Frames of Reference and the "Turn to Remedy" in Facial Challenge Doctrine

by KEVIN C. WALSH*

Introduction

The Roberts Court persists in using the terms "facial challenge" and "as-applied challenge" as if there are two discrete types of constitutional "challenge" and a trans-substantive doctrine that governs when each type of challenge is appropriate. As Richard Fallon's analysis has revealed, however, the terms do not denote two distinct categories of constitutional litigation.[1] All constitutional challenges to statutes are "as-applied" in that they assert that a statute may not validly be enforced against a particular litigant.[2] Facial challenges are those as-applied challenges that invite assessment of the enforceability of a statute with respect to all of its applications.

Facial challenge doctrine as it currently stands is a grab bag of high-level principles bearing on the propriety of invalidating a statute in all its applications. It has been developed and deployed across a range of substantive areas of law. This allows the Court, for example, to import a statement about the propriety of facial invalidation from a case about congressional power into a case about a state law regulating election procedures.[3] On occasion, this causes the Court to overlook relevant differences among various strands of substantive constitutional law that govern whether a statute is unconstitutional in all its applications.

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* Visiting Assistant Professor, Villanova University School of Law.

1. *See generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

2. *See id.* at 1324 ("[T]here is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her.").

3. *See* Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008) (citing United States v. Raines, 362 U.S. 17, 22 (1960)); *id.* at 1191 (citing Sabri v. United States, 541 U.S. 600, 609 (2004)).

This Symposium on Facial Challenges in the Roberts Court provides an opportunity to chart a path toward greater doctrinal coherence in light of the Court's most recent uses of the distinction between facial and as-applied challenges. In his contribution to this Symposium, David Faigman makes two claims that I address in this response. The first of Professor Faigman's claims is descriptive: "the debate over facial versus as-applied challenges is merely a subcategory of the pervasive issue concerning defining the proper frame of reference for empirical questions arising under the Constitution."[4] As Professor Faigman uses the term, a "frame of reference" is "the lens through which concrete cases are adjudicated."[5] It determines "whether a constitutional provision raises factual issues, and the kinds of facts that are relevant to particular constitutional inquiries."[6] Professor Faigman's description captures an important insight into the role played by facial challenge doctrine in constitutional adjudication. In some cases in which the Court deploys facial challenge doctrine, however, the frame of reference is set entirely by substantive law. In those cases, facial challenge doctrine influences how the Court disposes of the case within the substantive-law frame of reference. Consider, for example, the Court's rejection of a facial challenge by political parties to Washington State's election scheme.[7] Associational freedom case law provided the frame of reference, which required proof of voter perception of the relationship between parties and candidates in Washington's scheme.[8] Such proof was not available because the scheme had not yet been implemented, and facial challenge doctrine foreclosed speculation about how voters would perceive the scheme when it was implemented.[9] As this example shows, defining frames of reference is not the exclusive function of facial challenge doctrine.

Faigman's second claim is prescriptive: "the proper frame of reference in deciding constitutional cases should be an explicit component of constitutional interpretation."[10] I agree. It is desirable for courts to

4. 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, 634 (2009).

5. *Id.* at 658. A clear illustration that Faigman provides is the way in which *McCleskey v. Kemp* framed the Eighth Amendment prohibition of cruel and unusual punishment to focus on case-by-case proof of individualized discrimination rather than statistical proof of systemic discrimination. *Id.* at 651.

6. *Id.*

7. *Wash. State Grange*, 128 S. Ct. at 1195–96.

8. *Id.* at 1193.

9. *Id.* at 1193–94.

10. Faigman, *supra* note 4, at 658.

intelligently establish the frame of reference for each constitutional ruling. I disagree, however, that "the Court surreptitiously manipulates the relevant frame to serve substantive objectives."[11] The Court's frame shifting is typically not surreptitious, and any "manipulation" that does occur consists of adjustments to the availability of facial challenges in light of changes in underlying substantive law. Whether such adjustments are appropriate depends on an assessment about the best way of implementing the underlying substantive law.

The Court's approach to facial challenges to laws regulating abortion provides a good example of this phenomenon. Constitutional challenges to abortion laws have given rise to sparring spanning the last decade or so over the propriety of facial invalidation.[12] Professor Faigman views the Court's most recent decision in this line—*Gonzales v. Carhart*, which upheld the federal ban on partial-birth abortions against a facial challenge[13]—as a case study in how *not* to decide the appropriate frame of reference for constitutional adjudication. My evaluation is more positive. Although certain particulars of Justice Kennedy's opinion for the Court are confounding, its insistence on as-applied adjudication going forward is entirely appropriate for establishing discrete health-based exceptions to the general partial-birth abortion ban. The decision properly extends the approach employed in Justice O'Connor's opinion for a unanimous Court the immediately preceding Term in *Ayotte v. Planned Parenthood of Northern New England*.[14]

The incremental remedial approach of *Ayotte*—in which the Court required the consideration of narrower relief as an alternative to facial invalidation—is a significant improvement over the blunt facial approach of *Stenberg v. Carhart*.[15] *Ayotte* reflects a "turn to remedy" that bypasses the stale debate over the verbal formulas of *United States v. Salerno* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Following *Ayotte*, courts should understand facial challenges as those that seek

11. *Id.* at 634.

12. *See, e.g.*, Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996) (Justice Stevens respecting the denial of certiorari); *id.* at 1176 (Justice Scalia dissenting from denial of certiorari). This debate has been framed to require a choice between applying the principles enunciated in *United States v. Salerno*, 481 U.S. 739 (1987) or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

13. Gonzales v. Carhart, 550 U.S. 124 (2007).

14. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

15. In *Stenberg v. Carhart*, 530 U.S. 914, 937–38 (2000), the Court held that the absence of a statutory health exception rendered Nebraska's ban on partial-birth abortions facially invalid. The absence of this exception was not the only flaw, but would have been sufficient by itself to require facial invalidation. *See id.* at 929–30.

invalidation of a statute in all of its applications. Courts should first ask as a matter of substantive law whether the applicable constitutional test requires such across-the-board invalidation. If only some applications are unconstitutional, courts should consider an injunction prohibiting the unconstitutional applications as a preferred alternative to facial invalidation.[16] This "turn to remedy" allows for greater calibration of the output of constitutional adjudication to the underlying constitutional protection in any given case than a forced choice between verbal formulas that purport to describe in a trans-substantive way the "heavy burden" to be borne by facial challengers.

The first part of this response discusses how facial challenge doctrine has functioned in a few recent Roberts Court cases in which it served a function other than to define the frame of reference. The second part defends the Court's current approach to facial challenges to abortion laws and suggests that it provides a promising approach to assessing the propriety of facial invalidation more widely.

I. Operation Within a Frame of Reference

In response to Professor Faigman's claim that "the debate over facial versus as-applied challenges is merely a subcategory of the pervasive issue concerning defining the proper frame of reference for empirical questions arising under the Constitution,"[17] this Part discusses recent cases in which facial challenge doctrine operated as a way of disposing of a challenge within a frame of reference set by substantive law rather than as a tool for defining the frame of reference itself. This discussion shows that facial challenge doctrine consists of more than a subcategory of the issue of defining frames of reference for constitutional adjudication. It provides a layer of analysis that the Court sometimes chooses to emphasize when deciding a constitutional claim within a frame set by substantive law.

Washington State Grange v. Washington State Republican Party was an associational freedom challenge to Washington State's election scheme, which permitted candidates to self-identify with a political party on the election ballot, regardless of whether the party had selected that candidate

16. *Ayotte* also requires a determination of whether partial invalidation is consistent with legislative intent, which it describes as "the touchstone for any decision about remedy." *Ayotte*, 546 U.S. at 330. For reasons that I will discuss in future work, this "legislative intent" qualification is problematic. For present purposes, however, my objections to this use of legislative intent are not pertinent.

17. Faigman, *supra* note 4, at 634.

as its nominee.[18] The Washington State Republican Party, Washington State Democratic Central Committee, and Libertarian Party of Washington State claimed that this scheme violated their freedom of association "by usurping [their] right to nominate [their] own candidates and by forcing [them] to associate with candidates [they do] not endorse."[19] The plaintiff parties filed suit before the scheme had operated in any election, and before the ballot had been designed.[20]

Justice Thomas wrote the opinion for an unusually configured Court.[21] This opinion rejected the parties' challenge because it turned on speculation about whether voters would be confused by candidates' party-preference designations.[22] The constitutional objections, in turn, rested on speculation because the Court interpreted its associational freedom precedents to require speculation. The majority interpreted these cases to mean that the unrebutted association of a candidate with a party on a ballot did not necessarily impinge on associational freedom as a matter of law. Justice Thomas appealed to prior case law that he characterized as reflecting "faith in the ability of individual voters to inform themselves about campaign issues."[23] In light of this case law, the possibility of voter confusion—unsupported by an evidentiary record reflecting how the statute would be implemented—was insufficient to ground a successful facial challenge.[24]

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18. Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1187–89 (2008). This scheme replaced an earlier "blanket primary" scheme virtually identical to the one struck down in *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000). The distinctive feature of a "blanket primary" is that "any person, regardless of party affiliation, may vote for a party's nominee." *Id.* at 576 n.6.

19. *Wash. State Grange*, 128 S. Ct. at 1189. The Washington State Grange became involved in the litigation through intervention as a defendant.

20. *Id.* at 1194.

21. *Id.* at 1187. Justice Thomas's opinion for the Court was joined by all justices other than Justices Scalia and Kennedy. Justice Scalia authored a dissent that Justice Kennedy joined. *See id.* at 1197–1203 (Scalia, J., dissenting). Chief Justice Roberts, joined by Justice Alito, wrote a concurring opinion whose sole function was to respond to Justice Scalia's dissent. *See id.* at 1196–97 (Roberts, C.J., concurring).

22. *Id.* at 1193 (majority opinion) ("At bottom, respondents' objection to I-872 is that voters will be confused by candidates' party-preference designations. Respondents' arguments are largely variations on this theme. Thus, they argue that even if voters do not assume that candidates on the general election ballot are the nominee of their parties, they will at least assume that the parties associate with, and approve of, them. This, they say, compels them to associate with candidates they do not endorse, alters the message they wish to convey, and forces them to engage in counterspeech to disassociate themselves from the candidates and their positions on the issues.").

23. *Id.* (citing Tashjian v. Republican Party of Conn., 479 U.S. 208, 220 (1986)).

24. *Id.* at 1193–94. Justice Thomas observed that the state's ballot had not yet been designed, and he reasoned that it was necessary to "ask whether the ballot could conceivably be

Joined by Justice Kennedy in dissent, Justice Scalia urged the Court to recognize as a matter of law that "thrusting an unwelcome, self-proclaimed association upon the party on the election ballot itself is . . . destructive of the party's associational rights."[25] Rather than demand evidence of voter perception from the parties, Justice Scalia interpreted the Court's associational freedom precedents as turning on the expressive associations' own assessments of how forced association would affect their ability to advocate their positions.[26]

Clearly, the majority and the dissent in *Washington State Grange* operated within different empirical frames of reference: the majority's frame of reference was voter perception, while the dissent's was the ballot itself. But the difference between the frames of reference was a function of differing understandings of underlying substantive law—First Amendment law regarding freedom of association—not of facial challenge doctrine. The majority's frame of reference required proof of voter perception of a ballot that had not yet been designed, a matter that was necessarily speculative at the time. Having thus characterized the constitutional challenge as requiring speculation, the Court then invoked facial challenge doctrine to foreclose that speculation and shut down the challenge.

Facial challenge doctrine played a similar role, although with less justification, in *Crawford v. Marion County Election Board*.[27] At issue was an Ohio statute requiring voters to present government-issued photo identification in order to vote.[28] The Court upheld the requirement by a six-to-three vote. The six votes in the majority were split between an

printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." *Id.* at 1194. Justice Thomas had no difficulty conceiving of a ballot design that, along with public education, would prevent voter confusion. *See id.* ("For example, petitioners propose that the actual I-872 ballot could include prominent disclaimers explaining that party preference reflects only the self designation of the candidate and not an official endorsement by the party. They also suggest that the ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as "my party preference is the Republican Party."). Having deflated the prospect of voter confusion, the opinion concluded that the parties' "arguments about forced association and compelled speech fall flat." *Id.* (footnotes omitted).

25. *Id.* at 1200 (Scalia, J., dissenting).

26. *Id.* at 1201 ("[C]ontrary to the Court's suggestion, it is not incumbent on the political parties to adduce evidence that forced association affects their ability to advocate for their candidates and their causes. We have never put expressive groups to this perhaps-impossible task. Rather, we accept their own assessment of the matter." (citations and internal quotation marks omitted)).

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

28. *Id.* at 1613.

opinion authored by Justice Stevens[29] and an opinion authored by Justice Scalia.[30]

According to Justice Stevens, the challengers asked the Court "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity."[31] The Court could not perform that balancing analysis in this facial challenge, according to Justice Stevens, because "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."[32] Apart from this evidentiary failure, Justice Stevens reasoned that the fact that it was a facial challenge required the challengers to bear a heavier burden than they apparently would have had to bear if the complaint had not been a facial challenge.[33] In increasing the "weight" that the challengers needed to bear, Justice Stevens relied on *Washington State Grange*.[34]

In contrast, nothing in Justice Scalia's opinion turned on the characterization of the case as presenting a facial challenge. Nor did Justice Scalia's approach require any balancing because under his approach individual impacts of a generally applicable law are irrelevant.[35] Instead, the Court's task was to determine whether the burdens imposed by a law are "severe" rather than "nominal," or mere inconveniences.[36] Similarly,

29. *Id.*

30. *Id.* at 1624 (Scalia, J., concurring).

31. *Id.* at 1622 (majority opinion).

32. *Id.*

33. *Id.* at 1621–22 ("Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.").

34. *Id.* at 1622 ("Only a few weeks ago we held that the Court of Appeals for the Ninth Circuit had failed to give appropriate weight to the magnitude of that burden when it sustained a preelection, facial attack on a Washington statute regulating that State's primary election procedures. Our reasoning in that case applies with added force to the arguments advanced by petitioners in these case."). Justice Stevens noted, seemingly gratuitously, that "petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute." *Id.* at 1623.

35. *Id.* at 1625 (Scalia, J., concurring) ("The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.").

36. *Id.* at 1624. Laws that impose a severe or discriminatory burden are subject to strict scrutiny, while the remainder are subject to "a deferential 'important regulatory interests' standard." *Id.* (citing Burdick v. Takushi, 504 U.S. 428, 433–34 (1992)).

neither of the dissenting opinions attributed any significance to the "facial" nature of the claim.[37]

As in *Washington State Grange*, the differing frames of reference in play in *Marion County Election Board* resulted from substantive law, not from the fact that plaintiffs brought a facial challenge. Not only was the opinion authored by Justice Stevens the only one of four opinions to invoke facial challenge doctrine, but it also appears as if the empirical frame of reference would have been the same for Justice Stevens regardless of whether the complaint was styled "facial" or "as-applied." In the case of an as-applied challenge, the challenger presumably would have been required to make the same showing as the *Marion County Election Board* challengers: that the burdens imposed on him or her were not outweighed by "the State's broad interests in protecting election integrity."[38] The difficulties Justice Stevens identified in performing such a balancing analysis are difficulties endemic to that type of doctrinal test, none the greater because of the relief that the challengers sought. The only function seemingly served by Justice Stevens's invocation of facial challenge doctrine was to make it more difficult for the challengers to prevail.

The speculation-foreclosing and burden-enhancing functions of facial challenge doctrine in *Washington State Grange* and *Marion County Election Board*, respectively, were entirely absent from the Court's decision of yet another facial challenge to an election-related law decided in the October 2007 Term. In *Davis v. FEC*,[39] the Court held unconstitutional the "Millionaire's Amendment" to the Bipartisan Campaign Finance Reform Act ("BCRA"), which raised the contribution limits for candidates facing wealthy opponents who spend more than $350,000 of their personal funds on a campaign.[40]

The challenger in *Davis* sought to have the asymmetrical contribution limits declared unconstitutional.[41] The Court described the claim as a

37. Justice Souter objected that Justice Stevens demanded too much precision when assessing the challengers' evidence. *Id.* at 1634 (Souter, J., dissenting) ("Petitioners, to be sure, failed to nail down precisely how great the cohort of discouraged and totally deterred voters will be, but empirical precision beyond the foregoing numbers has never been demanded for raising a voting-rights claim."). Justice Souter also faulted Justice Stevens for not "insist[ing] enough on the hard facts" when assessing the State's arguments. *Id.* at 1628. Justice Breyer concluded that the statute was unconstitutional because it imposed a disproportionate burden on voters without statutorily valid identification—a conclusion that he was able to reach because of the record developed in the litigation. *Id.* at 1643–45 (Breyer, J., dissenting).

38. *Id.* at 1622 (majority opinion).

39. Davis v. FEC, 128 S. Ct. 2759 (2008).

40. *Id.* at 2765–67.

41. *Id.* at 2767–68. Jack Davis was an unsuccessful candidate for Congress in 2004 and 2006 who spent over $1 million of his own funds in 2004 and over $2 million of his own funds in

"facial challenge," and the Court's holding—that "imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment"[42]—rendered the differential limits unconstitutional across the board. Yet the Court never invoked the "heavy burden" language seen in *Marion County Election Board* or the "judicial restraint" language of *Washington State Grange*. Instead, facial invalidation flowed directly from the substantive First Amendment test that the Court applied.

Although *Washington State Grange*, *Marion County Election Board*, and *Davis* can all be described as facial challenges related to election law, they each dealt with different areas of substantive constitutional law. That is why it is unexceptionable that facial challenge doctrine made no appearance in *Davis*. The First Amendment test applied in that case was simply not the kind of test that required the sort of evidence whose absence doomed the political parties' challenge to Washington's election scheme. Yet, Justice Stevens's use of facial challenge doctrine from *Washington State Grange* in *Marion County Election Board* reveals that at least some members of the Court do not appreciate that the relevant considerations bearing on adjudication of a facial challenge are not entirely trans-substantive. Justice Stevens seemingly reasoned that because both cases were about election law and both were facial challenges, the reasoning in *Washington State Grange* about what a heavy burden the challengers must bear "applies with added force to the arguments" advanced by the challengers in *Marion County Election Board*.[43] This loose connection between the two cases makes little sense. One challenge was rooted in associational freedom and the other in equal protection. Whether these two different bodies of law should be implemented through the same record-based frame of reference requires some argument or explanation. This is not to deny that the high-level principles that make up facial challenge doctrine may appropriately apply across a range of substantive areas.[44] The

2006. *Id.* at 2767. In 2006, Davis filed suit seeking a declaration that the "Millionaire's Amendment" was unconstitutional and an injunction against its enforcement by the Federal Election Commission. *Id.*

42. *Id.* at 2774.

43. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621–22 (2008).

44. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190–91 (2008) (citing Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) (challenge to state law requiring parental notification for a minor's abortion as violating the right to privacy); Sabri v. United States, 541 U.S. 600 (2004) (challenge to federal criminal statute regarding misuse of federal funds as exceeding Congress's power under the Commerce Clause); United States v. Raines, 362 U.S. 17 (1960) (challenge to federal criminal statute prohibiting interference with voting as exceeding Congress's enforcement power); Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936) (Brandeis, J., concurring) (challenge to contract between Tennessee Valley

point, rather, is that these principles do not necessarily apply every time that a Court is asked to invalidate a statute in all of its applications. Depending on the underlying substantive law, none, some, or all of these principles may be fittingly invoked.

Any review of the use of facial challenge doctrine by the Roberts Court to date would be incomplete without discussing the series of three Supreme Court decisions addressing the constitutionality of BCRA's restrictions on certain broadcast advertisements funded by corporate general treasuries. Each of these cases addressed the constitutionality of BCRA section 203, which expanded previously existing restrictions on broadcast advertisements funded by corporate general treasuries that mention a candidate within certain times before an election involving that candidate.[45] Taken together, these cases illustrate how the complex web of facial challenge doctrine can entangle the justices in distracting and abstract arguments about the relationship between facial and as-applied challenges, to the detriment of clear argument about substantive-law divisions.

In *McConnell v. FEC*, the Supreme Court upheld section 203 against a facial attack, concluding that the ban was not overbroad and constitutionally could be applied to cover express advocacy and its

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Authority and Alabama Power Company as exceeding Congress's power); Yazoo & Miss. Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217 (1912) (challenge to state law mandating prompt settlement of certain claims for goods damaged during railroad shipment as violating due process)).

45. Prior to BCRA, the restrictions on expenditures for broadcast advertisements from the general treasuries of corporations were limited to expenditures supporting "express advocacy." *See* McConnell v. FEC, 540 U.S. 93, 126 (2003). BCRA section 203 extended the restrictions to encompass all "electioneering communications," regardless of whether they expressly advocated the election or defeat of a particular candidate. *See id.* at 189–90. BCRA's definition of "electioneering communication" covers any "broadcast, cable, or satellite communication" that:

> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C.A. § 434(f)(3)(A)(i) (West Supp. 2003). A communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons" in the district or State the candidate seeks to represent. *Id.* § 434(f)(3)(c).

functional equivalent.[46] In *Wisconsin Right to Life v. FEC* ("*WRTL I*"), the Court unanimously held that *McConnell*'s rejection of facial invalidity did not foreclose an as-applied challenge.[47] In *FEC v. Wisconsin Right to Life* ("*WRTL II*"), the Court held that section 203 was unconstitutional as applied to three advertisements Wisconsin Right to Life had developed and sought to run during a prior election.[48]

The difficulty with reconciling these cases is that the standard for as-applied challenges set forth in Chief Justice Roberts's opinion in *WRTL II* undercuts the no-overbreadth holding of *McConnell*.[49] The common ground among the justices that there was room after *McConnell* for some case-by-case adjudication is revealed in the unanimous holding of *WRTL I*. That much makes sense: Rejection of a facial challenge is not equivalent to a holding of across-the-board validity, but rather a rejection of across-the-board invalidity. That a statute is not invalid in *all* its applications is consistent with the statute being invalid in *some* of its applications. However, applicable substantive constitutional law provides limits to this mode of reasoning. *McConnell*'s holding of no overbreadth rested on a determination that the set of unconstitutional applications was not "substantial" when "judged in relation to the statute's plainly legitimate sweep."[50] If the standard for identifying unconstitutional applications set

46. *McConnell*, 540 U.S. 93.

47. Wis. Right to Life v. FEC (*WRTL I*), 546 U.S. 410, 410 (2006) (per curiam).

48. FEC v. Wis. Right to Life (*WRTL II*), 127 S. Ct. 2652 (2007). The Court was split as to the outcome, and the five justices in the majority were further split in their rationale. Chief Justice Roberts, in an opinion joined by Justice Alito, reasoned that section 203 could be constitutionally applied only to advertisements that were susceptible of no reasonable interpretation other than as advocacy for or against a particular candidate. *Id.* at 2667. Justice Scalia, in an opinion joined by Justices Kennedy and Thomas, rejected the Roberts/Alito test and advocated the overruling of *McConnell*'s holding of facial validity. *Id.* at 2680–84 (Scalia, J., concurring). These three justices would have held section 203 facially unconstitutional because it was overbroad. *Id.* at 2683–84. The four dissenting justices concluded not only that section 203 was constitutional as applied to Wisconsin Right to Life's advertisements, but also that the Court's holding to the contrary effectively overruled *McConnell*. *Id.* at 2698–99 (Souter, J., dissenting).

49. As Justice Scalia noted, seven of the nine justices believed that the constitutional reasoning in *WRTL II* could not be reconciled with the constitutional reasoning underlying the holding of facial constitutionality in *McConnell*. *Id.* at 2684 n.7 (Scalia, J., concurring in part and concurring in the judgment) ("The claim that § 203 on its face does not reach a substantial amount of speech protected under the principal opinion's test—and that the test is therefore compatible with *McConnell*—seems to me indefensible. Indeed, the principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.").

50. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

forth in *WRTL II* sweeps in a "substantial" amount of applications "in relation to the statute's plainly legitimate sweep," then *WRTL II* and *McConnell* cannot be reconciled. Whether that is the case, however, has nothing to do with facial challenge doctrine, and everything to do with First Amendment law and the test for overbreadth.

Against this backdrop, it is possible to see how facial challenge doctrine sowed confusion in the *WRTL II* debate over whether the standard set forth in Chief Justice Roberts's opinion was reconcilable with *McConnell*.[51] In addition to dueling with the other justices over the meaning of *McConnell* to show that this earlier case *did not settle* what constitutional test governed an as-applied challenge, Chief Justice Roberts argued that the earlier decision "*could not have settled*" that issue.[52] The reason for this purported impossibility, according to Chief Justice Roberts, is that "[c]ourts do not resolve unspecified as-applied challenges in the course of resolving a facial attack."[53]

The flaw in Chief Justice Roberts's argument is that the resolution of a facial attack sometimes does entail resolution of unspecified as-applied challenges. For example, a decision that rejects an overbreadth challenge on the ground that the statute covers *no* constitutionally protected speech necessarily rejects *every* as-applied challenge premised on the claim that

51. The question that Chief Justice Roberts and Justice Alito took to be open in *WRTL II* was what constitutional test to apply in deciding the constitutionality of section 203 as applied to any given advertisement. *WRTL II*, 127 S. Ct. at 2664 (concluding that "*McConnell* did not adopt any test as the standard for future as-applied challenges). The district court, too, thought that *McConnell* did not establish a constitutional test for as-applied challenges. *See* Wis. Right to Life v. FEC, 466 F. Supp. 2d 195, 206 n.16 (D.D.C. 2006) ("The as-applied challenge here . . . puts squarely before a court for the first time the issue of whether three particular ads are genuine issue ads, thereby forcing this Court to decide whether to limit its assessment of the purpose and effect of those ads to the information contained within the ads' four corners. Thus, since the *McConnell* Court was spared such a choice in dealing with the facial challenge it confronted, its references to purpose and effect are of limited significance in this matter today."). The four dissenting justices disagreed that this was an open question. According to Justice Souter's dissent, *McConnell* left open only "the possibility of a 'genuine' or 'pure' issue ad that might not be open to regulation under § 203." *WRTL II*, 127 S. Ct. at 2699 (Souter, J., dissenting). On this approach, any ad "reasonably understood as going beyond a discussion of issues" would be constitutionally proscribable. *Id.* ("While we left open the possibility of a 'genuine' or 'pure' issue ad that might not be open to regulation under § 203, we meant that an issue ad without campaign advocacy could escape the restriction. The implication of the adjectives 'genuine' and 'pure' is unmistakable: if an ad is reasonably understood as going beyond a discussion of issues (that is, if it can be understood as electoral advocacy), then by definition it is not 'genuine' or 'pure.'"). The other three justices read *McConnell* to have adopted a different test: "whether the advertisement is the 'functional equivalent of express advocacy.'" *Id.* at 2679 (Scalia, J., concurring in part and concurring in the judgment).

52. *Id.* at 2670 n.8 (majority opinion) (emphasis added).

53. *Id.*

the proscribed speech is constitutionally protected.[54] As discussed above, whether any as-applied challenges remain open after the rejection of a facial challenge does not turn on facial challenge doctrine alone but on how the challenged statute fares under the substantive constitutional test applied in the earlier challenge. Facial challenge doctrine cannot provide a full defense to the charge of sub rosa overruling.

II. The Promising "Turn to Remedy"

Notwithstanding the difficulties with some uses of facial challenge doctrine, the Roberts Court has already laid the foundation for a more fruitful approach to facial invalidation. It can be found in the Court's pivotal but neglected decision in *Ayotte v. Planned Parenthood of Northern New England*, in which Justice O'Connor authored the opinion for a unanimous Court.[55] In this, her last opinion for the Court, Justice O'Connor altered the framework for assessing the appropriateness of facial invalidation of abortion-related laws that lack a health exception and pointed the way toward a more promising approach to assessing the propriety of facial invalidation more generally. This approach focuses on the remedy of facial invalidation and requires the Court to examine the conditions under which that remedy is appropriate. This contrasts with the focus of the prior approach—which it has not yet entirely replaced—on the "weight" of the burden to be carried by one bringing a facial challenge. This Part explains the approach taken by the Court in *Ayotte* and answers Justice Ginsburg's and Professor Faigman's objections that the Court's approach to facial invalidation in *Gonzales* was inconsistent with precedent and is normatively misguided.

The lead question presented in the *Ayotte* petition for certiorari asked the Court to address the standard for facial challenges to abortion restrictions.[56] The First Circuit had facially invalidated New Hampshire's

54. *See, e.g.*, Hoffman Estates v. The Flipside, Hoffman Estates, 455 U.S. 489, 497 (1981) (describing the challenged ordinance as "a law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test").

55. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

56. Petition for Writ of Certiorari for Defendant-Appellant, *Ayotte*, 546 U.S. 320 (No. 04-1144), 2005 WL 474024 *1 ("Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S[outheastern] P[ennsylvannia] v. Casey*, 505 U.S. 833, 876–77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the 'no set of circumstances' standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?"). The Court's decision to grant certiorari in this case with respect to the *Salerno* versus *Casey* debate was puzzling. There were two factors weighing in favor of a grant. First, the decision below did identify a 6-1 split. Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53, 57–58 (1st Cir. 2004) (identifying 6-1 circuit split in favor of the *Casey* standard, consisting

law requiring parental notification for a minor to obtain an abortion.[57] The lead constitutional defect in the statute, according to the court of appeals, was that it lacked an explicit health exception.[58] The First Circuit understood the constitutional requirement of a statutory health exception as a requirement of legislative precision: a statute that lacks an explicit health exception restricts access to abortions that women are constitutionally entitled to obtain, and is therefore entirely unconstitutional.[59] This legislative-precision-based understanding of the need for a health exception came directly from *Stenberg v. Carhart*, in which the Court invalidated Nebraska's ban on partial-birth abortions because, among other reasons, it lacked a health exception.[60]

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of the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits versus the Fifth Circuit); *id.* at 58 n.4 (identifying the Fourth Circuit as "sympathetic" to the Fifth Circuit's approach). Second, that decision also weighed in on the split, aligning First Circuit law with the majority side of the split. *Id.* at 58 ("We agree with these six circuit courts that the undue burden standard—proposed as a standard 'of general application' by the *Casey* plurality, and twice applied to abortion regulations by a majority of the Court—supersedes *Salerno* in the context of abortion regulation." (internal citations omitted)). But there was a countervailing reason weighing against a grant. The First Circuit's resolution of the split was immaterial to its ultimate disposition of the case for lack of a statutory health exception. That is, although the First Circuit concluded that the "undue burden" standard of *Casey* governed, the court never determined whether the statute posed an undue burden. *See id.* at 65.

57. *Heed*, 390 F.3d at 65. The First Circuit's invalidation was "facial" in three senses: first, the Court ordered invalidation in response to a challenge styled as a "facial challenge." *See* Planned Parenthood of N. New Eng. v. Heed, 296 F. Supp. 2d 59, 63 (D.N.H. 2003) ("The plaintiffs seek a declaration that the Act is unconstitutional on its face."). Second, the invalidation turned solely on an examination of the statute on its face, along with other provisions of state law, in light of the constitutional requirement that the text contain a health exception. *See Heed*, 390 F.3d at 62 ("The New Hampshire Act contains no explicit health exception, and no health exception is implied by other provisions of New Hampshire law or by the Act's judicial bypass procedure. Thus, the Act is facially unconstitutional."). And third, the invalidation resulted in the unenforceability of the statute in all of its applications. *See id.* at 65 (describing the Act as "in its entirety unconstitutional" and affirming the district court's injunction against its enforcement).

58. The court of appeals drew the necessity for a statutory health exception from *Casey* and *Stenberg*, even though the Court's earlier decision in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), upheld a state parental notification requirement that did not contain an explicit health exception. *Heed*, 390 F.3d at 58 ("[T]the Supreme Court has . . . identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health." (citing *Stenberg*, 530 U.S. at 929–30)); *see also id.* at 60 ("[T]he *Hodgson* Court did not consider a challenge to that statute's lack of a health exception, and even if it had, the subsequent decisions in *Casey* and *Stenberg* would nevertheless require a health exception in the instant case." (footnote omitted)). In addition to holding the statute unconstitutional because it lacked a health exception, the Court also held that the statute's life-of-the-mother exception was too narrow. *Id.* at 62–64.

59. *See id.* at 59–60.

60. *See id.* at 60.

The Supreme Court unanimously vacated the judgment ordering facial invalidation and remanded for consideration of "relief more finely drawn."[61] The Court purported to leave its abortion precedents intact and to address a question of remedy only.[62] Yet *Ayotte* unmistakably changed substantive constitutional law governing health-based exceptions to abortion regulations. The Court in *Stenberg v. Carhart* had interpreted *Casey* to require that the statute itself contain a health exception.[63] Under this approach, the constitutional flaw inhered in the statute insofar as it criminalized constitutionally protected conduct. The switch in substantive law in *Ayotte* came in Justice O'Connor's description of the constitutional flaw to be remedied: "When a statute restricting access to abortion *may be applied in a manner that harms women's health*, what is the appropriate relief?"[64] This description altered the nature of the constitutional requirement for a health exception from the text-focused constitutional requirement of *Stenberg v. Carhart* to an application-focused requirement in *Ayotte*.

Having framed the constitutional problem as inhering in certain applications rather than in the statute itself, the First Circuit's facial invalidation was overly "blunt"[65] given that "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem."[66] This factual reality was irrelevant to the First Circuit's facial invalidation because it understood the constitutional requirement as one of legislative precision to be assessed by reference to

61. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 321 (2006).

62. *Id.* at 323 ("We do not revisit our abortion precedents today, but rather address a question of remedy: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response?").

63. *See Stenberg*, 530 U.S. at 930–31.

64. *Ayotte*, 546 U.S. at 328 (emphasis added).

65. *Id.* at 330.

66. *Id.* at 331. Justice O'Connor's opinion for the Court acknowledged the shift from *Stenberg*, in which the Court "held Nebraska's law unconstitutional because it lacked a health exception." *Id.* (A more precise description of *Stenberg* would be that the Court "held Nebraska's law [entirely] unconstitutional because it lacked [an explicit] health exception [in statutory text.]"). Justice O'Connor explained this departure from *Stenberg* with the assertion that "the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn." *Id.* This assertion is "artfully phrased," for while "the parties in *Stenberg* did not ask for more finely drawn relief, . . . an amicus brief filed by Feminists for Life did." Stuart Buck, The Buck Stops Here (January 20, 2006), http://stuartbuck.blogspot.com/search?q=ayotte. The "more finely drawn" relief advocated in this *amicus* brief did not relate to the health exception, but rather to the application of the challenged statute to D&E abortions. *See* Brief for Feminists for Life of America et al. as Amici Curiae Supporting Petitioners at 15, *Stenberg*, 530 U.S. 914 (No. 99-830), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/99-830/99-830fo1/brief.pdf.

statutory text. Yet under the Court's new application-based approach, consideration of this factual reality was essential to the proper disposition of the challenge.

Ayotte not only shifted the doctrinal test from looking at the text of the statute to how the statute would actually operate. The decision also implicitly changed the frame of reference for facial invalidation as previously set forth in *Casey*. The Court in *Casey* held that Pennsylvania's spousal notification requirement was facially invalid because it unduly burdened a "large fraction" of women.[67] The denominator of this "fraction" did not consist of "all women" or "all pregnant women" or all women "seeking abortions." Rather, it consisted of those women for whom the spousal notification requirement would be "an actual rather than an irrelevant restriction," i.e., the approximately one percent of 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."[68] The Court in *Ayotte* did not purport to apply *Casey*'s "large fraction" test, but instead assessed the proportion of unconstitutional to constitutional applications by reference to *all* pregnant minors seeking abortions.[69] Had the Court followed *Casey* in *Ayotte*, it would have had to affirm the First Circuit's facial invalidation because the denominator of the "large fraction" would have been only those pregnant minors for whom the absence of a health exception would be "an actual rather than an irrelevant restriction."[70]

Ayotte, therefore, answers Professor Faigman's criticism that the Court's approach to facial invalidation in *Gonzales* was inconsistent with *Casey* and *Stenberg*.[71] While it is true that the approach to facial invalidation in *Gonzales* cannot be reconciled with these earlier cases, that inconsistency is a function of *Ayotte*, the most recent and most directly on-point precedent regarding the absence of a statutory health exception from a law regulating abortion.

The Court's decision to uphold a federal ban on partial-birth abortions in *Gonzales* reversed contrary decisions by the Second,[72] Eighth,[73] and

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

68. *Id.* at 894–95.

69. *Ayotte*, 546 U.S. at 328 ("In some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health.").

70. *Casey*, 505 U.S. at 895.

71. Faigman, *supra* note 4, at 649–50.

72. Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006). Unlike the Eighth and Ninth Circuit decisions, this Second Circuit decision was not directly before the Supreme Court on certiorari in *Gonzales v. Carhart*. Moreover, unlike the Eighth and Ninth Circuit decisions,

Ninth Circuit Courts of Appeals.[74] Writing for a five-to-four majority, Justice Kennedy concluded that "[t]he 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."[75] Although the decision rejected the facial challenge, Justice Kennedy's opinion for the Court held open the possibility that the federal partial-birth abortion ban could at some later point be held unconstitutional with respect to some applications "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."[76]

Justice Ginsburg charged in her dissent that the Court erred by departing from *Casey*'s treatment of the "denominator" issue. But Justice Ginsburg's dissenting opinion does not acknowledge the inconsistency between *Ayotte* and *Casey* on precisely this issue. The dissenting opinion instead describes *Ayotte* as a case in which the facial challenge was "entertained,"[77] a description that is accurate but misleading given that *Ayotte vacated* the lower court's facial invalidation.[78]

Professor Faigman develops the criticism that *Gonzales* "squarely contradicts" the approach to facial invalidation taken in *Casey*.[79] Like Justice Ginsburg's dissent, however, Professor Faigman's article does not explain why the Court should have ignored *Ayotte* in favor of its earlier approach. Certainly, the Court bears significant blame for this state of affairs for not acknowledging in *Ayotte* its departure from *Casey*. It is likely that at least some of the justices who joined in the unanimous

this decision ordered additional briefing on the question of remedy based on its recognition that *Ayotte* may require a remedy other than facial invalidation. *Id.* at 281. The court then stayed its order pending the Supreme Court's decision in *Gonzales v. Carhart* and ordered supplemental briefing on the impact of the Court's decision in that case after it was decided. *See Nat'l Abortion Fed'n v. Gonzales*, 489 F.3d 125 (2d Cir. 2007). It subsequently ordered that judgment be entered for the government after the challengers conceded that *Gonzales v. Carhart* foreclosed their facial challenge. *See Nat'l Abortion Fed'n v. Gonzales*, 224 Fed. Appx. 88 (2d Cir. 2007)).

73. Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005).

74. Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

75. Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (2007).

76. *Id.*

77. *Id.* at 1651 (Ginsburg, J., dissenting).

78. In fairness to Justice Ginsburg, the reference to *Ayotte* as a case in which a facial challenge was "entertained" came in response to Justice Kennedy's assertion that "these facial attacks should not have been entertained in the first instance." *Id.* at 1638 (majority opinion). It is difficult to know precisely what to make of this statement given that the Supreme Court in *Gonzales v. Carhart* not only "entertained," but also rejected, the facial challenge.

79. Faigman, *supra* note 4, at 650.

opinion in *Ayotte* did not intend a departure from *Casey*, not the least of whom would be the author of both, Justice O'Connor.[80] Further, Justice Kennedy's opinion for the Court in *Gonzales* does not treat *Ayotte* as having displaced *Casey* even though the analysis above concludes that it has. If *Ayotte* does displace *Stenberg*'s use of *Casey* with respect to the absence of a health exception, however, then the charge of inconsistency cuts both ways, requiring justification for choosing the old over the new.

In addition to inconsistency with precedent, Professor Faigman condemns *Gonzales* for failing to contemplate the "constitutional costs" that its insistence on as-applied adjudication imposes on women affected by the absence of a health exception.[81] Professor Faigman states that the Court's approach requires that "a woman who confronted potential health complications with a second trimester abortion . . . would have to petition a court to enjoin application of the statute to her."[82] Because the "structural impediments" to such a lawsuit are great, "it is quite unlikely that many as-applied challenges will be brought."[83] Consequently, Professor Faigman concludes that "by moving the frame of reference from an at-large determination to a case-by-case determination, the Court made it impossible for women to vindicate a right that the Court itself said existed: the right of a woman to choose a pre-viability abortion without undue interference by the government."[84]

This practicability objection rests on an unduly narrow understanding of just what alternatives the Court's opinion leaves open. It is not necessary after *Gonzales* for an individual woman seeking an abortion to bring suit. Nothing in that decision purports to eliminate the third-party standing of abortion doctors to assert their patients' rights. More importantly, an as-applied challenge would not need to be limited to the circumstances of an individual woman, but could encompass sets of potential patients defined by reference to constellations of medical circumstances rendering the partial-birth procedure the safest in light of those circumstances.[85] All of which is to say that a pre-enforcement, as-

80. *See* David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 701 n.57 (2009) ("The various sections of the Joint Opinion in *Casey* were not separately attributed, but researchers using the papers of Justice Blackmun have since confirmed what everybody suspected at the time—that Justice O'Connor wrote the section striking down the spousal notification provision.").

81. Faigman, *supra* note 4, at 663.

82. *Id.*

83. *Id.*

84. *Id.*

85. Transcript of Oral Argument at 24, Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (No. 05380), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcri

applied challenge would look very much like the facial challenges that gave rise to *Gonzales*. The key difference is that the as-applied challenge would focus only on a subset of potential statutory applications, rather than all of them. The issue would be whether the Act constitutionally could be applied in certain circumstances, not whether it constitutionally could be applied at all.[86]

I agree with Professor Faigman that the Court should make "a frank assessment of the consequences of insisting on as-applied challenges" and either abandon its insistence or "identify a mechanism that would [give] some substance to such challenges."[87] But there is strong evidence that the Court undertook just such an assessment in the course of deciding *Gonzales*. The Solicitor General's acknowledgement "that preenforcement, as-applied challenges to the Act can be maintained"[88] came in response to pointed questioning from Justices Breyer and Kennedy at oral argument.[89] And Justice Ginsburg's questioning elicited the further explanation from Solicitor General Clement that an as-applied challenge could be brought with respect to a range of potential applications defined by the medical circumstances that abortion doctors themselves could identify as appropriately calling for a partial-birth abortion as the safest alternative.[90] Presumably, it is a challenge of this sort that the Court intended to leave open "to protect the health of the woman if it can be shown 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."[91] Faigman offers no reason to believe that such a challenge could not be brought. Without addressing the inadequacy of the alternative that the Court left open, it overstates the objection to assert that "Kennedy's opinion suggesting as-applied challenges as a bona fide alternative is either self-delusion of the highest magnitude or a crass political maneuver designed to dispose of all

pts/05-380.pdf ("[M]y understanding is that even when you talk about an idiosyncratic condition, I mean, the doctors who perform these abortions perform, you know, hundreds of them a year and they can identify those conditions and they have names for those conditions and I think it would be amenable to bringing a more as applied challenge." (argument of Solicitor General Paul D. Clement)).

86. *See id.* at 22 ([W]hat you would have in mind is a doctor who had standing under this Court's abortion jurisprudence would come in and say, look, in my practice I've seen that this procedure would be particularly useful in dealing with preeclampsia or placental previa or some condition.").

87. Faigman, *supra* note 4, at 664.

88. Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (2007) (citing Transcript of Oral Argument Transcript at 21–23, *Gonzalez*, 127 S. Ct. 1610 (No. 05380)).

89. Transcript of Oral Argument at 18–23, *Gonzalez*, 127 S. Ct. 1610 (No. 05-380).

90. *Id.* at 23–24.

91. *Gonzales*, 127 S. Ct. at 1638.

of these cases, notwithstanding substantial health risks created for women, without owning-up to that reality."[92]

The extent to which *Gonzales* is best understood as an application of the *Ayotte* approach is certainly debatable. The opinion in *Gonzales* speaks in terms of the "heavy burden" imposed on parties bringing a facial challenge, and offers *Salerno*'s "no set of circumstances" test and *Casey*'s "large fraction" test as two alternatives for describing "[w]hat that burden consists of in the specific context of abortion statutes."[93] With this framing of the problem, the Court threatens to undo the progress that it made in *Ayotte* away from the misguided *Salerno* versus *Casey* "debate." It also threatens to prolong the use of facial challenge doctrine as an obstacle to clear argument about frames of reference rooted in substantive constitutional law.

The Court recognized in *Ayotte* that its prior approach had mandated a too-hasty facial invalidation in *Stenberg*. Although the Court's accounting for its insistence on as-applied adjudication in *Gonzales* is not entirely satisfying, the reason for this is not inconsistency with precedent but the failure explicitly to embrace the better of the two strands of precedent available to it. The advantage of *Ayotte* over *Stenberg* is that *Ayotte* asks the right question: what justification is there in this case for declaring a statute invalid in all its applications and enjoining it in its entirety?

Because the New Hampshire legislature repealed the parental notification statute at issue in *Ayotte* before the district court could rule on more finely tailored relief,[94] it is unknown whether a partial injunction against all, but only, the unconstitutional applications of New Hampshire's parental notification statute would have been feasible or consistent with legislative intent. But it certainly seems correct that such tailored relief ought to be considered before the more potent remedy of total invalidation.[95] The process of considering more tailored relief would allow courts to take into account on a case-by-case and doctrine-by-doctrine basis the factors that Professor Faigman appropriately contends ought to be considered: the practicability of meaningful case-by-case analysis, the constitutional values at risk in adopting or failing to adopt an at-large

92. Faigman, *supra* note 4, at 663.

93. *Gonzales*, 127 S. Ct. at 1640.

94. *See* Planned Parenthood of N. New Eng. v. Ayotte, 571 F. Supp. 2d 265, 270–71 (D.N.H. 2008).

95. *Cf.* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Interpretation*, 2002 UTAH L. REV. 381, 456–61 (advocating the use of "classical avoidance supported by an injunction" as a remedy to be considered by federal courts facing overbreadth and vagueness challenges).

decision, and the costs associated with at-large decisions versus case-by-case adjudication.[96]

Conclusion

Facial challenge doctrine not only defines the frame of reference in some cases, but also operates in other cases to influence the likelihood that a challenge will succeed within a frame set entirely by substantive law. A persistent difficulty bedeviling the deployment of facial challenge doctrine is the insufficient attention paid to the interdependence of that doctrine and the underlying substantive constitutional law that it implements. This difficulty can be met by reorienting the doctrine from one that focuses on the weight of a challenger's burden to one that focuses on the propriety of facial invalidation as a remedy. The Court's adoption of this approach in *Ayotte* is promising, but the Court has yet to follow through in a way that allows the *Ayotte* approach to live up to its promise.

96. *See* Faigman, *supra* note 4, at 659.

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