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Note*


TABLE OF CONTENTS

I. Introduction ............................................. 760
II. Background ............................................. 762
   A. Legal Background of the Overbreadth Doctrine .... 762
   B. History of the First Amendment Overbreadth Doctrine ............................................. 764
   C. Overbreadth Doctrine Outside of the First Amendment ............................................. 765
      1. The Court's Words ...................................... 765
      2. The Court's Actions .................................... 766
   D. Abortion Overbreadth Hypothetical ................ 767
   E. Abortion History Examining the Use of Overbreadth ............................................. 768
   F. Gonzales v. Carhart ..................................... 771
III. Analysis .............................................. 775
   A. The Court Should Reject Overbreadth in Abortion 776
      1. Arguments for Applying the Overbreadth Doctrine Are Unpersuasive .................... 777
         a. Chilling Rationale in Abortion Cases ............ 778
         b. Careful Drafting Rationale in Abortion Cases ............................................. 781
      2. Overbreadth Improperly Shifts Power Between Branches ..................................... 782

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* Joshua C. Howard, B.A., B.S.Ed. 2006, University of Nebraska—Lincoln; J.D. expected May 2009, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Executive Editor, 2008–2009). This Article is dedicated to my mom, Mabel, who passed away during the editing process. She was a determined and compassionate woman who instilled in me a yearning to learn and achieve. I also want to give special thanks to my wife, Jill, who is probably glad that she will not have to read any more drafts; my dad, Jim, who always reassured me of my abilities; and my brother, Jim, who taught me that non-dairy creamer is flammable.
I. INTRODUCTION

When Gonzales v. Carhart1 ("Carhart II") was announced, reactions were anything but soft-spoken or ambivalent. The case certainly struck a nerve; the decision was described on one hand as "a shocking setback,"2 "irrational, voyeuristic, piggish and without redeeming legal value,"3 and "alarming,"4 but on the other hand as "a very historic decision"5 and "incredibly important."6 Despite the outcry it inspired, the decision's effect on actual abortions performed will be minimal. In Carhart II, the Supreme Court reversed the holdings of the Eighth and Ninth Circuit Courts of Appeals and upheld the Partial Birth Abortion Act of 2003.7 The Act bars women from obtaining a partial-birth abortion,8 a procedure which accounts for only .17% of all abortions, or approximately 2,232 annually, in the United States.9 Further, the Act is unlikely to actually preclude these abortions—rather

8. Id. at 1621–23. Partial-birth abortion is a colloquial term for a late term abortion procedure. Partial-birth is a variation of the more common dilation and evacuation (D & E) procedure and is known alternately as dilation and extraction (D & X) or intact D & E. The primary difference between the D & E and D & X procedures is how the fetus is removed. During a D & E, the doctor intends to remove the fetus intact; in contrast, a doctor removes the fetus through many passes during a D & E procedure. A more thorough description of these and other abortion procedures can be found in id. at 1621–23.
9. Lawrence B. Finer & Stanley K. Henshaw, Abortion Incidence and Services in the United States in 2000, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 13 (2003), available at http://www.guttmacher.org/pubs/psrh/full/3500603.pdf. Although the Court suggests that there is no definitive measure of the percentage of abortions that involve D & X, the aforementioned study indicates that the number is low.
it will merely ensure that an alternate abortion procedure will be utilized.\(^{10}\) *Carhart II*'s real significance lies in the explanations and details of the majority opinion. Within the opinion, the Court rationalized and clarified, as well as clouded, previous jurisprudence on medical uncertainty, the appropriate standard of review, and the vagueness and overbreadth doctrines.

This Note focuses on what *Carhart II* signals for future legal analysis in determining when an abortion law is facially invalid. Noting that the standard for facial review in abortion cases remained undecided, the *Carhart II* majority suggested two possible standards.\(^{11}\) The Court could apply the traditional rule that a law is facially invalid if "no set of circumstances exists under which the act would be valid."\(^{12}\) Alternatively, the Court could apply a standard which facially invalidates a law if it imposes an undue burden "in a large fraction of the cases in which [it] is relevant."\(^{13}\) However, instead of selecting a test, the Court followed the famous advice of Yogi Berra: "when you come to a fork in the road, take it."\(^ {14}\) The Court determined a facial challenge to the Act failed either test, and therefore stated, "We need not resolve that debate."\(^ {15}\)

This Note examines the resolution that the Court should adopt in the future. Part II provides background on the overbreadth doctrine, including a historical overview of the doctrine's application in its traditional context of the First Amendment. Further, Part II provides a brief review of abortion precedents with an emphasis on facial challenges and concludes with an analysis of the key holdings and rationalizations in *Carhart II*. In Part III, the Note analyzes the merits of the possible abortion overbreadth tests. Section A will analyze which test is superior, based on congruency with prior precedent and probable effects. Within this section, arguments for traditional overbreadth are considered and found to be unconvincing in the abortion context. This section also observes the inappropriate shift in power favoring the judicial branch that the overbreadth doctrine would cause within the abortion arena. This section ends with a discussion of the grave difficulty that would arise in applying a large-fraction test and the

\(^{10}\) *Carhart II*, 127 S. Ct. at 1639. Other available procedures include D & E and medical induction. The majority opinion notes that women will still have available abortion methods: "D & E and intact D & E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction.... Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications." *Id.* at 1623.

\(^{11}\) *Id.* at 1639.

\(^{12}\) *Id.* (citations omitted).

\(^{13}\) *Id.*

\(^{14}\) YOGI BERRA, WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT!: INSPIRATION AND WISDOM FROM ONE OF BASEBALL'S GREATEST HEROES (Hyperion 2001).

\(^{15}\) *Carhart II*, 127 S. Ct. at 1639.
risk that such a test might tempt the Justices to adhere to their moral beliefs rather than the law. Finally, section B suggests which standard the Roberts Court would likely adopt if faced with such a decision, based on a review of the Justices’ previous remarks and decisions.

II. BACKGROUND

A. Legal Background of the Overbreadth Doctrine

Under traditional challenges to the constitutionality of a statute, the deciding court issues either a facial or an as-applied holding. An as-applied holding invalidates the law only as it pertains to a particular individual and their unique circumstances. In considering an as-applied challenge, a court asks only whether the particular person's activities were constitutionally protected. If the individual's rights were violated, then the breadth of the statute may be limited by simply severing the unconstitutional portions. Alternatively, a facial challenge questions the constitutionality of the statute in its entirety. In sum, statutes that are structurally unconstitutional typically require facial invalidation, while statutes that violate individual rights commonly require as-applied invalidation.

Two types of facial invalidation have evolved as well. The first reflects a "traditional" facial challenge, typically based on a structural issue in the statute. The statutory defect under such a challenge is not the statute's applicability but rather the statutory terms themselves. The second type is the overbreadth facial challenge, which originally only applied to First Amendment cases. An overbreadth challenge suggests a statute has too many unconstitutional applications, and they outweigh the constitutional applications to such an ex-

19. David H. Gans, Strategic Facial Challenges, 85 B.U. L. REV. 1333, 1334 (2005). The severed unconstitutional part of the law would be removed; therefore, it could no longer be applied to the person who brought the challenge or anyone else.
20. Id.
23. Id. at 363–65. United States v. Morrison, 529 U.S. 598 (2000), serves as one example where the Court held that the challenged law was facially unconstitutional because Congress had insufficient power to create the regulation under the Commerce Clause.
tent that the statute ought to be held facially unconstitutional.25 Notably, a court must hypothesize possible applications of a statute to determine the relation of unconstitutional applications to all applications.26 Thus, the court is using an "empirical" test to create a ratio of the applications.27

The traditional facial challenge standard was announced in United States v. Salerno:28 "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid."29 To invalidate a statute under the Salerno standard, a court must not be able to hypothesize any possible constitutional applications of the statute.30 Furthermore, an individual litigant's constitutional rights must have been burdened; otherwise, the no-set-of-circumstances test would fail. This means the litigant must also have a valid as-applied challenge, relying on his or her own constitutional rights. The stringent nature of the Salerno test indicates why courts tend to facially invalidate laws only for structural defects, which apply to all persons under the statute.31 Despite strong criticism from both judges and commentators, the Salerno rule continues to govern facial challenges.32

In contrast, under an overbreadth challenge, the litigant does not argue that his or her actions were protected.33 Instead, the litigant argues that the statute is unconstitutional as applied to "too many"

26. Broadrick, 413 U.S. at 615.
27. Luke Meier, A Broad Attack on Overbreadth, 40 VAL. U. L. REV. 113, 131–32 (2005) ("The court must ponder the numerous situations in which the statute in question might be applied, weigh the speech and state interests in each fact pattern and 'predict' how those competing interests would be resolved if actually litigated, and then calculate the empirical relationship between the number of applications that would be constitutional and those that would be unconstitutional.").
29. Id. at 745 (emphasis added).
30. Isserles, supra note 16, at 383 ("Salerno's test for judging facial claims on the merits seems to invite, indeed to require, consideration of the very hypothetical claims ... a litigant can overcome Salerno's facial challenge test only by a Herculean effort at hypothetical litigation: a demonstration that each and every application of the statute would be unconstitutional.").
31. Meier, Broad Attack, supra note 27, at 133 (stating that the facial invalidity is due to a defect in the statute, without regard to the statute's applications).
32. Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of the petition for certiorari) ("The dicta in Salerno 'does not accurately characterize the standard for deciding facial challenges,' and 'neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.'") (quoting Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L. REV. 235, 236, 238 (1994))).
people that are not presently before the court, and because of the num-
ber of these unconstitutional applications, the law should be stricken.34 Thus, the overbreadth doctrine allows for third-party standing because the litigant is defending the rights of others not before the court.35 The overbreadth doctrine also has less stringent rules for facially invalidating a statute. Even if there is a constitutio
nal application of the statute, an overbreadth challenge allows invalidation of a statute as long as the statute is too broad. A better understanding of the intricacies of the overbreadth doctrine can be gained from the following review of overbreadth case law.

B. History of the First Amendment Overbreadth Doctrine

The overbreadth doctrine began with the 1940 Supreme Court case, *Thornhill v. Alabama.*36 *Thornhill* noted that free speech rights are inherently important to democratic government as democracy requires the free exchange of ideas and an educated public.37 To justify its actions, the Court spawned the overbreadth doctrine by stating that while the petitioner could not argue that his rights had been violated, he could “complain of the sweeping regulations.”38 Although the Court did not refer to its newly created doctrine as one of overbreadth, it applied third-party standing and allowed the litigant to challenge the sweep of the rule against hypothetical litigants rather than him.39

In 1973, the Court further clarified and narrowed the overbreadth doctrine in another free speech case, *Broadrick v. Oklahoma.*40 *Broadrick* noted that “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly

34. Isserles, supra note 16, at 366.
37. *Thornhill,* 310 U.S. at 95–97 (“The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.”).
38. Id. at 96.
39. Id.
legitimate sweep." Broadrick changed the doctrine by requiring a law to not only be overbroad but also substantially overbroad. Thus, Broadrick requires courts to hypothesize about the sweeping effects of a law, estimate the likely number of unconstitutional applications, decide at what point this fraction becomes too large, and determine whether the fraction of overbroad applications for the statute under review has surpassed the "substantial" threshold.

In reaching its holding, the Court noted that the overbreadth doctrine was "manifestly, strong medicine," and that it should be used "sparingly and as a last resort." The Court also pointed out that the overbreadth doctrine is a departure from traditional judicial tenets that will only be entertained in the First Amendment context. Further, the overbreadth doctrine should only be used for facial invalidation if partial invalidation by severing the unconstitutional part of the statute is impossible. Although the Court has heard many overbreadth cases since Broadrick, there has been no substantial change to the basic structure of the doctrine. Thus, the overbreadth doctrine remains alive and well.

C. Overbreadth Doctrine Outside of the First Amendment

1. The Court's Words

Until recently, the Court has been relatively clear in its language that the overbreadth doctrine cannot be used outside the First

41. Id. at 615 (emphasis added).
42. Meier, Broad Attack, supra note 27, at 131.
43. Id.
44. Broadrick, 413 U.S. at 613.
45. Id.
46. Id. The Court initially limited the effect of the overbreadth doctrine not only by confining it to free speech cases but also by requiring partial invalidation if possible. "The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." Id.
47. Notable cases have held laws are substantially overbroad. See, e.g., Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (holding that a law banning "adult-oriented materials" was substantially overbroad); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (holding that an airport regulation which banned all free speech rights within the airport was substantially overbroad). On the other hand, a number of cases have found that the laws were not overbroad using the Broadrick test. See, e.g., Hill v. Colorado, 530 U.S. 703 (2000) (upholding a statute making it illegal to hand out pamphlets within one hundred feet of a nursing home without proper consent); New York v. Ferber, 458 U.S. 747 (1982) (holding that a statute restricting the promotion of child pornography was not substantially overbroad). Since Broadrick, the Court has also found that overbreadth does not apply to commercial speech, but the Broadrick substantial overbreadth test did not change. Bigelow v. Virginia, 421 U.S. 809 (1975).
Amendment. Despite the Court’s specific enunciations, the Court’s application of the overbreadth doctrine appears to be anything but clear or limited solely to the First Amendment. In 1984, the Court plainly stated, “outside the limited First Amendment context, a criminal statute may not be attacked as overbroad.”48 Again, in 1987, the Court said, “we have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”49 However, a distinction has existed between what the Court has said regarding the application of the overbreadth doctrine and what it has done. Recently, the Court has conceded this contradiction.50

2. The Court’s Actions

In 2004, the Court finally divulged that they had been using the overbreadth doctrine outside of the First Amendment:51 “[W]e have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings.”52 Specifically, the Court acknowledged having applied the overbreadth doctrine outside the First Amendment in three distinct areas: the right to travel,53 abortion,54 and legislation under Section Five of the Fourteenth Amendment.55 After listing these “few” applications, the Court said that overbreadth invalidation is not applicable outside these four contexts.56 The Court’s acknowledgment that it has long applied the overbreadth doctrine outside the First Amendment did not come as a surprise, as the dichotomy between what the Court has said and done with regard to the doctrine has long been recognized.57 The Court’s confession may not have been complete, however. One commentator58 contends there are numerous other legal arenas in which the Court

51. Id.
52. Id. at 609.
53. Aptheker v. Sec’y of State, 378 U.S. 500 (1964) (holding that a law restricting the right to travel based on political affiliations was too broad).
56. Sabri v. United States, 541 U.S. 600, 610 (2004). The four contexts include the aforementioned right to travel, abortion, legislation under section five, as well as free speech.
57. John F. Decker, Overbreadth Outside the First Amendment, 34 N.M. L. Rev. 53, 79 (2004); Dorf, supra note 32, at 282 (“[T]his discussion demonstrates the gross overstatement of the Court’s pronouncement in Salerno that it has ‘not recognized an overbreadth doctrine outside the limited context of the First Amendment.’” (citations omitted) (emphasis added)).
has applied the overbreadth doctrine, including the right to privacy against surveillance,\textsuperscript{59} the right to privacy regarding contraceptives,\textsuperscript{60} the right to vote,\textsuperscript{61} and the right to raise children.\textsuperscript{62}

D. Abortion Overbreadth Hypothetical

The concept of overbreadth in abortion can be difficult to conceptualize. A simplified hypothetical may help to clarify how overbreadth works in abortion. Suppose that a legislature enacts a law banning all post-viability abortions without any exceptions for women’s health. Further assume that a court would use \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}\textsuperscript{63} as precedent to hold that an exception for the health of the woman must exist for post-viability abortion restrictions.

Now suppose Peggy has carried a fetus for twenty-eight weeks and is suffering no medical complications due to her pregnancy. She wants to have an abortion due to financial hardships, but is unable to obtain an abortion because the law banned all post-viability abortions.

Peggy would have two potential types of challenges: as-applied and facial. If she files an as-applied challenge, she would argue that her rights had been constitutionally violated. Peggy would lose this suit, however. Following the \textit{Casey} precedent, a court would find that her right to privacy had not been violated because the fetus was viable, and she was suffering no health problems. Consequently, a legislature could legally restrict her right to privacy.

Now suppose that Peggy files a facial challenge. Instead of arguing that her rights had been violated, she claims that the law was overbroad. Based on the overbreadth doctrine, Peggy claims that the statute will unconstitutionally burden a large fraction of women to whom the statute is relevant. The numerator of the fraction would consist of women to whom the law unconstitutionally burdens; in this scenario, the numerator would consist of women who require abortions for health concerns after viability. The denominator would be made up of all relevant women with a court having discretion in choosing the framing. The court would then be left with the task of determining if

\textsuperscript{59} Berger v. New York, 388 U.S. 41 (1967) (holding that a statute allowing eavesdropping by the police without sufficient reason was unconstitutionally overbroad under the Fourth and Fourteenth Amendments).

\textsuperscript{60} Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a law restricting contraceptive use violated the right of marital privacy).

\textsuperscript{61} Louisiana v. United States, 380 U.S. 145 (1965) (holding that a statute requiring voters to demonstrate comprehension of state and federal constitutions violated the Fifteenth Amendment).

\textsuperscript{62} Troxel v. Granville, 530 U.S. 57 (2000) (holding that a law that allowed the court to grant visitation rights to people despite the mother’s wishes violated her due process rights).

\textsuperscript{63} 505 U.S. 833, 846 (1992).
this fraction was large. If so, Peggy would win the facial challenge, and the law would be struck down. Thus, Peggy may have made a successful challenge based on the law's unacceptable effects, not to her, but to other women. However, note that under the traditional Salerno no-set-of-circumstances test for facial invalidation, Peggy would lose her challenge because her own situation would be a circumstance where the law was valid. This scenario indicates that the determination of whether to apply the traditional facial challenge or overbreadth to abortion cases will have real, demonstrable effects.

E. Abortion History Examining the Use of Overbreadth

A thorough review of abortion cases, with an eye to the overbreadth doctrine, shows that courts have applied the doctrine to abortion cases since Roe v. Wade in 1973.64 Roe, the landmark case invalidating a Texas statute prohibiting abortion based on substantive due process, noted that the lower court held that the statute was an "overbreadth infringement on the plaintiffs' Ninth Amendment rights."65 Although not explicitly relying on the overbreadth doctrine, the Court wrote that the statute "sweeps too broadly" in restricting abortions for the woman's health.66 Justice Scalia and former Chief Justice White subsequently reflected that Roe "seemingly employed an 'overbreadth' approach—though without mentioning the term and without analysis."67 Thus, Roe may be read as an implicit application of the overbreadth doctrine.

In 1990, the Court explicitly referenced the Salerno rule in Ohio v. Akron Center for Reproductive Health.68 In reversing a circuit court's ruling that a statute requiring parental notification was unconstitutional, the Court stated, "because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'"69 Despite the Court's statements, the use of the Salerno no-set-of-circumstances standard for abortion did not last long and has not been used since.

The next landmark abortion case was Planned Parenthood of Southeastern Pennsylvania v. Casey70 in 1992. Casey reaffirmed Roe71 and found that a statute requiring spousal notification imposed
an "undue burden" on women seeking abortions. The Court specifically rejected the trimester framework of Roe, stating that it was not essential to the holding of Roe, and instead utilized a new undue burden standard. The respondents based their argument in part on the Salerno standard and argued that the law had many constitutional applications. Instead of applying Salerno to decide whether an undue burden existed, the Court used the large-fraction test: if "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion[,] it is an undue burden, and therefore invalid." To determine the fraction, the Court repeatedly narrowed the number of women to whom it deemed the law to be relevant until the fraction was equal to one. The Court made both the numerator and denominator equal the number of women to whom the law was a substantial obstacle. The Court reasoned that it should only analyze the law's effect on the women it restricted.

Although the Casey majority never explicitly admitted to applying the overbreadth doctrine in their analysis, that is, in effect, exactly what they did. Indeed, the similarity between the overbreadth doctrine and the Casey large-fraction test is striking. Under each, a court

we do so today. . . . [I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in Roe was based on a constitutional analysis which we cannot now repudiate." Id. 72.

72. Id. at 898.
73. Id. at 873.
74. Id. at 894.
75. Id. at 895.
76. Id. at 894–95 ("By selecting as the controlling class women who wish to obtain abortions, rather than all women or all pregnant women, respondents in effect concede that [the statute] must be judged by reference to those for whom it is an actual rather than an irrelevant restriction. Of course, as we have said, [the statute's] real target is narrower even than the class of women seeking abortions identified by the State: it is married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement.").
77. Id. at 894–95.
78. Id. at 894.
79. Numerous commentators have opined that the Court used the doctrine or at least a "functional equivalent." Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 356 (2006); see also Decker, supra note 57, at 104 (rationalizing that the large-fraction rule "may be nothing more than another way to say the same thing" as substantial overbreadth); Dorf, supra note 32, 275–76 (indicating that the Casey Court applied reasoning similar to overbreadth and stating, "[t]he Casey plurality thus applied 'substantial overbreadth' analysis"); Isserles, supra note 16, at 362–63 (writing that the Court used a "test modeled on the First Amendment Overbreadth Doctrine"); Kevin Martin, Note, Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence, 99 COLUM. L. REV. 173, 173 (1999) (asserting plainly that overbreadth exception has been extended to abortion jurisprudence).
must decide whether there is an impermissible fraction of unconstitu-
tional applications out of the total number of possible
applications. The two tests in practice are merely one test with two names. The Casey majority even relied upon the potential chilling effect of the statute—which is a common overbreadth doctrine rationale for invalidation—in its analysis: "We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."

In 2000, the Court addressed the next major facial challenge abortion case, Stenberg v. Carhart ("Carhart I"). In the decision, the Court upheld the invalidation of Nebraska's ban on "partial birth" abortions, on grounds that the law provided no exception for the health of the woman and burdened a woman's right to choose the procedure. The Court never clarified which test it applied in determining whether an undue burden existed. However, based on the majority's rationale, the Carhart I test is a far less demanding test than Salerno and might possibly be even less rigorous than Casey. Although Carhart I did not indicate which standard the Court should

80. Meier, Broad Attack, supra note 27, at 167.
81. Casey, 505 U.S. at 894. The Court's use of an overbreadth rationale indicates that the Court responded to similar concerns as those within the First Amendment and indeed came to a similar solution. For a discussion regarding the chilling rationale for the overbreadth doctrine, see Fallon, supra note 36, at 867-70.
82. 530 U.S. 914 (2000).
83. The Nebraska statute defined partial-birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." NEB. REV. STAT. § 28-326(9) (Supp. 1999), invalidated by Carhart I, 530 U.S. 914. The petitioners argued that the statute only banned D & X abortions. Contrarily, the Court held that both D & X and D & E abortions were prohibited by the statute.
84. Carhart I, 530 U.S. at 930
85. Id. at 929-45. The Court alluded to their rationale throughout the opinion, without ever directly stating what standard it used in reviewing the constitutionality. The Court stated that its opinion is based on Casey, in holding "Nebraska has not convinced us that a health exception is 'never necessary to preserve the health of women.'" Id. at 937-38. The Court appeared to reason that a singular restriction on a constitutional abortion right is "a large fraction." Justice Thomas, in dissent, argued that the majority never indicated that it applied the large-fraction test because, in his opinion, "the Nebraska statute easily survives it." Id. at 1020 (Thomas, J., dissenting). Because any Act which survives the Casey large-fraction test must necessarily also survive the Salerno standard, Thomas appeared to imply that the Court has created a new test altogether.
use in future abortion cases, it reflected the Court's abandonment of
Salerno.

F. Gonzales v. Carhart

In 2003, in the wake of Carhart I, Congress passed a federal ban prohibiting "partial-birth" abortions. Two facial challenges to the ban were filed in the United States District Courts for the District of Nebraska and the Northern District of California. Both district courts enjoined the enforcement of the ban, and the Eighth and Ninth Circuit Courts affirmed. The Supreme Court then granted certiorari and heard the cases together. On April 18, 2007, the Supreme Court decided the joined cases in Carhart II, holding in a five-four decision that the ban survived a facial challenge.

Justice Kennedy began the majority opinion with a detailed analysis of the types of abortion procedures and a discussion of the history leading up to the ban in Carhart II. Next, the majority opinion applied the central tenets of Casey. Beginning its analysis, the major-

86. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003). As the Carhart II majority noted, the federal "Act responded to [Carhart I] in two ways. First, Congress made factual findings. . . . Second, . . . the Act's language differs from that of the Nebraska statute struck down in [Carhart I]." Carhart II, 127 S. Ct. 1610, 1624 (2007). Congress decided that the findings of the District Court in Carhart I were questionable. Id. Congress came to its own findings for the Act stating that partial-birth abortion was never medically necessary. Id. The Act's language also includes "anatomical landmarks" to describe the banned procedure and scienter requirements to prevent criminalization when intent is absent. Id. at 1627–28.

87. For the purpose of the statute: "the term 'partial-birth abortion' means an abortion in which the person performing the abortion—(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus." 18 U.S.C. § 1531(b)(1).

89. Id.
90. Id.
91. Id. at 1618. Justice Kennedy wrote the majority decision for the Court. Id. Justices Roberts, Scalia, Thomas, and Alito joined the majority opinion. Id. Justice Thomas also wrote a concurring opinion with which Justice Scalia joined, and Justice Ginsburg authored the dissent with Justices Stevens, Souter, and Breyer joining. Id.
92. Id. at 1620–23.
93. Id. at 1623–26.
94. Id. at 1626–27, 1639. The opinion seems to indicate that the Court did not revisit the validity of Casey but only applied its principles. Kennedy, Roberts, and Alito did not indicate that they believed Casey was incorrectly decided. However, Thomas wrote, with Scalia joining, that "the Court's abortion jurisprudence, in-
ity determined that the Act's scope was limited to D & X abortions and did not apply to D & E abortions, despite the respondents' arguments.\textsuperscript{95} Further, the majority reasoned that the "anatomical landmarks"\textsuperscript{96} contained within the law as well as the overt act\textsuperscript{97} and scienter\textsuperscript{98} requirements prevented the Act from encompassing D & E abortions.\textsuperscript{99} The majority then stated that the Act was not invalid based on vagueness because it provided "doctors 'of ordinary intelligence a reasonable opportunity to know what is prohibited.'"\textsuperscript{100} Unlike the Nebraska Act, which prohibited a fetus being delivered a "substantial portion" before an abortion, the majority held that the federal Act contained a sufficient division between lawful and unlawful acts by using anatomical landmarks.\textsuperscript{101} The majority reasoned that the landmarks along with the intent requirement prevented the statute from being overly vague.\textsuperscript{102}

After determining the statute was not void for vagueness or overbreadth, the majority held that the Act did not impose an undue burden.\textsuperscript{103} The majority decided that the lack of an exception for the woman's health was not fatal to the Act because medical uncertainty existed over whether the banned procedure was ever necessary to protect the health of the woman.\textsuperscript{104} Next, the majority addressed "whether the Act can stand when this medical uncertainty persists."\textsuperscript{105} The majority cited cases indicating that the Court had given legislatures discretion when medical uncertainty existed in holding that "[m]edical uncertainty does not foreclose the exercise of legisla-

\textsuperscript{95} Id. at 1627 (majority opinion).
\textsuperscript{96} The anatomical landmarks are included in the definition of partial-birth abortion. See supra note 87.
\textsuperscript{97} 18 U.S.C. § 1531(b)(1)(B) (2003) specifically states "performs the overt act, other than the completion of delivery, that kills the partially delivered fetus."
\textsuperscript{98} 18 U.S.C. § 1531(b)(1)(A) states that the act of partially delivering the fetus must be "deliberately and intentionally" to be considered a partial-birth abortion. The Court held that if the fetus was delivered past the anatomical landmarks by "accident or inadvertence, the Act is inapplicable." Carhart \textit{II}, 127 S. Ct. at 1628 (citation omitted). Further, the Court stated that "the fetus must have been delivered 'for the purpose of performing an overt act that the [doctor] knows will kill [it].'" Id. (quoting 18 U.S.C. § 1531(b)(1)(B)) (alterations in original).
\textsuperscript{99} Carhart \textit{II}, 127 S.Ct. at 1627-28.
\textsuperscript{100} Id. at 1628 (quoting Grayned v. City of Rockford, 408 U.S. 102, 108 (1972)).
\textsuperscript{101} Id. The majority plainly concluded its reasoning stating, "Doctors performing D & E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability." Id.
\textsuperscript{102} Id. ("[T]he act cannot be described as 'a trap for those who act in good faith.'") (quoting Colautti v. Franklin, 439 U.S. 379, 395 (1979)).
\textsuperscript{103} Id. at 1632.
\textsuperscript{104} Id. at 1635-38.
\textsuperscript{105} Id. at 1636.
tive power.” Further considerations including alternative measures of abortion also influenced the majority in its decision to uphold the statute. In reaching its decision, the majority also acknowledged the government’s legitimate interests, including the integrity and ethics of the medical profession, the potential life of the fetus, valuation of human life, and emotional well-being of the woman.

The final section of the majority decision addressed facial challenges and the burden that a party asking for a facial challenge must overcome. The opinion noted that facial challenges should not have been pursued in the present case because the case “can be better quantified and balanced” in an as-applied challenge. Even though the Casey rule had been recently accepted and applied, the majority questioned the proper standard and referenced the two types of “burdens” which have been used by the Court in abortion cases. The majority cited Akron for the Salerno no-set-of-circumstances test and Casey for the large-fraction test. By noting instances where the Supreme Court has used both rules, the majority indicated that the appropriate standard remains uncertain. Holding that the Carhart II challenge failed under either test, the majority then plainly stated, “[w]e need not resolve that debate.” More specifi-

106. Id. at 1637.
107. Id. The majority rationalized that the district courts’ findings of other safe abortion procedures were important to the decision. The Court also recognized that the Act prohibited the delivery of a living fetus and that an injection could likely kill a fetus before the procedure. Id. Therefore, the doctor could still perform the abortion if necessary.
108. Id. at 1633 (“[T]he state has a ‘legitimate concern for maintaining high standards of professional conduct’ . . . .” (quoting Barsky v. Board of Regents, 347 U.S. 442, 451 (1954))).
109. Id. (indicating that the Court had previously undervalued the government interest in potential life).
110. Id. at 1633–34. The majority described Congress’s finding that the D & X abortion had a “disturbing similarity to the killing of a newborn infant” and “that it was concerned with drawing a bright line that clearly distinguishes abortion and infanticide.” Id. (citation omitted). With these statements, the Court and Congress indicated government’s interest in preventing any possible devaluation in human life.
111. Id. at 1634 (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort infant life they once created and sustained.”).
112. Id. at 1638–39.
113. Id.
114. Id. at 1639.
118. Id.
119. Id.
120. Id.
cally, the majority held that the Act was not unconstitutional in a "large fraction of relevant cases," let alone in all circumstances as required by *Salerno* or *Akron*.121 Thus, having decided the Act survived any facial challenge, the majority set aside the question of which test was best, reiterating that it does not "resolve questions" unless necessary to decide the case at bar.122 Despite upholding the constitutionality of the Act, the majority opinion noted that the Act might be susceptible to as-applied challenges under appropriate circumstances.123

A terse concurring opinion, authored by Justice Thomas and joined by Justice Scalia, made two noteworthy points.124 Justice Thomas noted that although he joined the majority opinion, he believed that the Court accepted incorrect precedent cases.125 He reiterated his belief that *Casey* and *Roe*, as well as the current abortion jurisprudence, are not rooted in the Constitution.126 Second, Justice Thomas stated that the respondents did not argue that the Act was void under the Commerce Clause, so the Court did not consider it.127 Justice Thomas's mention of the Commerce Clause when the issue was not before the Court seems to indicate that he believed that Congress exceeded its power under the Constitution.128

121. *Id.*

122. *Id.* ("It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.").

123. *Id.* The majority added a caveat to the invitation of as-applied challenges stating, "[n]o as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception." *Id.*

124. *Id.* at 1639–40 (Thomas, J., concurring).

125. *Id.*

126. *Id.*

127. *Id.* at 1640.

128. An alternative possibility is that Thomas was preemptively stating that the law was a constitutional use of the Commerce Clause before criticism arose. This possibility seems unlikely, however, due to his predilections. Justice Thomas's view of the restricted nature of the Commerce Clause can be seen in *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting). Justice Thomas stated commerce originally meant "trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange." *Id.* at 58–59. (citation omitted). A further cue that Justice Thomas was indicating a belief that Congress did not have the power for the Partial-Birth Abortion Act is his subsequent citation in his opinion to *Cutter v. Wilkinson*, 544 U.S. 709, 727 n.2 (2005) (Thomas, J. concurring). Within the concurring opinion of *Cutter*, Thomas stated that the Court properly declined to analyze Congress' power under the Commerce Clause because the issue was not raised just as he did in *Carhart II*. *Id.* Also in *Cutter*, however, Justice Thomas further stated that the statute "may well exceed Congress' authority under either the Spending Clause or the Commerce Clause." *Id.*
In the dissent, Justice Ginsburg argued that prior abortion precedents have held that a health exception is necessary, and the majority was incorrect in not requiring a health exception in the Act.\textsuperscript{129} In contrast to the majority's reasoning, the dissent argued that the ambiguity of whether a D & X is ever necessary for the health of the woman signals the need for the health exception.\textsuperscript{130} The dissent also argued that medical evidence does in fact indicate that D & X abortions are sometimes necessary for the health of the woman\textsuperscript{131} and that the majority relied too heavily on "flimsy and transparent justifications"\textsuperscript{132} and "moral concerns"\textsuperscript{133} to demonstrate the government's interest in the fetus.\textsuperscript{134}

The dissent also criticized the majority's refusal to apply the Casey standard for facial challenges and alleged that the majority incorrectly determined the denominator of the large-fraction test.\textsuperscript{135} Justice Ginsburg argued that the Court applied the Casey rule "under identical circumstances" in Carhart I and that the majority provided no explanation for its failure to follow this precedent.\textsuperscript{136} Regarding the proper framing of the large-fraction test, Justice Ginsburg maintained that when a woman's health is at risk, the denominator will always be women to whom a statute is relevant.\textsuperscript{137} Therefore, both the numerator and denominator would be the number of relevant women, that is, women who would be burdened under the Act. Justice Ginsburg's interpretation would always make the fraction equal to one when the health of the woman is involved.\textsuperscript{138} The dissent also argued that the majority's encouragement of as-applied challenges endangers women's health because it would require women to wait on the judicial process.\textsuperscript{139}

III. ANALYSIS

As previously noted, the Court has a long history of applying the overbreadth doctrine in cases outside the First Amendment.\textsuperscript{140} In—

\begin{itemize}
  \item \textsuperscript{129} \textit{Carhart II}, 127 S. Ct. at 1641–43 (Ginsburg, J., dissenting).
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.} at 1644–46.
  \item \textsuperscript{132} \textit{Id.} at 1646.
  \item \textsuperscript{133} \textit{Id.} at 1647.
  \item \textsuperscript{134} \textit{Id.} at 1646–49.
  \item \textsuperscript{135} \textit{Id.} at 1650–51.
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.} at 1651.
  \item \textsuperscript{138} \textit{Id.} at 1651 n.10 ("There is, in short, no fraction because the numerator and denominator are the same: The health exception reaches only those cases where a woman's health is at risk. Perhaps for this reason, in mandating safeguards for women's health, we have never before invoked the 'large fraction' test.").
  \item \textsuperscript{139} \textit{Id.} at 1651–52.
  \item \textsuperscript{140} See supra Part II.C.1.
\end{itemize}
deed, while the overbreadth doctrine has been applied inconsistently to abortion cases, the more recent cases have utilized the *Casey* standard.\textsuperscript{141} Yet, ambiguity still exists and leaves courts uncertain of what standard to apply in abortion cases.\textsuperscript{142} Not only has the Supreme Court struggled to choose the correct standard, but circuit courts also have been unsure.\textsuperscript{143} Although lower courts seem to have generally accepted the *Casey* standard prior to *Carhart II*, a stable standard would aid courts in reviewing facial challenges of abortion cases.

**A. The Court Should Reject Overbreadth in Abortion**

Heavy debate exists over whether the overbreadth doctrine should apply to abortion cases. Previous commentators\textsuperscript{144} have alternately argued that overbreadth should\textsuperscript{145} and should not\textsuperscript{146} be applied in abortion cases. These notes, however, have been limited in their discussion.\textsuperscript{147} This Note aspires to fully analyze the application of the overbreadth doctrine in the abortion context and to persuasively argue that it is like a pig in a parlor—out of place and useless. The tenet of this Note is that the *Salerno* test is the better rule. Contentions against the *Casey* overbreadth doctrine will be grouped into three main categories: (1) arguments that the rationale used for utilizing the overbreadth doctrine within the First Amendment does not apply to abortion cases, (2) arguments that the structure of the United States judiciary and the system of government as a whole are inco-

\textsuperscript{141} See supra Part II.D.

\textsuperscript{142} Carhart II, 127 S. Ct. at 1639.

\textsuperscript{143} The uncertainty has been noticed by Justices and commentators alike. Justice Scalia, joined by Justices Rehnquist and Thomas, cited cases indicating that the Fifth Circuit has applied the *Salerno* rule, while the Eighth Circuit followed *Casey*. Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1179 (1996). Leading Cases, *Abortion Rights—Remedy for Unconstitutionality*, 120 Harv. L. Rev. 293, 303 n. 7 (2006) states that the 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, and 10th Circuits seem to have followed the *Casey* test for abortion, whereas the 4th and 5th Circuits have been inconsistent; Wharton, *supra* note 79, at 355, argues that the 5th Circuit has applied *Salerno* in most cases, while the 4th Circuit has both rejected *Salerno* and applied it in abortion cases.

\textsuperscript{144} The application of the overbreadth doctrine to abortion has not been the main topic of any law review articles outside of three notes. See infra note 145–46.


\textsuperscript{146} Martin, *supra* note 79.

\textsuperscript{147} The notes mentioned, *supra* notes 145–46, focus on applying the overbreadth rationale to abortion cases and the ramifications that each standard could have on women. Analysis regarding the apparent difficulty in applying the *Casey* standard and the effect of *Casey* on the structure of the government are similarly important considerations that this Note will discuss. See infra Part III.A.2 & 3.
gruent with the use of overbreadth doctrine in abortion cases, and (3) arguments that the effects of the facial invalidation tests suggest Salerno is the better test to apply.

1. Arguments for Applying the Overbreadth Doctrine Are Unpersuasive

Numerous rationales for the application of the overbreadth doctrine to abortion have been offered, and many of them are in fact extensions of the common First Amendment justifications. The most often cited reason for the use of the overbreadth doctrine both within and outside the First Amendment context is the chilling effect rationale.148 Within the First Amendment, the chilling rationale argues that "the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech."149 The argument is that people will just abstain from constitutional speech rather than try to mount an as-applied challenge to defend their rights because of the cost and burden of litigation.150 Therefore, many people might not be fully exercising their constitutionally protected speech rights. The Supreme Court indicated that society as a whole is damaged because it is "deprived of an uninhibited marketplace of ideas" by the overbroad laws.151

A second rationale for the overbreadth doctrine is that it encourages legislatures to carefully draft laws. Under this theory, when the Court holds a law to be facially invalid, it is deterring the legislature from writing an overbroad law in the future.152 The Supreme Court has addressed this rationale, arguing that the overbreadth doctrine not only protects speech rights after the law is passed but also before its passage by encouraging the law to be drafted narrowly.153 Furthermore, the Court believes that courts should make legislatures pay for their mistakes to encourage careful drafting.154


149. Hicks, 539 U.S. at 119.

150. Id.

151. Id.

152. Hill, supra note 148, at 1073.


154. Id. at 121 ("Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes as they might otherwise be. ... Thus, careless drafting cannot be considered to be cost free based on the power of the courts to eliminate overbreadth by statutory construction.").
a. Chilling Rationale in Abortion Cases

The chilling argument has been adopted by proponents of the Casey rule, who suggest that chilling will occur if there is overbreadth within the abortion context. Chilling in abortion would include the concern that women may abstain from having a constitutionally protected abortion for fear of breaking the law, when they otherwise would have obtained an abortion. In fact, one commentator argues that abortion is quite susceptible to the prophylactic effect because "both the pregnant woman and the necessary medical personnel must have the courage to disregard the chilling effect." Justice Ginsburg's dissent reflects this argument: "In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgments as to the safest medical procedure for their patients."

Although this rationale seems plausible, the theory breaks down in its application. Most Americans probably do not know or understand the intricacies of current abortion laws to the extent that they would be deterred from seeking an abortion. Therefore, if any abortion procedure is available, as remains the case after the Carhart II opinion, most pregnant women desiring abortions would consult a doctor or reproduction advocacy agency rather than wholesale refraining from seeking such consultation due to a ban on specific

155. Dorf, supra note 32, at 271 ("[T]he 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."); Gavel, supra note 145, at 1846; Ford, supra note 145, at 1456.
156. Dorf, supra note 32, at 271.
158. No specific study was found describing women's understanding of abortion laws within the United States. A poll conducted by Columbia Law School found that a majority of Americans believe that overturning Roe v. Wade would lead to abortions being outlawed when a reversal would only mean that there is no constitutional right to an abortion. To outlaw abortion, states would have to legislatively ban abortion, which may or may not happen depending on the state. Columbia Law School, Americans' Knowledge of the U.S. Constitution (May 2002), http://www2.law.columbia.edu/news/surveys/survey_constitution/fact_sheet.shtml.
159. Meier, Broad Attack, supra note 27, at 144 argues four assumptions must be met for chilling to occur: "First, it requires that citizens have knowledge of what the law is. Second, it assumes that a citizen who does know the law will refrain from engaging in constitutionally protected speech because that speech is prohibited under the overbroad statute. Third, it requires that a citizen be aware of court decisions that strike down the law as overbroad. Fourth, it assumes that a citizen, aware of the court decision, will now engage in the constitutionally protected speech previously refrained from." If any one of these criteria is not met, the overbreadth doctrine will not prevent chilling. The assumptions demonstrate that citizens must have knowledge of the law, willingness to obey it, and desire to exercise their rights in full. These assumptions, particularly the two entailing knowledge, are likely not true for most women.
160. The most common example of an advocate would be Planned Parenthood.
procedures. A woman desiring an abortion would likely rely on the doctor's view of the legality of the abortion. As Justice Ginsburg suggests, the doctor would probably be left with the decision of whether the particular abortion procedure is constitutionally protected or banned by legislation.\footnote{161}

The issue of prophylaxis then depends on whether doctors would be chilled by an overbroad statute. If indeed a law is even minimally overbroad and contains restrictions on constitutionally protected abortions, then doctors may be put into very difficult situations. For example, under the Partial-Birth Abortion Act, if a woman were to come to a doctor in a situation where a D & X abortion would be safer than a D & E, then the doctor would have the arduous and unenviable task of deciding whether to follow the letter of the law or to best protect the woman's health. For three main reasons, this Note argues that the doctor would most likely perform the abortion in the face of the overbroad law. First, by knowing the Court's previous rationale, doctors may be willing to anticipate the Court's decision in discrete cases. Second, doctors and reproductive advocate agencies were invited by the Court in Carhart II to bring as-applied challenges. Finally, the majority indicated that ways around the statute existed.

The majority in Carhart II stated that doctors of reasonable intelligence should be able to correctly apply the Act in question.\footnote{162} Because of their experience and superior knowledge, doctors and advocacy agencies are also likely to be able to determine if an abortion would be constitutionally banned based on the Court's previous rationale. Doctors who perform abortions have an incentive to stay abreast of the laws regarding abortions and therefore know that abortion laws always protect a woman's health. More specifically, an abortion law cannot restrict an abortion protecting the health of a woman.\footnote{163}

\begin{flushleft}
\footnote{161.} Carhart II, 127 S. Ct. at 1652. By writing that the majority's decision "places doctors in an untenable position," Justice Ginsburg implies that the ultimate decision of whether to perform the abortion will come down to the doctor. \\
\footnote{162.} Id. at 1628 (majority opinion) ("The Act provides doctors of ordinary intelligence a reasonable opportunity to know what is prohibited. Indeed, it sets forth relatively clear guidelines as to prohibited conduct and provides objective criteria to evaluate whether a doctor has performed a prohibited procedure." (citations and internal quotations omitted)). \\
\footnote{163.} Id. at 1635. Recent Supreme Court cases have made clear that a law is unconstitutional if the health of a mother is jeopardized. Citing Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), the Carhart II majority wrote that a law cannot bar a procedure "necessary, in appropriate medical judgment, for the preservation of the health of the mother." 127 S. Ct. at 1635 (citations and internal quotations omitted). The Court further clarified that a law is unconstitutional if it subjected women to significant health risks. Id. (citations and internal quotations omitted). A woman's right not to be subjected to health concerns is one point on which the whole Court could agree. The dissent also wrote that an abortion should be allowed "in appropriate medical
Thus, doctors are in the position to know if the abortion law that they are obligated to follow interferes with protecting the health of the mother, that the law could not be enforced. Based on their medical experience, doctors should also be able to determine if the D & E procedure might put the woman's health in jeopardy, whereas the D & X procedure would be safe. Hence, a doctor likely would feel secure in performing the abortion in this case, even though the doctor would be making this decision at his peril due to the statutory violation. An argument could certainly be made that doctors would not perform the abortions for fear of sanction or litigation costs in protecting their constitutional rights. It seems more likely, however, that, if put in such a difficult spot, the doctor would protect the health of the mother with the knowledge of the possible repercussions.164 The following paragraphs also discuss why a doctor is unlikely to be placed in this situation.

Carhart II invited the doctors and agencies to mount as-applied challenges in discrete cases.165 Justice Ginsburg argued that the possibility for pre-enforcement, as-applied challenges is the only redemptive aspect of the opinion.166 Doctors and agencies would be able to mount as-applied challenges "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" to protect the health of the woman.167 Citing this language, Justice Ginsburg anticipated that doctors and agencies would swiftly challenge these laws based on individual instances.168 This permits doctors and advocacy agencies to mount as-applied challenges based on previous cases where the law was overbroad. If, as Justice Ginsburg expects, as-applied challenges are raised, then seemingly few cases would exist where the law would be overbroad. More precisely, as overbroad portions of a law are severed through the use of as-applied challenges, few situations will exist where a doctor is put between choosing to protect a woman's health and following the black letter law.

Finally, in extreme cases, methods of circumventing the overbroad application of a statute may exist. In Carhart II, for example, the majority stated, "[i]f the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus judgment, for preservation of the life or health of the woman." Id. at 1641 (Ginsburg, J., dissenting) (citations omitted).

164. If charged under the statute for performing an abortion to protect the health of the mother, the doctor could argue and would likely win an as-applied challenge to the statute. The cost of the litigation may also be covered either by advocacy agencies or pro-choice attorneys willing to do pro bono work.
165. Carhart II, 127 S. Ct. at 1640 (Ginsburg, J., dissenting).
166. Id. at 1651.
167. Id. at 1638.
168. Id. at 1652 (Ginsburg, J., dissenting).
is an alternative under the Act that allows the doctor to perform the procedure."\textsuperscript{169} This procedure would not be banned under the statute because the statute specifically refers to "a living fetus."\textsuperscript{170} Abortion methods circumventing the statute may also prevent doctors from being put in perilous situations.

Another important aspect of the First Amendment chilling argument is missing. In the case of abortion, society as a whole is arguably not as injured by the restriction of constitutional abortions as constitutional speech. One distinction is that the right to privacy is unenumerated whereas the right to free speech is enumerated in the First Amendment.\textsuperscript{171} Also, unlike free speech, the "marketplace of ideas" would not be affected in the same manner by reproductive autonomy rights. Arguably, a democratic society cannot function without the free exchange of ideas. In creating the overbreadth doctrine, the Court stated that "free and fearless reasoning and communication of ideas to discover and spread political and economic truth" were "essential to effective exercise . . . of popular government."\textsuperscript{172} The right to reproductive privacy does not undergird democracy in the same manner as free speech. Even though reproductive autonomy may allow a woman greater reproductive freedom, thereby creating a democratic society that responds to her reproductive needs, a democratic society can still function with some limitations on reproductive rights. While pregnancy or childrearing may burden participation in democracy, they do not preclude it.\textsuperscript{173}

b. Careful Drafting Rationale in Abortion Cases

Numerous arguments have been made regarding the validity of the judiciary's idea of punishing a legislature for writing an overbroad law. One criticism of such judicial punishment is that the overbreadth doctrine application may excessively deter the legislature.\textsuperscript{174} The legislature may choose to write a statute more narrowly than necessary and remove applications that are in fact constitutional in fear of a court's heavy hand.\textsuperscript{175} Furthermore, consistent judicial punishment in a certain area might completely deter legislative action in that area.

\textsuperscript{169} Id. at 1637 (majority opinion).
\textsuperscript{171} The distinction may indicate the founding fathers' view of the importance of each right to the young democracy, as they likely enumerated the rights that they deemed most essential in the Bill of Rights.
\textsuperscript{172} Thornhill v. Alabama, 310 U.S. 88, 95 (1940).
\textsuperscript{173} In fact, parents seem to be more apt to participate in local democratic functions such as school boards and parent-teacher organizations. Parents may also be more likely than non-parents to express interest in larger issues and cases affecting schools and health and safety.
\textsuperscript{174} Fallon, supra note 36, at 890.
\textsuperscript{175} Id.
even if such legislation would be permissible. As one commentator has also noted, many of the landmark free speech cases did not involve overbreadth. It could therefore be argued that landmark cases protected speech before the advent of overbreadth, and overbreadth is actually preventing future landmark cases. The arguments for and against this concept, however, seem identical regardless of whether the substantive law is free speech or abortion. Although this deterrence function of overbreadth seems questionable, it will not be further discussed in this section because the argument is not different in the abortion context. However, overbreadth's deterrence rationale will be analyzed as to its effect on the shift in federal power.

2. Overbreadth Improperly Shifts Power Between Branches

The structure of the United States government is incongruent with the application of the overbreadth doctrine, particularly in abortion cases. The overbreadth doctrine shifts power from the legislature to the judiciary, and thereby conflicts with the pillars of American jurisprudence and allows courts to seize additional power. Because the Court has previously afforded itself more power by extending rights under the Fourteenth Amendment, overbreadth's alteration of standing impermissibly gives the Court too much power.

The Constitution specifically grants jurisdiction for the Court to review "cases" and "controversies." As the Court has elucidated, it is limited to "adjudicating rights in particular cases between the litigants." Therefore, the Court cannot merely judge the validity of laws without the presence of dispute. A similar axiom holds "that constitutional rights are personal and may not be asserted vicariously." These important standing rules of American jurisprudence have been altered under the overbreadth doctrine. While this shift may be more appropriately viewed as permissible for enumerated First Amendment rights, standing should not be altered for unenumerated substantive due process rights. Allowing such a

176. See id.
178. Meier, Broad Attack, supra note 27, at 152–53.
179. This concept will be revisited infra Part III.A.2 to consider the improper effects of overbreadth in a substantive due process case.
180. Meier, Broad Attack, supra note 27, at 154.
183. Id. at 610–11.
184. Id. at 610.
185. Id. at 611–15.
change would grant the judiciary great power in protecting rights that are less clearly found in the Constitution.

Deference should also be given to the legislature when interpreting a statute. The Court has stated, "[i]n exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people."186 Additionally, "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality."187 Hence, the Court should prefer severing an unconstitutional application over facial invalidation.

The structural changes associated with overbreadth have led to an effect previously mentioned: over-deterrence of the legislature's power. As noted earlier, some commentators applaud the deterrence effect that overbreadth has on legislatures,188 yet this deterrence also comes with a cost. Legislatures may become overly careful in drafting so as to avoid any overbreadth ruling.189 Thus, the legislature may choose to narrow the statute beyond what would be constitutionally necessary.190 Overbreadth, therefore, also has a prophylactic or chilling effect on the legislature. While this effect will likely prevent legislatures from banning constitutionally protected actions, it will also create scenarios where a legislature wishes to ban a non-constitutionally protected action as part of a statute, but, for fear that the entire statute will become facially invalid, it refuses to do so. Thus, the intent of the representative body of elected officials is subjugated by the unelected Court. As a result, the United States' separation of powers between the branches is altered with the judiciary acquiring greater authority.

The same result occurs in the mere ruling of overbreadth. When a court holds that a statute is overbroad, it often invalidates a number of constitutional applications of the law; constitutional aspects of the law are removed along with the unconstitutional.191 Again, one finds that actions which the elected body of lawmakers banned, which were not constitutionally protected, are no longer banned based on the rul-

188. See supra Part III.A.1.
189. Fallon, supra note 36, at 890 ("Fearful of the consequences of having a statute declared unconstitutionally overbroad, legislatures may draft laws with overabundant caution. If they are intimidated into withholding sanctions even from constitutionally prohibited expressive activity . . . legislatures may fail to deal effectively with pressing social problems.").
190. Id.
191. Id.
ings of the judiciary. The effect could be a diminished ability of the legislature to handle social and political issues.192

The Court has previously described its role under the overbreadth doctrine as making the legislature "pay" for drafting overbroad legislation,193 and punishing the legislative branch.194 Yet, "when the judiciary starts testing the bounds of its constitutional limitations in the name of teaching the legislature a lesson, the judiciary seems to forget its adjudicatory function and views itself as a policymaker."195 By preventing the legislature from passing constitutional portions of statutes, declaring constitutional parts of statutes unconstitutional, and punishing the legislature for its drafting, the Court's overbreadth doctrine improperly shifts the power of the legislative process.

Although these effects of overbreadth have been generally accepted for free speech cases, the combination of overbreadth and substantive due process goes too far. Many people disagree over the validity of substantive due process.196 What would seem beyond debate, however, is that the acceptance of substantive due process gives the Court greater power than would a denial of substantive due process.197 The Court's detection of unenumerated rights has exactly the same effect as a constitutional amendment. The Court's holding that the phrase "nor shall any State deprive any person of life, liberty, or property, without due process of law"198 grants a substantive right to privacy binding the government just as much as would a constitutional amendment for privacy.199

Under the Casey standard, the Court uses overbreadth to protect a substantive due process right. In this abortion case scenario, the

192. Id.
194. Hill, supra note 148, at 1073 ("Meting out wholesale punishment to achieve deterrence in these few situations seems injudicious.").
196. Scholars and commentators alike have argued that substantive due process has no basis in the Constitution. In particular, Justice Scalia has argued, "The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called "substantive due process") is in my view judicial usurpation." City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).
197. Thomas A. Glessner, Essay, Curbing Raw Judicial Power: A Proposal for a Checks and Balances Amendment, 11 REGENT U. L. REV. 297, 304 (1999) ("No doctrine has done more to bootstrap judicial power than that of 'substantive due process.'").
199. The legitimacy of substantive due process has not been discussed and is beyond the scope of this Note; however, reading implicit rights into the substantive due process clause grants the judiciary more power to regulate than it would have absent such interpretation.
Court starts by acknowledging the fundamental right to privacy. When applying the Casey standard, the Court then determines that the right that it found and defined needs more protection than standard rights. To give extra protection, the Court changes the traditional Salerno standard for facial invalidation and holds that the statute is facially invalid if it is unconstitutional in large fractions of cases. In determining the fraction of women burdened, the Court has then drawn up a framework that allows for easier facial invalidation. When the Court has accepted the Casey standard, it frames the denominator of the fraction to match the numerator and determines that the statute is facially invalid.

The Casey overbreadth standard simply allows the judiciary to monopolize power in abortion cases by allowing courts to facially invalid statutes even if there is only a single infringing application and most applications are constitutionally permissible. The Court should not be able to scrap entire statutes and punish legislatures in such a broad way, particularly when the constitutional right at hand is not an enumerated right. The shift of power to the courts may be allowable in the First Amendment context, where the Court has continually said that there is something special about the enumerated right to free speech to the function of democracy. However, the overbreadth doctrine is not appropriate in the context of the unenumerated abortion context.

3. Overbreadth Cannot Be Properly Applied

The current overbreadth test requires the Court to consider the number of constitutionally protected applications in light of the total. The Court wrote, “we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” The question then turns to how to determine whether a statute is substantially overbroad. This then becomes the “hard question.” The answer to the question and the framing of the statute’s sweep could determine the Court’s holding.

200. Roe v. Wade, 410 U.S. 113, 152 (1973) (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”).
203. Broadrick, 413 U.S. at 615.
204. Fallon, supra note 36, at 893.
Within the realm of First Amendment overbreadth, the Court has previously utilized a proportion to determine whether a statute was substantially overbroad.\textsuperscript{205} The proportion has typically been the number of unconstitutional applications of the law compared to the number of constitutional applications. One commentator has noted that "this approach calls for uncabined judicial speculation"\textsuperscript{206} and goes on to cite examples of Justices applying this test to the same facts and reaching different results.\textsuperscript{207} The proper framing of overbreadth is simply unclear and arguably leads to Justices framing arguments in accordance with their desired result.

In \textit{Carhart II}, the Court disagreed on the correct framing of the overbreadth doctrine, giving further credence to the difficulty in consistent judicial application of such a test. The majority rather offhandedly noted that respondents have not demonstrated that "the Act would be unconstitutional in a large fraction of relevant cases."\textsuperscript{208} The dissent, however, more precisely stated:

But \textit{Casey} makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is \textit{not} "all women," nor "all pregnant women," nor even all women "seeking abortions." Rather, a provision restricting access to abortion, "must be judged by reference to those women for whom it is an actual rather than an irrelevant restriction."\textsuperscript{209}

Thus, in the present case, the Justices also applied the same standard to the same facts and came to different results, undoubtedly due to their framings of the issue. The ambiguity and leeway in framing the issue could allow the Justices to decide cases according to their moral convictions or gut feelings apart from the rules of law. This allows the Court to decide any \textit{Casey} standard problem according to the whims of the slim majority, without constraint on the Justices' rationale.\textsuperscript{210} This seems to contradict the idea that courts should make decisions based on rules of law and not on their personal moral beliefs.

A closer look into how the large-fraction test has been framed shows that when the Court actually relies on \textit{Casey}, it frames the test

\textsuperscript{205} Id. at 894 (citing Massachusetts v. Oakes, 491 U.S. 576 (1989), where Justices Brennan and Scalia agreed that the law was overbroad but disagreed over whether it was substantially overbroad).

\textsuperscript{206} Id. at 894.

\textsuperscript{207} Id.

\textsuperscript{208} \textit{Carhart II}, 127 S. Ct. 1610, 1639 (2007).

\textsuperscript{209} Id. at 1651 (Ginsburg, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)) (citations omitted).

\textsuperscript{210} Certainly no one, except for possibly the Justices themselves, can speak as to the Justices' true rationale in framing a \textit{Casey} problem. However, it seems unremarkable to think that a Justice's beliefs regarding the overarching abortion issue play a large role in that Justice's determination of the correct standard, even if unwittingly.
as Justice Ginsburg illustrated in the dissent of *Carhart II*. Yet, Justice Ginsburg’s framing leads to an unusual result. Because Justice Ginsburg would say that the statute burdens all women to whom it is relevant, the fraction would equal one and the statute would be considered overbroad.

However, a truly odd result perpetuates from the framing suggested by Justice Ginsburg. This common framing leads to the conclusion that if all applications of a statute are constitutional except one type, then the law would still be facially invalid. Even if there was only one possible unconstitutional application in a sea of constitutional applications, this framing would suggest that both the numerator and the denominator of the large-fraction test should consist of the one unconstitutional application. Hence, this framing requires every application to be a constitutional application. Notably, this framing of *Casey* is the antithesis of *Salerno*, which states that a law is facially invalid only if no set of circumstances exists under which the Act would be valid.

The results of the typical framing of *Casey* are highly incongruent with the notion of American jurisprudence. Traditionally, courts should attempt to save a statute and interpret a statute to avoid unconstitutionality. The common framework of *Casey* does the exact opposite and repudiates a law if there is only one unconstitutional application. Thus, the *Salerno* rule is preferable. So long as there is at least one constitutional application, the facial challenge will fail. Thus, the overall intent of the elected body is enforced, but as-applied challenges are still allowed so that constitutional rights remain protected. Further, the *Salerno* rule is easy to apply; no tricky balancing test is necessary. *Salerno* also leaves less room for Justices to alter the test so as to give effect to their moral beliefs.

**B. The Roberts Court Will Likely Reject Overbreadth in Abortion**

Multiple facial challenges to abortion legislation have arisen during the recent decades. If recent history continues, the Roberts

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211. *Carhart II*, 127 S. Ct. at 1651 (Ginsberg, J., dissenting); *Casey*, 505 U.S. at 895. The majority in *Carhart II* never relied on *Casey* and also did not indicate their framing of the large-fraction test.

212. *Carhart II*, 127 S. Ct. at 1651 (Ginsberg, J., dissenting).

213. *Id.* at 1651 n.10.

Court may very well soon face another facial challenge to an abortion statute. The question then arises: what standard will the Roberts Court adopt for facial challenges in the abortion context? The answer to this question is more than a scholarly exercise—after all, such predictions can serve as an important guide to Congress and legislatures across the country, each of which certainly has need of knowing which standard would likely apply in order to formulate legislation within constitutional bounds. By identifying the likely standard, a legislature would be better able to pass acts that are both constitutional and match the wishes of the representatives and constituents.\(^{215}\)

Making an accurate prediction of what standard the Roberts Court might adopt is difficult.\(^{216}\) However, the Justices' proclivities can be determined based on their previous statements and holdings. In \textit{Janklow}, certain Justices tipped their hands to what standard they might adopt.\(^{217}\) In the memorandum denying certiorari in an abortion case, Justice Stevens discussed his belief that the no-set-of-circumstances test of \textit{Salerno} was merely dicta, was not supported by precedent, and was not the correct test for facial challenges.\(^{218}\) From his statements, it is clear that Justice Stevens does not believe that \textit{Salerno} is the correct test outside of the abortion context, let alone within it.

In the dissent of \textit{Janklow}, Justice Scalia, joined by Justices Rehnquist and Thomas, wrote that \textit{Casey} "did not purport to change [the] well-established rule [of \textit{Salerno}]."\(^{219}\) Furthermore, the dissent commented that the Court incorrectly accepted the lower court's application of the \textit{Casey} standard without ever deciding the correct standard.\(^{220}\) In a separate abortion case, Justice Scalia stated that the lower court's finding of unconstitutionality seemed incorrect be-

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\footnote{For example, if an act's scope could be interpreted to encompass a small protected group, under the overbreadth doctrine, the legislature would have to worry that such legislation would be invalidated by the courts. However, if the \textit{Salerno} rule seems most likely to apply, the legislature has more assurance that statutes, even if interpreted broadly to encompass many people, will not be facially struck down.}

\footnote{The possibility certainly exists that the Roberts Court as currently assembled will not hear another abortion facial challenge case. This Note, however, focuses on the Roberts Court's likely determination because it is the sole Court whose membership is known. Furthermore, the Note's analysis of the particular Justices' views may continue to be insightful even if the composition of the Court were to change.}

\footnote{\textit{Janklow} v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996) (Stevens, J., respecting the denial of the petition for certiorari).}

\footnote{\textit{Id.} at 1175.}


\footnote{\textit{Id.} at 1177–80.}
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cause there were some valid applications of the law.\textsuperscript{221} Justice Scalia indicated that certiorari should have been granted so the Salerno test could be applied instead of the overbreadth doctrine.\textsuperscript{222}

The Court's failure to reach four votes to grant certiorari in Ada may also indicate that the Justices view Casey as the correct standard. Justices Stevens, Kennedy, Souter, and Thomas all voted not to review the case.\textsuperscript{223} Justice Thomas's acceptance of the Casey standard, however, would be surprising in light of his Janklow dissent. One commentator has previously noted that the Janklow majority's "silence concerning the doctrine speaks volumes" because none of the Justices even questioned whether Casey was the correct standard.\textsuperscript{224} Another commentator has argued that the fact that Justices Kennedy and Souter joined the opinion of Casey indicates that they rejected the Salerno test in abortion cases.\textsuperscript{225}

Justice Souter's preference of the overbreadth doctrine in abortion cases was also seen in a denial of a motion for injunction.\textsuperscript{226} Justice Souter, by joining the concurrence written by Justice O'Connor, indicated that he believed the lower courts incorrectly applied the Salerno rule rather than the Casey standard.\textsuperscript{227} The memorandum states his opinion that the Casey rule should be applied whenever a case reviews a law restricting abortion.\textsuperscript{228}

Previous case law has provided little information in determining whether the newer Justices would apply the doctrine. However, Carhart II, in the context of previous decisions, may indicate how the Court is likely to rule. In abortion cases leading up to Carhart II, the Court has usually applied the overbreadth doctrine.\textsuperscript{229} In Carhart II, the Court went to great lengths to state that the standard of a challenge for abortion statutes is open to review and unclear.\textsuperscript{230} The Carhart II majority could have easily applied the Casey test and arrived at the same result. Instead, the Court carefully pointed out that the issue remains unresolved.\textsuperscript{231} The majority's rationale might reflect an unwillingness to accept or apply the overbreadth doctrine in the

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\item \textsuperscript{221} Ada, 506 U.S. at 1011 (Scalia, J., dissenting from denial of writ of certiorari).
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Decker, supra note 57, at 92.
\item \textsuperscript{226} Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993); Wharton, supra note 79, at 351–52.
\item \textsuperscript{227} Schafer, 507 U.S. at 1013–14.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} See supra Part II.C.2.
\item \textsuperscript{230} Carhart II, 127 S. Ct. 1610, 1639 (2007).
\item \textsuperscript{231} Id.
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abortion context.\textsuperscript{232} The majority also stated, "[t]he latitude given facial challenges in the First Amendment context is inapplicable here."\textsuperscript{233} The overbreadth doctrine is exactly the "latitude" of which the Court speaks; consequently, this statement seems to imply the majority's belief that the overbreadth doctrine has no place in reviewing abortion statutes.

Moreover, the Court's half-hearted attempt to apply the \textit{Casey} test indicates the majority's contempt for the large-fraction test. When the Court has previously considered the large-fraction overbreadth test, it has carefully articulated its reasons in defining the denominator a certain way and stated that the statute "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction."\textsuperscript{234} In \textit{Carhart II}, however, the Court just noted the denominator that the Court chose\textsuperscript{235} without considering whether its choice aligned with precedent.

Therefore, if the Roberts Court is presented with a case in which it must decide the correct burden for a facial challenge in an abortion case, the Court would most likely split five to four in favor of applying the \textit{Salerno} rule. Justices Stevens, Souter, Breyer, and Ginsburg are likely to argue the applicability of the overbreadth doctrine, whereas Justices Thomas, Scalia, Alito, and Roberts, would probably argue for \textit{Salerno}. In such a decision, Justice Kennedy is likely to continue his consistent role as the vital swing vote on the Roberts Court.\textsuperscript{237} Al-

\textsuperscript{232} It could aptly be argued that the Court may have left the standard unresolved in order to reach a majority rather than a plurality opinion if it had applied \textit{Casey}. While this is also a sensible conclusion, it is less convincing when viewed in light of \textit{Carhart II} as a whole. Within \textit{Carhart II}, the majority states that it "assumes" principles of \textit{Casey} and applies "its standards to the cases at bar." \textit{Id.} at 1626-27. This appears to be the majority's method of applying precedent without considering whether the members of the majority concur with the precedent. The majority could have easily done the same thing in regard to the standard. While the majority indicated that the standard was unclear, all recent cases had applied a standard more akin to \textit{Casey}. Further, the majority cites the pre-\textit{Casey} case of \textit{Ohio v. Akron Center for Reproductive Health}, 497 U.S. 502 (1990). Instead of taking the same approach of assuming the dominant standards as it did earlier, the majority specifically states that the correct standard is unclear. Therefore, the majority's wording is much more likely to be indicating disapproval of the current standard rather than merely trying to avoid a plurality opinion.

\textsuperscript{233} \textit{Carhart II}, 127 S. Ct. at 1639.
\textsuperscript{235} \textit{Carhart II}, 127 S. Ct. at 1639 ("We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications.").
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} Robert Barnes, \textit{Justice Kennedy: The Highly Influential Man in the Middle: Court's 5 to 4 Underscore His Power}, \textit{WASHINGTON POST}, May 13, 2007, at A01 ("It is easy to define Justice Anthony M. Kennedy's role on the Supreme Court this term, and difficult to exaggerate his importance. . . . [H]e's 'The Decider.' At this midpoint of the court's rulings, he has been on the losing side in only two of the 40
though previous cases indicate that Justice Kennedy might apply overbreadth, the opinion of Carhart II, authored by Justice Kennedy himself, seems a more authoritative and persuasive hint at his view. Therefore, Justice Kennedy appears likely to lead the Court to a five to four split rejecting the overbreadth doctrine in abortion cases.

This prediction is highly congruent with an observed trend within the Roberts Court to issue opinions that “lean heavily toward as-applied challenges” rather than facial invalidations.\textsuperscript{238} Utilizing the more stringent Salerno rule, the Roberts Court would, in practice, preclude facial challenges to abortion regulations that rely on hypothetical burdens or harms to hypothetical parties, encouraging parties instead to bring as-applied challenges as they arise.

If indeed the Court does reject the overbreadth doctrine in abortion, the number of facial challenges would be drastically reduced. Facial challenges could no longer be brought to challenge laws that ban both constitutionally and non-constitutionally protected actions. Instead, facial challenges would be limited to statutes containing structural errors, in which the statutes are valid under no set of circumstances.

IV. CONCLUSION

Although much uproar accompanied the announcement of the Carhart II decision, its practical effect on abortions is likely to be inconsequential. The real importance of the case is found in the minutia; within the details, one finds that the majority questioned whether the Casey or Salerno test should be used in abortion cases. By contemplating the appropriate standard, the Court emphasized the importance the standard may hold in future cases. Indeed, the most important effect of Carhart II may be the shift away from the Casey standard that it signals.

This Note has argued that the traditional rationales for overbreadth are not convincing in the abortion context, that Casey improperly shifts power between branches of the government, and that the Justices are unlikely to be able to impartially apply the large-fraction test. Thus, the use of the overbreadth doctrine in the abortion context

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options issued. Because the court so far has shown itself to be strikingly—and evenly—divided on ideological issues, Kennedy holds enormous power in pivoting between the left and right, legal experts say. He stands alone in the middle—and that enhances his importance.

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is simply inappropriate. In an arena so filled with emotional fervor, the ambiguous and esoteric large-fraction test allows framing according to the whims of the Justices. A court system that decides cases, which are emotionally and morally important to millions across the nation, differently based on a continually changing Court composition will certainly lose the faith of the American people. To prevent the morals of Justices, rather than constitutional mandates, from seeping into the judiciary’s decisions, the Court should refrain from facially invalidating a law instituted by an elected, representative body unless no set of circumstances exists under which the act would be valid.

A future holding by the Roberts Court choosing the applicable standard in abortion might be anticipated. Many of the Justices’ leanings towards the correct standard for abortion facial challenges can be discovered through a review of Supreme Court case law. However, the simple fact that the Carhart II majority considered which standard to apply rather than just assuming a Casey precedent suggests that the majority was not comfortable with the more widely and recently applied Casey test. Thus, the best indicator that the Roberts Court will likely apply the Salerno standard in the future is its implied reluctance to accept Casey as precedent for facial changes.

On the outset of the opinion, the majority accepted the principles of Casey as precedent, yet strikingly, it refused to apply the large-fraction test outright. The majority’s aberration in handling the standard of review demonstrates the majority’s uneasiness in using the Casey standard and likely signals an impending evolution in the Court’s holdings. Because the Court’s determination of the correct burden will drastically affect both challengers and defenders of abortion statutes, the Court’s forthcoming choice of the correct standard becomes vitally important.