that his as-applied challenge "cannot be addressed" due to the lack of factual record. *Richmond Med. Ctr.*, 570 F.3d at 180.

¹⁰¹ Metzger, *supra* note 4, at 791–92 & nn.77–78 (citing sources).

intent, as a test, does little to constrain courts from using severability doctrine to rewrite statutes in substantial fashion.”¹⁰² Determinations of legislative intent, after all, are both difficult and extremely malleable, and they often must be reached without reliable guideposts from the legislature itself. Thus, the effect of the Roberts Court’s decisions in *Ayotte* and *Gonzales* is that parties will have to fight over the appropriate scope of an injunction against an unconstitutional abortion regulation and over what the legislature would have wanted, with no real standards for making that judgment, and in a highly politicized arena.

Second, the Court has not actually encouraged any more fact-finding by the lower courts before ruling on the constitutionality of abortion restrictions or ensured that concrete fact scenarios will be before those courts in the future. Indeed, *Gonzales* contemplates the continuing availability of *pre-enforcement* as-applied challenges in the abortion context and did not appear to question the validity of third-party standing in those cases.¹⁰³ As noted above, future as-applied challenges to abortion restrictions will presumably be functionally identical to the facial challenges before the Court in *Ayotte* and *Gonzales*; the only difference will be in the remedy obtained. Thus, the Court has not served the purpose that purportedly drove its decision to turn away the facial challenge in *Gonzales*—deciding the case based on a concrete fact scenario.

Indeed, it does not appear that the Roberts Court’s decisions will prevent unnecessary constitutional adjudication in any respect. In fact, these decisions potentially require courts to decide even more constitutional questions than they already do in the abortion area and to address problems that they most likely lack the competence to resolve. For example, if the landscape created by *Ayotte* and *Gonzales* is such that future challenges to abortion restrictions—for example on the ground that those restrictions lack a health exception—will have to be as-applied challenges seeking limited invalidation of the law, then parties to those lawsuits will begin spending considerable time and resources fighting over the scope of the injunction to be issued by the district court. If the law is unconstitutional as applied, the key question will become, “As applied to whom?”

¹⁰² David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 663, 669 (2008).

¹⁰³ Cf. Borgmann, *supra* note 17, at 592–93 (arguing that “[r]equiring evidence of actual harm in a challenge to a rights-infringing law defeats the very purpose of a pre-enforcement challenge” and may be “morally troubling” in some cases).

Unfortunately, the Supreme Court has given absolutely no guidance as to how lower courts should answer that question.¹⁰⁴ If plaintiffs were to mount a successful pre-enforcement as-applied challenge based on the federal PBABA's lack of an exception for women who need the procedure for medical reasons, would the district court then be expected to enjoin the statute only when the procedure is "necessary, in appropriate medical judgment," to avoid "significant health risks" to the woman?¹⁰⁵ Or would the injunction instead carve out specific, enumerated medical conditions that, if present, would prevent application of the statute?¹⁰⁶ Would a district court overstep its bounds if, following Justice Ginsburg's suggestion, it issued an injunction barring the law's enforcement in its entirety *except* where the procedure lacks any health benefit that makes it superior to other procedures?¹⁰⁷ As should be apparent from these examples, it is doubtful that judges possess the competency to make the sort of medical decisions that are called for by such a scheme.¹⁰⁸ And it does not take much imagination to believe that those injunctions might then be appealed as unconstitutionally narrow or excessively broad, thus requiring further constitutional line-drawing in this area.

Lurking behind these somewhat technical objections to the Court's decision to shift the focus of abortion jurisprudence to the problem of remedies is a broader, more fundamental concern about the effect of *Ayotte* and *Gonzales* on the future of the health exception. It seems that the Court has effectively re-opened the issue of the meaning and

¹⁰⁴ See Manian, *supra* note 97, at 619–20.

¹⁰⁵ *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327–28 (2006); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879–80 (1992)) (internal quotation marks omitted).

¹⁰⁶ See *id.* at 167 (stating that a pre-enforcement as-applied challenge "is the proper manner to protect the health of the woman if it can be shown 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" (emphasis added)); *Ayotte*, 546 U.S. at 331 ("Only a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application.").

¹⁰⁷ *Gonzales*, 550 U.S. at 189 (Ginsburg, J., dissenting) (arguing that the lower court's injunction should have been "trimmed only to exclude instances in which another procedure would safeguard a woman's health at least equally well").

¹⁰⁸ Cf. Manian, *supra* note 97, at 622 ("Normally, we leave to the attending physician's judgment the determination of what is medically necessary Judges lack the medical training to second-guess a treating physician's medical judgment [in an individual case]."). I have argued elsewhere that courts are more competent than legislators to decide disputed issues of medical fact. See B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 332–41 (2007). I continue to believe this is true, as a matter of comparative competence, but I doubt that either legislators or federal judges are as well-qualified as physicians, in conjunction with their patients, to make medical treatment decisions.

scope of the health exception requirement itself in two important respects. First, it is widely accepted that the importance, and therefore the degree of protection, accorded to a particular constitutional right—what Professor Daryl Levinson has called the “cash value” of a right—“is a function of the remedial consequences attached to its violation.”¹⁰⁹ Thus, one might argue that the Supreme Court has essentially cheapened the abortion right by taking facial invalidation off the table as a possible remedy for unconstitutional abortion laws—or at least those that lack a health exception.¹¹⁰ The consequences of this cheapening are both real and meaningful, since in some instances—the PBABA cases presumably being one—the game will no longer be worth the candle and constitutional challenges simply will not be brought.¹¹¹ Thus, contrary to Justice Ginsburg’s prediction,¹¹² no as-applied challenges to the federal D&X ban have been filed in the wake of the Court’s decision in *Gonzales*.

But perhaps even more profoundly, the Supreme Court has opened the door to deciding questions that have long gone unanswered in its jurisprudence—most likely for good reason. Since the Supreme Court’s vague suggestion in *Doe v. Bolton*,¹¹³ the companion case to *Roe v. Wade*, that the word “health” in the abortion context should be understood broadly, “in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient” and in accordance with the physician’s “best medical judgment,” the Supreme Court has avoided defining or limiting the contours of the constitutionally required health exception.¹¹⁴ Instead, the Supreme Court has simply mandated a health exception, with lower courts following suit. Legislatures, for their part, have generally included in their abortion regulations health exceptions that are sufficiently broad and general to avoid being challenged, usually by adopting some version of the “medical judgment” language of *Roe* and *Doe*.¹¹⁵ Presumably, legislators knew

¹⁰⁹ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 874 (1999).

¹¹⁰ Cf. Hartnett, *supra* note 3, at 1756–57 (noting that facial challenges “raise the stakes” of constitutional litigation and suggesting that the Supreme Court’s decision in *Ayotte* indicates a desire to “lower[] the stakes in a time of transition” while awaiting Justice O’Connor’s successor to the Court).

¹¹¹ Cf. David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L.Q. 631, (2009) (predicting that few as-applied challenges will be brought to future abortion regulations based on the lack of a health exception “not because they are without merit, but because the structural impediments are too great”).

¹¹² *Gonzales*, 550 U.S. at 189–90 (Ginsburg, J., dissenting).

¹¹³ 410 U.S. 179 (1973).

¹¹⁴ *Id.* at 192.

¹¹⁵ See, e.g., FLA. STAT. ANN. §390.01114(2)(d), (3)(b) (requiring parental notice for

that to omit or tinker with the health exception meant risking invalidation of the entire abortion regulation and having to start over from scratch.¹¹⁶ This state of affairs essentially created and preserved a large realm of discretion for physicians, rather than courts or legislatures, to decide when an abortion, or a particular abortion procedure, was medically appropriate. Indeed, this right could even be characterized as a separate right from the right to procreative choice—it more closely resembles a right to protect one’s health through seeking appropriate medical treatment.¹¹⁷

Now, by opening up the health exception to specification—and even *requiring* specification of its meaning and scope—the Court has arguably changed the actual nature of the right.¹¹⁸ The remedial tail,

abortions performed on minors, except, *inter alia*, if “In the physician’s good faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements” and in turn defining “medical emergency” in terms of the “physician’s good faith clinical judgment”); IND. CODE § 16-34-2-4(i) (creating an exception to the requirement of parental consent for minors seeking abortions “where there is an emergency need for a medical procedure to be performed such that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman and the attending physician so certifies in writing”); OHIO REV. CODE ANN. § 2317.56(A)(2) (West 2004) (requiring certain information be given to the woman before an abortion is performed, unless there is a medical condition “that, in the reasonable judgment of the physician who is attending the woman, so complicates the pregnancy that it necessitates the immediate performance or inducement of an abortion”). There have been a few pre-*Gonzales* challenges to statutes on the ground that the health exceptions are unconstitutionally narrow. See *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 924, 935 (9th Cir. 2004) (holding unconstitutional a law requiring parental consent for minors seeking abortions except in the case of “a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion.”); *Women’s Med. Prof’l Corp. v. Taft*, 353 F.3d 436, 440, 450 (6th Cir. 2003) (upholding against constitutional challenge a health exception that allowed the D&X procedure only when “necessary, in reasonable medical judgment, to preserve the life or health of the mother *as a result of the mother’s life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function*” (emphasis added)).

¹¹⁶ See Hartnett, *supra* note 3, at 1756 (noting that “facial challenges raise the stakes” of litigation).

¹¹⁷ Elsewhere, I have argued extensively that such a right exists, though its recognition has not been consistent outside the abortion context. See Hill, *supra* note 108; see also John A. Robertson, *Controversial Medical Treatment and the Right to Health Care*, HASTINGS CTR. REP., Nov.–Dec. 2006, at 15, 15 (arguing that a negative right to health care “anchors a woman’s use of abortion and contraception, and underlies the great deference ordinarily accorded doctors and patients to pursue medical care”); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1824 (2007) (inferring that the abortion cases recognize a constitutional “right to defend oneself using medical care”).

¹¹⁸ Cf. Levinson, *supra* note 109, at 873 (discussing the concept of “remedial equilibration,” which holds that “constitutional rights are inevitably shaped by, and incorporate, remedial concerns”). But see, e.g., Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 749–53 (1979) (giving

in other words, has started to wag the substantive doctrinal dog. Instead of simply delegating medical decisions to physicians, both legislators and courts will be asked to determine the meaning of medical necessity, resulting in narrower and possibly inconsistent definitions of it. The scope of the injunction in each particular case, usually crafted by the district court based on the evidence before it, will now determine the scope of the constitutional right of women to protect their health with a medically necessary abortion. That injunction may be broader or narrower in some geographic areas or types of cases than in others. It would be an understatement to say that this result is in tension with the prior state of affairs, according to which the patient's constitutional right to a medically necessary abortion was sacrosanct and the appropriate choice of treatment was left to the woman and her physician to decide.

Not only is this revised constitutional doctrine troubling from the perspective of the women whose health may be put at risk while the "new" meaning of the constitutionally required health exception is worked out, it is troubling from the perspective of judicial modesty. It appears that the Roberts Court has sub silentio overturned prior substantive precedent pertaining to the health exception, while leaving enormous doubt as to what must take its place.¹¹⁹ It has thus likely embroiled the lower federal courts in decisions about the scope and meaning of the health exception for years to come.

CONCLUSION

A reader who is more sympathetic to the ideological leanings of the newest Justices of the Roberts Court might claim that it is only sensible to require more limited invalidation of laws regulating abortion as a means of halting the "'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice."¹²⁰ Indeed, one might argue that facial invalidation was far too powerful medicine for a statute whose only ailment was the lack of a health exception, and that the Supreme Court's approach in *Ayotte* and

examples of cases in which the Supreme Court has issued narrow remedial rulings out of federalism concerns without correspondingly narrowing the underlying constitutional rights).

¹¹⁹ *Cf. Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 340 (6th Cir. 2007) ("[I]t is not apparent how and whether *Gonzales* diminishes the rule requiring an exception to protect the woman's life that does not impose upon her an increased medical risk.").

¹²⁰ *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in judgment in part and dissenting in part)).

Gonzales merely restores a healthy state of affairs to constitutional remedies doctrine.¹²¹

Although an evaluation of the substantive merits of that view is beyond the scope of this essay, I find the Court's approach in *Ayotte* and *Gonzales* to be unwise. I believe that it may subject some women to significant health risks and lead to poor decisionmaking about important medical issues. In any case, whether wise or foolish, the Roberts Court's decisions in those cases are anything but modest. They herald potentially radical changes to substantive constitutional doctrine under the guise of judicial restraint.

¹²¹ See, e.g., Collett, *supra* note 2, at 732.