Court would be better off practicing what it preaches and deferring to legislative judgment in this area while policing the boundary of improper self-entrenchment, rather than overenforcing abstract individual rights.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Equitable Remedies

Abortion Rights — Remedy for Unconstitutionality. — Since deciding *Roe v. Wade*,[1] the Supreme Court has sent mixed signals regarding the proper standard to apply in addressing facial challenges to abortion regulations. In several cases, the Court applied the standard set forth in *United States v. Salerno*,[2] which requires a plaintiff challenging the facial validity of a statute to "establish that no set of circumstances exists under which the [statute] would be valid."[3] In more recent cases, the Court has applied the standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] under which a statute is invalid if, "in a large fraction of the cases in which [that statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[5] These mixed signals, in the words of Judge Easterbrook, have "put courts of appeals in a pickle" because they "cannot follow *Salerno* without departing from the approach taken in . . . *Casey*; yet [they] cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books."[6] Unsur-

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ment." Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109–10 (1993).

[1] 410 U.S. 113 (1973).

[2] 481 U.S. 739 (1987).

[3] *Id.* at 745. Cases applying the *Salerno* standard include *Rust v. Sullivan*, 500 U.S. 173 (1991), which addressed a facial challenge to regulations specifying that certain public funds could not be used to encourage, promote, or advocate abortion as a method of family planning, *see id.* at 180, 183; *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), in which the Court stated that "because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which [it] would be valid,'" *id.* at 514 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment)); and *Webster*, in which Justice O'Connor remarked that "some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional," 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment).

[4] 505 U.S. 833 (1992).

[5] *Id.* at 895. For example, the Court employed the *Casey* standard in *Stenberg v. Carhart*, 530 U.S. 914, 937–38, 945–46 (2000).

[6] A Woman's Choice–E. Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002).

prisingly, a circuit split concerning the appropriate standard has developed.[7]

Last Term, in *Ayotte v. Planned Parenthood of Northern New England*,[8] the Court had an opportunity to resolve this split and clarify the quantum of proof necessary to bring a facial challenge to an abortion regulation.[9] The Court, however, chose not to address that issue. Instead, the Court addressed only the question of remedy and held that facially invalidating an abortion regulation with at least one undisputed unconstitutional application "is not always necessary or justified."[10] Although this decision leaves open the important quantum-of-proof question — a "question that virtually cries out for [the Court's] review"[11] — it also suggests a promising new remedial emphasis in the Court's abortion jurisprudence. This new focus, which recognizes the federal judiciary's limited constitutional mandate and instructs the lower courts that facial invalidation is an exception rather than the norm, rightly takes the Court's abortion jurisprudence one step closer to ensuring that the federal judiciary respects the properly limited role of the courts in a democratic society. The separation-of-powers principles underlying *Ayotte* also indicate the importance — and perhaps the likelihood — of having federal courts apply the *Salerno* standard to

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[7] A majority of circuits have concluded that *Salerno* does not govern facial challenges to abortion regulations. *See* Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 627 (4th Cir. 2005) (collecting cases from the First, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits). The Second Circuit seems to have joined those courts applying the *Casey* standard, *see* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 287 (2d Cir. 2006), though Chief Judge Walker expressed the need for the Supreme Court "to inform [the lower courts] how much evidence is required to sustain [facial] challenges," *id.* at 295 (Walker, C.J., concurring). The Eleventh Circuit has not articulated its conclusion on the issue. *See* Womancare of Orlando, Inc. v. Agwunobi, No. 4:05CV222-WS, 2006 WL 2528765, at *9 (N.D. Fla. Feb. 10, 2006) ("Without guidance from the Eleventh Circuit, and without clarification from the Supreme Court as to whether the *Salerno* standard still applies in the abortion context, this court will do what the majority of circuit courts have done and will apply *Casey*'s undue burden standard."). The Fourth Circuit's decisions concerning the proper standard are inconsistent. *Compare Hicks*, 409 F.3d at 627 ("*Salerno* does not govern a facial challenge to a statute regulating abortion."), *with* Greenville Women's Clinic v. Comm'r, 317 F.3d 357, 362 (4th Cir. 2002) ("[T]he challenger must establish that no set of circumstances exists under which the [statute] would be valid." (quoting *Salerno*, 481 U.S. at 745) (internal quotation mark omitted)). The Fifth Circuit's decisions are similarly inconsistent. *See* Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999) (citing one decision applying *Salerno* and another decision applying *Casey*, but then "declin[ing] to address any internal inconsistency in this area of Fifth Circuit jurisprudence").

[8] 126 S. Ct. 961 (2006).

[9] "Quantum of proof" in this context refers to the percentage of all applications of a statute that a plaintiff must demonstrate would be unconstitutional in order to bring a successful facial challenge — 100% under *Salerno*, but less than 100% under *Casey*. *See, e.g.*, *Nat'l Abortion Fed'n*, 437 F.3d at 295 (Walker, C.J., concurring).

[10] *Ayotte*, 126 S. Ct. at 964.

[11] Janklow v. Planned Parenthood, 517 U.S. 1174, 1178 (1996) (Scalia, J., dissenting from denial of certiorari) (arguing that the Court should have granted certiorari to resolve whether the "clear principle" of *Salerno* applies in abortion cases).

facial challenges of abortion regulations. By once again invoking and applying *Salerno* in the abortion context, the Court can take another necessary step toward restoring, to the tripartite allocation of power, "the more modest role Article III envisions for federal courts."[12]

In 2003, the New Hampshire legislature enacted the Parental Notification Prior to Abortion Act.[13] The statute prohibits performing an abortion on an unemancipated minor until forty-eight hours after written notice is delivered to the minor's parent or guardian.[14] Although the statute contains a judicial bypass provision and an exception for the minor's life, it does not contain an exception for the minor's health.[15]

Before the statute took effect, three abortion clinic operators and a doctor who performs abortions filed a complaint in the United States District Court for the District of New Hampshire.[16] Arguing that the statute was unconstitutional because it lacked a health exception, contained an inadequate life exception, and had an insufficient confidentiality provision, the plaintiffs sought an injunction and a declaration that the Act was unconstitutional on its face.[17] After identifying the circuit split regarding the appropriate standard for evaluating facial challenges to state abortion laws, the court concluded that "the *Casey* . . . standard applies in the context of abortion legislation."[18] Applying that standard, the court held the Act invalid on its face because it did not "comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception."[19] Accordingly, the court granted the plaintiffs' request for declaratory relief and permanently enjoined enforcement of the statute.[20]

The First Circuit affirmed. Writing for the panel, Judge Torruella[21] agreed with the district court's conclusion that the *Casey* undue burden standard applied because that standard "supersede[d] *Salerno* in the context of abortion regulation."[22] The court also agreed

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[12] DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1864 (2006).

[13] N.H. REV. STAT. ANN. §§ 132:24–:28 (2005).

[14] *See id.* § 132:25.

[15] *See id.* § 132:26.

[16] *See* Planned Parenthood of N. New Eng. v. Heed, 296 F. Supp. 2d 59, 62 (D.N.H. 2003).

[17] *See id.* at 62–63.

[18] *Id.* at 63.

[19] *Id.* at 65. The court also held the life exception unconstitutional. *Id.* at 67. Having found that the "lack of a health exception render[ed] the entire Act unconstitutional," the court declined to rule on the adequacy of the Act's confidentiality provision. *Id.*

[20] *See id.* at 68.

[21] Chief Judge Boudin and Judge Saris, sitting by designation, joined the opinion.

[22] Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53, 58 (1st Cir. 2004).

that the Act was "constitutionally invalid in the absence of a health exception."[23]

The Supreme Court vacated and remanded. Writing for a unanimous Court,[24] Justice O'Connor[25] emphasized at the outset that the Court was not revisiting its abortion precedents[26] but was instead addressing only a question of remedy.[27] More specifically, the Court was determining the "appropriate judicial response" when confronted with an unconstitutional application of a statute.[28] In making such a determination, the Court usually has attempted "to limit the solution to the problem."[29] Its aim was thus "to enjoin only the unconstitutional applications of [the] statute while leaving other applications in force . . . or to sever [the statute's] problematic portions while leaving the remainder intact."[30]

In carrying out that aim, the Court was guided by "[t]hree interrelated principles [that] inform [its] approach to remedies."[31] First, understanding that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," the Court tried "not to nullify more of [the] legislature's work than [was] necessary."[32] Ac-

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[23] *Id.* at 61. The court further agreed that the Act's life exception was unconstitutional. *See id.* at 64. Because it had "already found the Act in its entirety unconstitutional on other grounds," the court of appeals, like the district court, did not reach the plaintiffs' objection to the judicial bypass provision. *Id.* at 65.

[24] *Ayotte* was the Court's first unanimous, non–per curiam abortion decision since *Bellotti v. Baird*, 428 U.S. 132 (1976), which also involved a parental notification statute, *see id.* at 134.

[25] *Ayotte* was Justice O'Connor's last opinion before her retirement from the Court. *See* 2005 Term Opinions of the Court, http://www.supremecourtus.gov/opinions/05slipopinion.html (last visited Oct. 15, 2006).

[26] *Ayotte*, 126 S. Ct. at 964.

[27] *Id.* at 964. With respect to its abortion precedents, the Court accepted two legal propositions as established: first, "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy," and second, "a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* at 966–67 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

[28] *Id.* New Hampshire conceded that, "[i]n some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health." *Id.* at 967. New Hampshire also conceded that, under Supreme Court precedent, "it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks." *Id.* Having made those two concessions, however, New Hampshire argued that the Act's judicial bypass provision and New Hampshire's "competing harms" statutes reliably protected minors' health in all medical emergencies. *See id.* (citing N.H. REV. STAT. ANN. §§ 627:1, :3(I) (1996)). Without much discussion, the Court rejected this argument by accepting the lower courts' view that "neither of these provisions . . . protect[ed] minors' health reliably in all emergencies." *Id.* Accordingly, the remainder of the Court's opinion focused on the issue of remedy.

[29] *Id.* at 967.

[30] *Id.* (citation omitted).

[31] *Id.*

[32] *Id.* (first alteration in original) (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984)) (internal quotation marks omitted).

cordingly, "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course.'"[33] "Second, mindful that [its] constitutional mandate and institutional competence are limited," the Court restrained itself from "rewrit[ing] state law to conform it to constitutional requirements," except in cases in which devising a judicial remedy was a "relatively simple matter" that did not "entail quintessentially legislative work."[34] Third, "the touchstone for any decision about remedy is legislative intent."[35] This final principle required the Court to determine whether the legislature would have "preferred what [was] left of its statute to no statute at all."[36]

Applying these principles, the Court concluded that the lower courts' remedy was unnecessarily "blunt" because those courts "need not have invalidated the law wholesale" when "[o]nly a few applications of [the] statute would present a constitutional problem."[37] Instead, "[s]o long as they are faithful to legislative intent," the lower courts may issue a declaratory judgment and an injunction prohibiting only the unconstitutional applications.[38] Recognizing that there was the open question whether the New Hampshire legislature would have preferred a parental notification law with a health exception to no law at all,[39] the Court remanded the case to allow the lower courts to determine legislative intent.[40]

Ayotte is best understood as an attempt by the Court to preserve judicial power by focusing on the substance rather than the form of

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[33] *Id.* at 968 (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

[34] *Id.* (second alteration in original) (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 479 n.26 (1995); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)) (internal quotation marks omitted).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 969.

[38] *Id.*

[39] In other words, it was unclear whether the New Hampshire legislature would have passed the Act if it were forced to include a health exception. The plaintiffs contended that the legislature would prefer no statute at all because the legislature feared that a general health exception would swallow the parental notification rule. *See id.*; Transcript of Oral Argument at 44–45, *Ayotte* (No. 04-1144) [hereinafter Transcript], *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1144.pdf (explaining the plaintiffs' position that some legislators "believe that any exception beyond one for a life-saving emergency renders . . . [an] abortion restriction meaningless"). For an explanation of why a general health exception could render an abortion restriction meaningless, see Recent Case, 119 HARV. L. REV. 685, 688–89 (2005). In contrast, New Hampshire argued that the statute's severability clause indicated that the legislature intended the statute to be "given effect without the invalid provisions or applications." *Ayotte*, 126 S. Ct. at 969 (quoting N.H. REV. STAT. ANN. § 132:28 (2005)) (internal quotation mark omitted). Justice Scalia also emphasized the severability clause during oral argument. *See* Transcript, *supra*, at 45 (responding to New Hampshire's position by stating that "the severability provision really just flatly contradicts [the] assertion that the New Hampshire legislature wouldn't want [the statute to be given effect without the invalid applications]").

[40] *Ayotte*, 126 S. Ct. at 969.

the plaintiffs' challenge. Although the plaintiffs structured their suit as a facial challenge, they conceded at oral argument that facial invalidation was not necessary because a narrower remedy "would solve the constitutional problem in this case."[41] In light of that concession and the plaintiffs' alternative plea for any relief just and proper,[42] the Court was not forced to address the most controversial issue before it: whether *Salerno*'s "no set of circumstances" standard or *Casey*'s "large fraction" standard applies to facial challenges of abortion regulations. But even though the Court did not address the conflict between *Salerno* and *Casey*, its analysis and conclusion, particularly when compared with *Stenberg v. Carhart*,[43] suggest a promising new remedial emphasis in the Court's abortion jurisprudence.[44] This new emphasis, which accentuates separation-of-powers principles, narrow judicial remedies, and the judiciary's limited constitutional mandate, implicitly endorses the underlying premises of *Salerno* and thus may signal an end to *Casey*'s facial invalidation approach. Having made one step in the right direction — toward restoring to the Court's abortion jurisprudence the tripartite allocation of power that Article III is designed to maintain — the Court should take another step in that direction and carry out the principles of *Ayotte* by once again expressly invoking and applying *Salerno* in the abortion context.

In *Salerno*, the Court explained that a "heavy burden" of proof is required to mount a successful facial challenge: "[T]he challenger must establish that no set of circumstances exists under which the [challenged] Act would be valid."[45] Although the Court has recognized the "First Amendment doctrine of overbreadth [as] an exception to [this] normal rule regarding the standards for facial challenges,"[46] at least as late as 1987 — and seemingly until *Casey* was decided in 1992 — it "ha[d] not recognized an 'overbreadth' doctrine outside the limited

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41 Transcript, *supra* note 39, at 37.

42 *See Ayotte*, 126 S. Ct. at 969.

43 530 U.S. 914 (2000).

44 In *Stenberg*, the Court facially invalidated a Nebraska statute banning partial birth abortions because the Court was not convinced that a health exception to the statute was never necessary to preserve the health of women. *Id.* at 937–38. According to the *Ayotte* Court, a narrower remedy was not ordered in *Stenberg* because the parties did not ask for, and the *Stenberg* Court "did not contemplate, relief more finely drawn." *Ayotte*, 126 S. Ct. at 969. Interestingly, however, at least Justices Scalia and Thomas appear to have contemplated narrower relief in *Stenberg*. In *Hill v. Colorado*, 530 U.S. 703 (2000), which was decided the same day as *Stenberg*, Justice Scalia, joined by Justice Thomas, suggested that facial invalidation in *Stenberg* was improper because "*Stenberg* applie[d] overbreadth analysis to an antiabortion law that ha[d] nothing to do with speech, even though until [1992] overbreadth was unquestionably the exclusive preserve of the First Amendment." *Id.* at 764 (Scalia, J., dissenting) (emphasis omitted).

45 United States v. Salerno, 481 U.S. 739, 745 (1987).

46 Virginia v. Hicks, 539 U.S. 113, 118 (2003).

context of the First Amendment."[47] But then in *Casey* and again in *Stenberg* in 2000, the Court, without so much as a mention of *Salerno*, applied the overbreadth doctrine and sustained facial challenges to abortion regulations. In neither of these cases did the Court address whether a less extreme remedy was appropriate. Against this backdrop, *Ayotte*'s focus on remedies signals a new emphasis in the Court's abortion jurisprudence. This new emphasis requires courts that have already concluded that an abortion regulation contains at least one unconstitutional application to apply the *Ayotte* test in order to determine if a narrow remedy, as opposed to facial invalidation, is possible.

Although this new remedial emphasis potentially cures some of the problems with the *Casey* standard, it is still unclear "what has happened to the *Salerno* doctrine in the abortion context."[48] *Ayotte* did not explicitly answer that question, but several factors, including the separation-of-powers principles animating *Ayotte*, point toward *Salerno* as the appropriate standard.

First, by requiring courts to consider hypothetical cases, facial invalidations generally force courts to overstep their bounds and thus should occur only in the rarest of circumstances. As the Court has long recognized, a federal court "has no jurisdiction to pronounce any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."[49] Accordingly, the profound power to pronounce a statute unconstitutional — what Justice Holmes called the "gravest and most delicate duty that [a court] is called on to perform"[50] — "is not to be exercised with reference to hypothetical cases thus imagined."[51] The principles that dictate this limited power of the federal courts and that limit permissible facial challenges "rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."[52]

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[47] *Salerno*, 481 U.S. at 745; *accord* Webster v. Reprod. Health Servs., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

[48] Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 294–95 (2d Cir. 2006) (Walker, C.J., concurring).

[49] Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (grounding the federal judiciary's authority to exercise judicial review on the necessity of doing so in the course of carrying out the judicial function of deciding "particular cases").

[50] Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

[51] United States v. Raines, 362 U.S. 17, 22 (1960); *see also* Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219–20 (1912) ("[T]his court must deal with the case in hand and not with imaginary ones. . . . How the state court may apply [the statute at issue] to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now.").

[52] Broadrick v. Oklahoma, 413 U.S. 601, 610–11 (1973).

The *Salerno* standard would ensure that facial invalidations happen sparingly by requiring challengers to satisfy a demanding standard of proof, thus encouraging them to bring as-applied rather than facial challenges. In this regard, *Salerno* is consistent with the Court's recent statement that "facial challenges are best when infrequent."[53] *Salerno* also is consistent with the *Ayotte* Court's indication that facial adjudication is an exception rather than the norm.[54] In contrast, the *Casey* standard does not at all deter plaintiffs from bringing facial challenges to abortion regulations. Plaintiffs are still encouraged to swing for the fences, though *Ayotte* may help ensure that they end up with something less than a home run when they are unable to show that all of a statute's applications would be unconstitutional. Thus, the Court should reject the *Casey* standard because a jurisprudence that encourages facial adjudication invites courts to overstep their bounds and "carries too much of a promise of 'premature interpretatio[n] of statutes' on the basis of factually bare-bones records."[55]

Second, the *Salerno* standard is a clear and readily administrable standard by which a court can easily evaluate the validity of a challenged statute.[56] In this regard, *Salerno* is much more consistent with the *Ayotte* Court's recognition of the federal judiciary's limited institutional competence than *Casey* is.[57] Under the *Salerno* standard, a court has to determine simply whether the plaintiff can show that the statute lacks a single valid application. This mode of adjudication helps conserve judicial resources by putting the burden on the government to prove only one instance in which the statute would operate constitutionally. In contrast, under the *Casey* standard, courts face the extraordinarily difficult task of first having to "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation"[58] and then having to determine whether the statute would work an unconstitutional result in a "large fraction" of those hypothetical situations.[59] Under that unclear standard, difficult questions about defining the number of unconstitutional applications in the numerator and the total relevant universe of applications in the denominator will often arise. And, unlike the *Salerno*

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53 Sabri v. United States, 124 S. Ct. 1941, 1948 (2004).

54 *See Ayotte*, 126 S. Ct. at 968.

55 *Sabri*, 124 S. Ct. at 1948 (alteration in original) (quoting *Raines*, 362 U.S. at 22).

56 *Cf.* Brief for the United States as Amicus Curiae Supporting Petitioner at 11–12, *Ayotte* (No. 04-1144), 2005 WL 1900328 [hereinafter Solicitor General's Brief] (making a similar argument regarding why the *Salerno* "no set of circumstances" standard is the preferable test for facial challenges).

57 *See Ayotte*, 126 S. Ct. at 968.

58 Barrows v. Jackson, 346 U.S. 249, 256 (1953).

59 *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 294 (2d Cir. 2006) (Walker, C.J., concurring) (internal quotation marks omitted).

approach, which would push the search for constitutional applications to the defendant, the *Casey* approach would not allow courts to rely solely on the parties to define the relevant numerator and denominator. Instead, the courts themselves would have to engage in that demanding task to ensure that the numerator and denominator are accurate, which would consume significant judicial resources.[60]

Third, contrary to the *Ayotte* Court's principle that courts should try not to nullify more of a legislature's work than is necessary, a court that facially invalidates a statute based on a showing that does not meet *Salerno*'s "no set of circumstances" standard thereby extends its relief beyond what is appropriate or necessary. Stated differently, the *Salerno* approach, in sharp contrast to *Casey*'s facial invalidation approach, "has the advantage of allowing statutes to stand as to the legitimate objects of legislative action while simultaneously exempting constitutionally protected activity from the statutes' reach."[61] Additionally, under the *Salerno* standard, a facial challenge provides no more relief than would be obtained through an exhaustive series of as-applied challenges because *Salerno* would require the plaintiff to show that a statute has no valid applications before a court can declare the statute facially unconstitutional. Although *Ayotte* seemingly cures this particular problem with the *Casey* standard, the early evidence suggests that the pre-*Ayotte* trend of facial invalidation is continuing.[62] Requiring lower courts to apply *Salerno* is necessary to ensure that the principles articulated in *Ayotte* are not rendered hollow rhetoric by the lower courts.

Lastly, the overbreadth doctrine, which is an exception to the Constitution's case-or-controversy requirement,[63] should not be applied

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[60] Facial challenges also put a heavy toll on legislative resources, particularly when a court facially invalidates a statute that has numerous constitutional applications and thus forces a legislature to redraft, redebate, and reenact a statute without the constitutional inadequacies in the original statute. Thus, in terms of their overall tolls on government resources, as-applied challenges may be more efficient than facial challenges.

[61] Nat'l Treasury Employees Union v. United States, 990 F.2d 1271, 1281–82 (D.C. Cir. 1993) (Sentelle, J., dissenting), *aff'd in part and rev'd in part*, 513 U.S. 454 (1995).

[62] For instance, just two weeks after *Ayotte* was decided, the Ninth Circuit affirmed a decision facially invalidating the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. III 2003). *See* Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1191 (9th Cir. 2006). In doing so, the Ninth Circuit concluded that granting a narrower remedy "would not be consistent with the *Ayotte* precepts, because in order to do so [the court] would be required to violate the intent of the legislature and usurp the policy-making authority of Congress." *Id.* at 1185. The Second Circuit also affirmed a decision facially invalidating the Act although, in light of *Ayotte*, it "defer[red] a ruling as to the remedy pending receipt of supplemental briefs." *Nat'l Abortion Fed'n*, 437 F.3d at 281. The Second Circuit has not yet decided the appropriate remedy.

[63] *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (explaining that the overbreadth doctrine represents a "departure from traditional rules of standing"); *see also* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1861 (2006) ("Article III standing . . . enforces the Constitution's case-or-

outside of the limited context of the First Amendment. Even if it should, the Court has never explained why the doctrine should be applied in the abortion context but not other nonspeech contexts.[64] Indeed, application of the doctrine in the abortion context is particularly "disturbing from a constitutional perspective because both substantive due process and overbreadth transfer significant power from legislatures to judiciaries."[65] Moreover, the Court's overbreadth opinions almost always caution against application of the doctrine to nonspeech claims. For instance, the Court recently indicated that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or conduct necessarily associated with speech."[66] And even within the speech context, the Court has explained that "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine" that the Court has "employed . . . sparingly and only as a last resort."[67] Accordingly, the Court has not even applied the doctrine to all free speech claims.[68] Instead, the Court has generally applied the doctrine only to overbroad statutes that could "deter or 'chill' constitutionally protected speech" and thus harm not only those whose speech is chilled by the regulations, but also "society as a whole, which is deprived of an uninhibited marketplace of ideas."[69] Without an explanation from the Court concerning why the last resort of overbreadth is justified in the abortion context, the doctrine should not apply in that context.

The interrelated principles that informed the *Ayotte* Court's approach to remedies rightly bring the Court's abortion jurisprudence one step closer to the tripartite allocation of power that Article III's case-or-controversy requirement is designed to maintain. More impor-

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controversy requirement." (omission in original) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2308 (2004))).

64 Interestingly, the *Sabri* Court, after citing *Stenberg* for the proposition that abortion is one of the "few settings" in which the Court has applied the overbreadth doctrine, explained that, "[o]utside these limited settings" and "absent a good reason," the Court does "not extend an invitation to bring overbreadth claims." Sabri v. United States, 124 S. Ct. 1941, 1948–49 (2004). Neither *Stenberg* nor any of the Court's other abortion decisions, however, provides the requisite "good reason" for applying overbreadth in the abortion context. *Cf. Nat'l Abortion Fed'n*, 437 F.3d at 294–95 (Walker, C.J., concurring) ("[T]he Supreme Court . . . has never balanced the jurisprudential and administrative considerations associated with jettisoning *Salerno* against whatever . . . concerns might militate in favor of a modified standard of proof.").

65 Kevin Martin, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173, 175 (1999). For additional reasons why the overbreadth doctrine does not apply — and should not be applied — in the abortion context, see Solicitor General's Brief, *supra* note 56, at 12–16.

66 Virginia v. Hicks, 539 U.S. 113, 124 (2003).

67 *Broadrick*, 413 U.S. at 613.

68 *See, e.g.*, Bates v. State Bar, 433 U.S. 350, 381 (1977) (declining to apply the overbreadth doctrine in the context of professional advertising).

69 *Hicks*, 539 U.S. at 119.

tantly, these principles signal an end to the *Casey* facial invalidation approach in the abortion context. Indeed, the separation-of-powers principles underlying *Ayotte* are starkly inconsistent with the *Casey* approach. By once again invoking and applying *Salerno* in the abortion context, the Court can resolve this inconsistency and clarify the standard that lower courts should apply to facial challenges of abortion regulations. The Court should do so this Term in *Gonzales v. Carhart*.[70]

B. Status of International Law

Enforceability of Treaties in Domestic Courts — Vienna Convention on Consular Relations. — Article 36 of the Vienna Convention on Consular Relations[1] (VCCR) "guarantees open channels of communication between detained foreign nationals and their consulates in signatory countries."[2] In a 2005 case, *Medellin v. Dretke*,[3] the Supreme Court chose not to consider whether that Article "create[d] a judicially enforceable individual right,"[4] instead dismissing the writ of certiorari as improvidently granted.[5] Justice O'Connor, dissenting from the Court's dismissal, noted that it is "unsound to avoid questions of national importance when they are bound to recur."[6] Confronting the same issue a year later, the Court again failed to heed Justice O'Connor's advice. Last Term, in *Sanchez-Llamas v. Oregon*,[7] the Supreme Court declined to decide whether Article 36 creates a judicially enforceable right,[8] holding that even if it does, suppression is not an appropriate remedy, and state procedural default rules apply.[9] By avoiding the question of the existence of judicially enforceable rights under Article 36 and by considering only a very limited set of remedies, the Court's decision exemplifies judicial minimalism. While

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[70] 126 S. Ct. 1314 (2006), *granting cert. to* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005) (facially invalidating the Partial-Birth Abortion Ban Act of 2003).

[1] Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

[2] Medellin v. Dretke, 125 S. Ct. 2088, 2096 (2005) (O'Connor, J., dissenting).

[3] 125 S. Ct. 2088 (per curiam).

[4] *Id.* at 2095 (O'Connor, J., dissenting).

[5] *Id.* at 2092 (per curiam).

[6] *Id.* at 2096 (O'Connor, J., dissenting).

[7] 126 S. Ct. 2669 (2006). In *Sanchez-Llamas*, the Court consolidated two cases — *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (2005) (mem.), and *Bustillo v. Johnson*, 126 S. Ct. 621 (2005) (mem.).

[8] The relevant part of Article 36 provides that if a national of a sending state arrested in the receiving state "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of the arrest. VCCR, *supra* note 1, art. 36. The authorities of the receiving State must also inform the arrested foreign national "without delay" of this right. *Id.*

[9] *Sanchez-Llamas*, 126 S. Ct. at 2674.