

# HEINONLINE

Citation: 36 Hastings Const. L.Q. 611 2008-2009

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Tue Sep 21 15:17:43 2010

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0094-5617](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0094-5617)

# Rights, Remedies and Facial Challenges

by MAYA MANIAN\*

In a few short years, the Roberts Court has managed to severely restrict the use of facial challenges across substantive areas of constitutional law.<sup>1</sup> Caitlin Borgmann's article, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*,<sup>2</sup> provides a compelling analysis of the vexing distinction between as-applied and facial challenges in constitutional litigation and the impact that limiting facial challenges has on constitutional rights. Borgmann argues that facial challenges are necessary to keep legislatures in check, particularly when legislatures "deliberately or recklessly infringe individual rights" of those who lack political power.<sup>3</sup> Facial challenges are needed in this context not only to protect important individual rights, but also to ensure that legislatures do not unfairly shift their constitutional responsibilities to the courts.<sup>4</sup> Legislatures have in the past skirted their constitutional duties by passing blatantly unconstitutional laws in order to pander to public sentiment, "leav[ing] the courts to do their dirty work" of conforming the legislation to the Constitution.<sup>5</sup>

Borgmann's article makes several significant contributions to the scholarship on as-applied and facial challenges. First, Borgmann provides a useful taxonomy to describe the various ways in which a "facial" versus an "as-applied" challenge can be presented. It has been difficult to distinguish as-applied from facial challenges due to the lack of clarity

---

\* Associate Professor, University of San Francisco School of Law. I thank Susan Freiwald, Peter Honigsberg, Julie Nice and Steve Shatz for helpful comments on earlier drafts. Thanks to Alexandria Walden for research assistance. Thanks also to Roy Sehgal for useful feedback.

1. See, e.g., *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007); *Wash. St. Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008); *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

2. Caitlin Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563 (2009).

3. *Id.* at 564.

4. *Id.*

5. *Id.* at 567.

regarding what these terms mean. Courts and commentators have confused as-applied and facial challenges with whether a suit is brought pre-enforcement or post-enforcement; have used different terminology depending on whether the challenge will lead to complete invalidation or partial invalidation of a law; and have failed to distinguish between the type of challenge at issue as opposed to the remedy provided by the court.<sup>6</sup> Borgmann categorizes the types of challenges litigants can bring first by whether the challenge is “pre-enforcement” or “post-enforcement.”<sup>7</sup> Pre-enforcement challenges can seek: (1) total invalidation of a law, which is the paradigmatic case of a “facial” challenge; (2) limited invalidation of a law to a subset of applications, which is variously described as either an “as-applied” or a “facial” challenge; and (3) case-specific invalidation where a party asserts that the law is unconstitutional solely as applied to her, which is the typical understanding of an “as-applied” challenge.<sup>8</sup> However, all pre-enforcement challenges are in some sense “facial” challenges since the statute has never been applied and, given the lack of facts regarding enforcement, the statute is measured solely on its face, i.e., by its text alone.<sup>9</sup> Similarly, post-enforcement challenges can seek total invalidation, limited invalidation or case-specific invalidation.<sup>10</sup>

Moreover, there is an important distinction between the type of *challenge* a litigant brings and the type of *remedy* a court applies, although courts have frequently confused the two.<sup>11</sup> Borgmann explains that the above categories refer to the types of *challenges* litigants may bring. The *remedies* granted in response to these challenges “can likewise be (1) total or full (invalidating the entire statute or provision); (2) partial (invalidating the statute only as applied to a certain set of applications); [or] (3) case-specific (invalidating only as applied to the claimant).”<sup>12</sup> I agree that the terms “as-applied” and “facial” challenges have no fixed meaning. Borgmann’s detailed categorization of the possible different types of challenges and remedies shows that the terms “as-applied” and “facial” challenges are hopelessly muddled and easily manipulable.

Second, although a number of scholars have analyzed the quagmire of law on as-applied and facial challenges in constitutional litigation,

---

6. *Id.* at 569–71.

7. *Id.*

8. *Id.* at 570–71.

9. *Id.*

10. *See id.* at 570.

11. *See infra* Part II.

12. *See* Borgmann, *supra* note 2, at 571.

surprisingly few have considered in detail the impact that the Supreme Court's preference for as-applied challenges has on underlying constitutional norms.<sup>13</sup> The type of challenge permitted tells us nothing about the underlying *right* at issue—that is, the Court generally applies the same procedural rules for allowing facial challenges across doctrinal areas without considering the effect on the rights at stake.<sup>14</sup> Borgmann brings to the fore the detrimental impact that hostility to facial challenges has on courts' ability to protect individual rights. Borgmann describes how the Roberts Court has been deeply skeptical of facial challenges in numerous individual rights cases, including those involving abortion rights, voting rights, political parties' associational rights, and Eighth Amendment rights related to the death penalty.<sup>15</sup> She argues that a normative agenda drives the Roberts Court's intolerance of facial challenges and shows that the Court's justifications for hostility towards facial challenges are pretextual.<sup>16</sup> The Court has often justified restricting the use of facial challenges for two reasons. First, the Court has asserted that facial invalidation (referring to total invalidation of a law) is a drastic remedy and principles of separation

---

13. See *id.* at 566 n.21 (citing scholarship on facial versus as-applied challenges); see also David Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333 (2005); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359 (1998); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (1994).

14. See Borgmann, *supra* note 2, at 569–71. There are two notable exceptions to this: First Amendment overbreadth and, until recently, abortion. First, the Court itself acknowledged that overbreadth doctrine is an exception to its general rule that “facial” challenges, i.e., total invalidation, should only be “entertained” when “the challenger . . . establish[es] that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987) (noting that overbreadth cases permit facial challenges even if the regulation could constitutionally apply to the challenger herself). The *Salerno* “no set of circumstances” test for facial challenges has been heavily criticized. See, e.g., Dorf, *supra* note 13, at 238–42 (arguing that the *Salerno* standard is incorrect as a matter of principle and practice). Second, in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992), the Court allowed a facial challenge to an abortion restriction where the regulation presented an “undue burden” to a “large fraction” of women to whom the restriction was relevant. Recently, in *Gonzales v. Carhart*, the Court appeared to retreat from *Casey*'s more permissive standard towards allowing facial challenges to abortion restrictions, although *Carhart* explicitly refused to resolve the conflict between the *Salerno* and *Casey* standards for reviewing facial challenges. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (noting confusion among courts whether *Salerno* or *Casey* standard applies to facial challenges in abortion context, but concluding that the Court “need not resolve that debate”).

15. See Borgmann, *supra* note 2, at 574–88.

16. *Id.* at 588–89.

of powers and federalism suggest limiting its use. Second, the Court claims that proper adjudication requires concrete facts, which pre-enforcement facial challenges typically lack. Borgmann convincingly demonstrates that, thus far, the Roberts Court has not been consistently committed to these rationales, particularly the supposed concern for concrete facts. Borgmann argues, persuasively, that the Court's approach to as-applied and facial challenges varies based on its normative assessment of the rights at issue, rather than a neutral approach based on purely procedural concerns.<sup>17</sup>

Third, Borgmann examines not only how hostility to facial challenges threatens substantive constitutional rights, but also how limiting facial challenges upsets the balance of power between legislatures and the courts. Borgmann asserts that more stringent judicial review of legislative purpose and of the legislature's factual foundations for regulations that infringe civil rights will help to determine when courts should totally invalidate a law "on its face" in order to ensure that legislatures do not shirk their constitutional duties.<sup>18</sup> Ultimately, "'facial challenges' offer a way of encouraging legislative constitutional accountability."<sup>19</sup>

This brief Comment attempts to build upon just one key point raised by Borgmann: that favoring one mode of constitutional litigation—facial or as-applied—has direct implications for substantive constitutional norms. More specifically, I want to comment further on Borgmann's claim that the Roberts Court's intolerance of facial challenges "permits the Court to withdraw from its critical role in safeguarding individual rights."<sup>20</sup> Borgmann reveals inconsistencies in the Roberts Court's analysis of facial challenges and persuades that these inconsistencies expose the Court's outcome-driven approach to facial challenges.<sup>21</sup> Where the Court is unsympathetic towards the underlying right, the Court is also unsympathetic towards a facial challenge and vice-versa.<sup>22</sup> I would further

---

17. *Id.* at 588–90, 597–98.

18. *Id.* at 598–610.

19. *Id.* at 600.

20. *Id.* at 564.

21. *Id.* at 588–90.

22. *Id.* at 589; see also *Warshak v. United States*, 532 F.3d 521, 538 (2008) (Martin, J., dissenting). The dissenting judge in *Warshak* noted that the Roberts Court does favor facial challenges if it favors the underlying right, such as the Second Amendment right to bear arms. *Id.* ("The majority makes much of the fact that facial challenges are no way to litigate the constitutional validity of certain laws. Yet our Supreme Court has no problem striking down a handgun ban enacted by a democratically elected city government on a facial basis. History tells us that it is not the fact that a constitutional right is at issue that portends the outcome of a case, but rather what specific right we are talking about." (citation omitted)).

suggest that the Court not only manipulates the law in an outcome-determinative manner, but also exploits the rules regarding the use of as-applied and facial challenges as a means to rewrite substantive law without having to openly overrule prior precedent. I also argue that this particular method of using seemingly procedural rules to alter—usually detrimentally—substantive rights is part of a larger pattern on the Roberts Court. Across different areas of law, the Roberts Court has tended to “close the courthouse doors” to individual rights claimants by manipulating seemingly technical rules and thereby obscuring its rollback of individual rights.<sup>23</sup>

Borgmann’s insightful analysis also raises a critical question: in the face of the Roberts Court’s hostility towards facial challenges, how should civil rights litigants frame their cases to better protect fundamental constitutional rights? I suggest that one possibility might be for civil rights advocates to avail themselves of the confusion surrounding the distinction between as-applied and facial challenges, and reframe their “facial” challenges as requests for a remedy that would apply to a broad subset of persons impacted by the rights-infringing law being challenged.

### I. About Face—Rewriting Abortion Law

On at least two occasions, the Roberts Court has rewritten substantive law under the guise of making merely procedural choices between as-applied or facial challenges.<sup>24</sup> One of the most prominent examples of the Court’s about face on facial challenges, *Gonzales v. Carhart*, illustrates the Court’s use of litigation posture to cloak its overruling of precedent.<sup>25</sup> *Carhart* upheld the federal “partial-birth” abortion ban, which bans a method of pre-viability second-trimester abortion that many physicians have concluded must be used in some cases to protect their patients’ health.<sup>26</sup> The federal abortion ban denies women a health exception, although previous Supreme Court decisions have always required a health

---

23. See Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (quoting Judith Resnik as labeling the previous Supreme Court term “the year they closed the courts” due to series of cases limiting ability of plaintiffs to bring lawsuits).

24. See *FEC v. Wis. Right To Life (WRTL II)*, 127 S. Ct. 2652, 2684 n.7 (2007) (Scalia, J., concurring in the judgment) (stating that *WRTL II* “effectively overrules *McConnell* without saying so”); *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

25. *Carhart*, 127 S. Ct. 1610.

26. See *id.* “Partial-birth” abortion is a political term, not a medical term. See Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER’S, Nov. 2004, at 33.

exception to abortion restrictions.<sup>27</sup> As Borgmann explains, *Carhart* proclaimed that facial challenges should never have been “entertained” by the Court in the abortion context.<sup>28</sup> Instead, the Court offered the promise of future “as-applied” challenges as “the proper manner to protect the health of the woman.”<sup>29</sup> It is impossible to reconcile the Court’s refusal to invalidate an abortion restriction lacking a health exception, or to at least partially invalidate such a restriction, with prior case law.<sup>30</sup> I agree with Borgmann’s claim that the Court’s promise of future “as-applied” challenges in the abortion context is illusory and more likely reflects the Court’s hostility to abortion rights. I would also argue that the majority used the debate surrounding the appropriate use of facial challenges as a means to rewrite substantive law *sub rosa*. *Carhart* overruled well-established precedent by essentially writing the requirement of a health exception to abortion restrictions out of the law. The manipulation of the as-applied and facial challenge approaches to constitutional litigation presented a way for the Court to reject the health exception rule without explicitly saying so.<sup>31</sup>

Since the *Roe v. Wade* decision, the Court has always required that abortion regulations contain health exceptions, even for post-viability abortions.<sup>32</sup> Although *Planned Parenthood of Southeastern Pennsylvania v. Casey* altered aspects of the *Roe* regime for protecting abortion rights, *Casey* reiterated that both pre- and post-viability abortion restrictions must contain health exceptions.<sup>33</sup> In *Stenberg v. Carhart*, the first Supreme

---

27. See cases and sourced cited *infra* notes 32–44 and accompanying text.

28. See Borgmann, *supra* note 2, at 580–81.

29. *Carhart*, 127 S. Ct. at 1638–39.

30. See Borgmann, *supra* note 2, at 580–81; David Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 703 (2009).

31. Anti-abortion groups have long advocated for eliminating the health exception. Brief for NARAL Pro-Choice America Foundation as Amicus Curiae Supporting Plaintiffs, *Planned Parenthood of N. New Eng. v. Ayotte*, 571 F. Supp. 2d 265 (D.N.H. 2006) (No. C-03-491-JD), 2006 WL 4099370 (explaining state legislatures’ “refusal to include a health exception [as] entirely consistent with efforts by national anti-abortion organizations and their nationwide legislative, litigation, and public relations strategies to eliminate the health exception requirement from the law.”); Judie Brown, *The Exception*, ALL ABOUT ISSUES, Mar.-Apr. 1992, [http://www.prolife.org.au/articles/abortion\\_anti-abortion\\_theology/article\\_16.php](http://www.prolife.org.au/articles/abortion_anti-abortion_theology/article_16.php) (last visited February 27, 2009) (discussing the anti-abortion movement’s moral obligation to oppose any exceptions to restrictive abortion policies); see also Sarah Kliff, *‘Health’ of the Mother*, NEWSWEEK, Oct. 16, 2008, <http://www.newsweek.com/id/164301> (last visited February 27, 2009).

32. See *Roe v. Wade*, 410 U.S. 113 (1973).

33. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

Court case to address a “partial-birth” abortion ban, the Court again demanded that abortion restrictions include a health exception.<sup>34</sup> The physicians who challenged each of the abortion restrictions in these cases (physicians typically have third-party standing in this context to represent the interests of their women patients) framed the case as a “facial” challenge—that is, as a pre-enforcement challenge seeking total invalidation of the law.<sup>35</sup> In each case, the Court granted total invalidation of the challenged abortion restriction.<sup>36</sup>

In *Ayotte v. Planned Parenthood of Northern New England*, the Court changed its analytical approach, but not the underlying rule requiring a health exception.<sup>37</sup> *Ayotte* concerned a challenge to a New Hampshire law prohibiting physicians from providing abortion services to minors until forty-eight hours after the minor’s parents received written notice of the pending procedure. The New Hampshire Legislature denied a medical emergency exception to the parental notification requirement.<sup>38</sup> At the Supreme Court, New Hampshire conceded that it would be unconstitutional under existing precedent “to apply the Act in a manner that subjects minors to significant health risks.”<sup>39</sup> Justice O’Connor wrote a unanimous opinion for the Court, a highly unusual configuration in an abortion case.<sup>40</sup> Rather than address the question presented by the case—whether and under what circumstances the Court should welcome a “facial” challenge in the abortion context—O’Connor framed the inquiry as one of remedy: “We do not revisit our abortion precedents today, but rather address a question of remedy: If enforcing a statute that regulates access to abortion would be

---

34. See *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Stenberg* stated that a health exception must be included in all abortion restrictions where “substantial medical authority” supports the need for medical exemptions. See *id.* at 938. *Stenberg* invalidated a Nebraska “partial-birth” abortion ban nearly identical to the federal ban upheld in *Carhart*. The essential difference between the two cases was the changed composition of the Court. See Michael C. Dorf, *Nineteenth Annual Supreme Court Review*, 23 *TOURO L. REV.* 815, 818–22 (2008) (arguing that although Court did not explicitly overrule any abortion precedents, the new majority in *Carhart* denied a health exception in contradiction to *Stenberg* and prior precedents going back to *Roe*).

35. The Supreme Court has made clear that physicians generally have the right to assert third-party standing on behalf of their patients seeking abortion. See *Singleton v. Wulff*, 428 U.S. 106, 118 (1976).

36. *Stenberg*, 530 U.S. at 945–46; *Casey*, 505 U.S. at 898 (striking down spousal notification provision on its face); *Roe*, 410 U.S. at 166.

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

38. *Id.* at 965.

39. *Id.* at 967.

40. See Borgmann, *supra* note 2, at 575–76 (stating that the *Ayotte* approach to facial versus as-applied challenges served to mask substantive disagreements among the justices and permitted Justice O’Connor to issue a unanimous decision).



unconstitutional in medical emergencies, what is the appropriate judicial response?”<sup>41</sup> Notably, O’Connor presented only two remedial options: to strike down the law in toto for failure to include a health exception or, if consistent with legislative intent, to craft a more carefully tailored injunction to preclude enforcement of the law in medical emergencies.

In order to determine the appropriate remedy, the Court remanded to the lower court directing it to apply the principles of severability articulated in the opinion.<sup>42</sup> Never did the Court suggest that each individual minor faced with a medical emergency must have her physician file a case-specific challenge seeking a health exemption. Nor did the Court suggest that the challengers must begin the litigation all over again with a narrower class of patients, i.e., the “small percentage” who would require emergency abortions, and seek a narrow injunctive remedy rather than total invalidation.<sup>43</sup> By focusing on remedy rather than the standard for reviewing facial challenges, the Court shifted attention to the question of *who* would rewrite the law—either the courts by crafting an injunction with limited invalidation of the challenged statute or the legislature if the statute were totally invalidated. Either way, the challengers obtained the relief they sought—the Court demanded that the abortion restriction contain a health exception.<sup>44</sup>

*Ayotte* presents a striking contrast to *Carhart*. As noted above, *Carhart* broadly rejected the previously accepted use of facial challenges as the primary method for invalidating unconstitutional abortion restrictions. In *Carhart*, the Court ignored extensive factual findings by the lower courts that substantial medical authority supported the need for a health exception to the federal abortion ban and deferred the question of whether women would be harmed by the ban to future “as-applied” challenges.<sup>45</sup> Yet the

---

41. *Ayotte*, 546 U.S. at 323. The writ of certiorari to the Supreme Court listed one of the questions presented in *Ayotte* as whether the courts should apply the *Casey* or *Salerno* standard for facial challenges in the abortion context. See *Planned Parenthood of N. New Eng. v. Ayotte*, 571 F. Supp. 2d 265, 269–70 (D.N.H. 2008).

42. *Id.* at 967–69.

43. *Id.* at 967. *Ayotte*’s approach contrasts starkly with *Carhart*’s approach, discussed *infra* notes 45–48 and accompanying text.

44. See Borgmann, *supra* note 2, at 574–76 (discussing *Ayotte*); Franklin, *supra* note 30, at 702 (“So even in *Ayotte* the facial challenge was in some sense successful: the plaintiffs’ sought-after remedy was narrowed but not denied.”); *infra* Part II for discussion of other implications of *Ayotte*’s remedy approach. Ultimately, the New Hampshire Legislature repealed the law at issue in *Ayotte* and the district court dismissed the case as moot. See *Planned Parenthood of N. New Eng. v. Ayotte*, 571 F. Supp. 2d 265 (2008).

45. See Borgmann, *supra* note 2, at 579–80; see also *Gonzales v. Carhart*, 127 S. Ct. 1610, 1638 (2007) (stating that women can seek health exceptions “if it can be shown that in discrete

Court left utterly vague what type of “as-applied” challenge it contemplated. If total invalidation of the federal abortion ban seemed too sweeping to the Court, it could have followed the approach taken in *Ayotte* and remanded for consideration of a more limited injunction preventing enforcement of the federal ban for the “small percentage” of cases involving medical necessity.<sup>46</sup> Although the challengers to the federal abortion ban did not frame the case in this manner, *Ayotte* certainly provided a workable precedent for the Court to rely upon.<sup>47</sup>

Could *Carhart* have meant that the challengers should re-litigate the same case on behalf of a narrower class of women patients suffering from a health need for the banned procedure? Rather than seek total invalidation of the federal abortion ban, perhaps these patients could focus on the issue of a tailored remedy as in *Ayotte*, i.e., injunctive relief prohibiting enforcement only in cases of medical need? Unfortunately, *Carhart* forecloses success on such a claim. The *Carhart* Court refused to totally invalidate the law and force Congress to amend it with a health exception. *Carhart* also refused to remand to the lower courts to consider whether they could properly issue an injunction precluding enforcement in cases of medical need, the approach suggested by *Ayotte*.<sup>48</sup> The challengers presented mountains of evidence, reviewed and accepted by three federal

---

and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used”).

46. *Ayotte*, 546 U.S. at 327.

47. See Franklin, *supra* note 30, at 703 (arguing that *Carhart* “is impossible to square with *Casey* and *Ayotte*, not to mention *Stenberg*”). *Ayotte* distinguished previous precedent allowing facial challenges, i.e., total invalidation, in the abortion context by blaming the parties for failing to request narrower relief. See *Ayotte*, 546 U.S. at 330 (stating that “the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn”). In contrast, by the time the federal abortion ban came under review, *Ayotte* provided a clear alternative remedy for addressing the lack of a health exception in abortion restrictions. See *Nat’l Abortion Fed’n v. Ashcroft*, 437 F.3d 278, 290 (2d Cir. 2006) (holding federal abortion ban unconstitutional due to lack of health exception and remanding for consideration of appropriate remedy in accordance with *Ayotte*).

48. See *Carhart*, 127 S. Ct. at 1638 (“Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.”). As in *Ayotte*, the Court could have remanded for consideration of limited injunctive relief protecting the health of women with medical need. See *id.* at 1651–52 (Ginsburg, J., dissenting) (questioning why the Court did not remand for narrower injunction protecting women’s health). *Carhart* fails to discuss *Ayotte* as relevant precedent, even though *Ayotte* clearly suggests employing a tailored remedy granting injunctive relief for the subset of medical necessity cases. See Kevin C. Walsh, *Frames of Reference and the Turn to Remedy in Facial Challenge Doctrine*, 36 HASTINGS CONST. L.Q. 667, 682–83 (2009).

district courts and three federal appellate courts, demonstrating that women would need a health exception to the federal abortion ban in particular medical circumstances.<sup>49</sup> For example, the trial courts, after carefully canvassing the evidence, found that the banned procedure could be medically necessary for women suffering from “uterine scarring, bleeding disorders, heart disease, or compromised immune systems.”<sup>50</sup> The lower courts also found that the banned procedure would be safer for women with health problems caused by the pregnancy, such as “placenta previa and accreta,” and for women carrying fetuses with fatal abnormalities such as severe hydrocephalus.<sup>51</sup> A second case involving a narrower class of patients seeking a health exception at the level of the statute (as opposed to an individualized case-by-case health exception) would merely present precisely the same evidence, which *Carhart* already held was insufficient to require writing a health exception into the law, whether by the courts or by Congress.<sup>52</sup>

Perhaps *Carhart* meant that each individual woman requiring a health exception must seek individual, case-specific relief on an as-needed basis. As Borgmann argues, however, this possibility remains unworkable, even if physicians can bring claims on behalf of their patients to protect confidentiality.<sup>53</sup> In situations of medical emergency, physicians simply

---

49. See *Carhart*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting) (discussing medical evidence on safety advantages of the banned procedure); see also *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 924–29, 1024–27 (D. Neb. 2004); *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 471–74, 480–82 (S.D.N.Y. 2004); *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 992–97, 1000–02 (N.D. Cal. 2004).

50. *Carhart*, 127 S. Ct. at 1645 (Ginsburg, J., dissenting) (citing district courts’ findings of fact); see also *Carhart v. Gonzales*, 413 F.3d 791, 803 (8th Cir. 2005) (concluding that, as in *Stenberg*, “substantial medical authority” supports medical necessity of a health exception to federal abortion ban); *Planned Parenthood Fed’n of Am. v. Gonzales*, 435 F.3d 1163, 1175–76 (9th Cir. 2006) (same); *Nat’l Abortion Fed’n v. Gonzales*, 437 F.3d 278, 285 (2d Cir. 2006) (same).

51. *Carhart*, 127 S. Ct. at 1645 (Ginsburg, J., dissenting) (citing district court’s findings of facts).

52. No new evidence on the comparative safety of the banned procedure can now be developed in the United States since the federal ban criminalizes the procedure nationwide. See Manuel Porto, *A Call for an Evidence-Based Evaluation of Late Midtrimester Abortion*, 190 AM. J. OBSTETRICS & GYNECOLOGY 1175–76 (2004) (urging that further studies of available mid-trimester abortion procedures be undertaken and noting that timeliness of such studies was crucial given pending decision on federal abortion ban).

53. Borgmann, *supra* note 2, at 592–93; see also David Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L.Q. 631, 664 (2009) (arguing that requiring women to seek case-specific medical exceptions to abortion restrictions places “nearly insuperable obstacles” to women’s right to protect their health).

could not obtain legal relief on behalf of their patients in sufficient time.<sup>54</sup> Even in non-emergency circumstances, the delays that would inevitably result from a physician's attempt to seek court approval of a health exception would place the woman's health at increased risk, perhaps even greater risk than using a less safe method of abortion.<sup>55</sup> The federally banned abortion procedure would generally only be used in late second-trimester, pre-viability abortions.<sup>56</sup> Each week of delay in a late second-trimester abortion significantly increases health risks to the woman and could cause delay past the point of viability, at which time an abortion can no longer be performed.<sup>57</sup> Particularly in cases where the woman suffers from a critical illness, medical evidence commands that the abortion procedure "should be done as early as possible."<sup>58</sup> Moreover, as is generally true with case-specific challenges, success in one case achieves little for future, similar cases; each woman burdened by the federal abortion ban would need her physician to seek an individualized health exception in advance of her treatment.<sup>59</sup>

Furthermore, even if it were medically and financially feasible for physicians to obtain health exceptions on behalf of individual patients when attempting to safely complete second-trimester abortions, what

---

54. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006) (noting that New Hampshire conceded need for immediate abortions in emergency situations).

55. To my knowledge, no such case-specific as-applied challenges have been filed to the federal abortion ban.

56. See Stephen T. Chasen et al., *Obstetric Outcomes After Surgical Abortion at >20 Weeks' Gestation*, 193 AM. J. OF OBSTETRICS & GYNECOLOGY 1161-64 (2005) ("intact D&X is usually done later in pregnancy"); Stephen T. Chasen et al., *Dilation and Evacuation at > or =20 Weeks: Comparison of Operative Techniques*, 190 AM. J. OBSTETRICS & GYNECOLOGY 1180-83 (2004) (stating that "[p]rocedures performed with intact D&X occurred at later gestational ages"). *Carhart* held that the federal abortion ban criminalizes the intentional use of only one method of second-trimester abortion, "intact D&E," but the medical literature labels this same procedure with various labels: "intact D&E," "intact D&X," or "D&X." See *Carhart*, 127 S. Ct. at 1621.

57. See Diana G. Foster et al., *Predictors of Delay in Each Step Leading to an Abortion*, 77 CONTRACEPTION 289-93 (2008) ("Second-trimester abortions carry an increased incidence of complications"); Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004) ("[T]here is a 38% increase in risk of death for each additional week of gestation . . . the increase in the risk of death due to delaying the procedure by 1 week is much higher at later gestational ages"). Viability determinations may vary, but generally a fetus is considered viable at 24 weeks. See *Late-Term Abortions: Legal Considerations*, ISSUES IN BRIEF (Guttmacher Inst., New York, N.Y.), January 1997, at 3, <http://www.guttmacher.org/pubs/ib13.pdf> (last visited February 19, 2009).

58. Charles H. Bowers et al., *Late-Second-Trimester Pregnancy Termination with Dilation and Evacuation in Critically Ill Women*, 34 J. OF REPROD. MED. 880 (Nov. 1989).

59. See Borgmann, *supra* note 2, at 592-93.

exactly would a judge be determining? Case-specific “as-applied” requests for a health exception present different questions than requests for courts to determine whether the evidence shows, *as a general matter*, that “substantial medical authority” supports the need for a statutory health exception.<sup>60</sup> Normally, we leave to the attending physician’s judgment the determination of what is medically necessary for an *individual patient*.<sup>61</sup> How would a judge know better than the attending physician what an individual patient’s medical needs are, particularly in complicated surgical contexts?<sup>62</sup> Judges lack the medical training to second-guess a treating physician’s medical judgment. As long as a credible physician backed a case-specific request for a health exception, the only sane response would be for the judge to grant the health exemption to the abortion restriction.<sup>63</sup> Therefore, if case-specific requests for health exceptions will always be granted, why require case-specific “as-applied” challenges except as an

---

60. See Faigman, *supra* note 53, at 653–54 (describing difference between “reviewable facts” and “case-specific” facts).

61. For example, compare health exceptions to compulsory vaccination laws. All fifty states have compulsory vaccination laws and all fifty states provide medical exemptions to those laws. Some states accept a physician’s note confirming medical need for an exemption without question and some states will conduct a bureaucratic check of the physician’s note, but no state requires individuals to file suit in a court of law to obtain a health exception. See Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out Of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 413 (2004) (explaining generally the requirement of a physician’s signature to verify a medical exemption from mandatory immunization); ANGIE A. WELBORN, CONGRESSIONAL RESEARCH SERVICE, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS, at 3 (Jan. 18, 2005) (discussing Colorado’s procedure for medical exemption as common among most states, which includes “certification from a licensed physician that ‘the physical condition of the student is such that one or more specified immunizations would endanger his or her life or health or is medically contradicted due to other medical conditions’”).

62. See Chasen et al., *supra* note 56, at 1183 (“[O]ur data supports that the most appropriate technique for surgical evacuation of pregnancy after 20 weeks’ gestation should be based on intraoperative factors. Attempts to regulate intact D&X on the basis of concern for maternal well-being cannot be supported by available evidence.”). Second-trimester abortion surgical techniques are specialized procedures that require particular knowledge and expertise. For example, studies show fewer complications resulting from second-trimester abortions when performed by experienced providers. See David K. Turok et al., *Second Trimester Termination of Pregnancy: A Review by Site and Procedure Type*, 77 CONTRACEPTION 155–61 (2008) (concluding that lack of experience likely contributed to higher complication rate in comparison of second-trimester abortion procedures conducted in high and low volume settings).

63. There are very few second-trimester abortion providers left in the United States. See Turok, et al., *supra* note 62, at 155–61 (noting lack of experienced second-trimester providers). Because second-trimester abortion procedures present greater risk of complications, the few providers remaining tend to be physicians at hospitals or specialized clinics who are likely to be credible authority.

insurmountable hurdle to women seeking a health exception?<sup>64</sup> The conclusion seems inescapable that the Court simply wanted to preclude any kind of a health exception to the federal abortion ban. In other words, the Court wrote the requirement of a health exception out of the law.

I believe we will likely never resolve how a judge should assess a request for an individual health exception to the federal abortion ban, because most, if not all, women will be unable to seek case-specific health exceptions and instead will be forced to jeopardize their health.<sup>65</sup> There is no right to a health exception if the remedy is unattainable in reality. By reframing the issue as one of altered litigation posture rather than openly overruling substantive doctrine, *Carhart* muddles what is in fact a significant rewriting of abortion law. *Carhart* diminished women's substantive right to choose abortion by overruling the long-held right to health exemptions from abortion restrictions.<sup>66</sup> The promise of future "as-applied" challenges to the federal abortion ban is pure illusion. As Justice Scalia stated in another Roberts Court case in which the Court overruled precedent under cover of the "as-applied" frame: "This faux judicial restraint is judicial obfuscation."<sup>67</sup>

*Carhart's* legalistic maneuver—manipulating procedural rules to achieve substantive results—is not a new method for the Roberts Court. I suspect that this is part of a pattern, and will continue to be a pattern, across different doctrinal areas. Two recent examples illustrate the Roberts

---

64. Another way of viewing the same question is why not grant at least limited injunctive relief, providing a health exception to the federal abortion ban "as-applied" to all women with medical need, if ultimately the only reasonable option would be for judges to leave these decisions to the treating physicians and their patients anyway? Requiring case-by-case adjudication of health exceptions is in and of itself an "undue burden." See Faigman, *supra* note 53, at 663–64 (arguing that barriers associated with bringing case-specific challenge is a "substantial obstacle" to exercise of the right to health exception).

65. Studies show that women seeking second-trimester abortions are typically very poor, very young or very sick. Even if it were medically feasible, these women are not likely to have the financial resources to litigate an "as-applied" case-specific request for a health exception. See Diana G. Foster et al., *Predictors of Delay in Each Step Leading to an Abortion*, 77 *CONTRACEPTION* 289–93 (2008) (finding lack of financial resources to be one significant factor leading to second-trimester abortion); Phillip G. Stubblefield et al., *Methods for Induced Abortion*, 104 *OBSTETRICS & GYNECOLOGY* 174, 179 (2004) (noting that women seeking second trimester abortion are medically "a very important group, including virtually all patients who have antenatal diagnosis of congenital anomalies, many women with serious illness, and a disproportionate share of very young women").

66. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

67. See *FEC v. Wis. Right to Life (WRTL II)*, 127 S. Ct. 2652, 2684 n.7 (2007) (Scalia, J., concurring in the judgment) (stating that *WRTL II* "effectively overrules *McConnell* without saying so"); Franklin, *supra* note 30, at 706–08 (discussing *WRTL II* and arguing that court overturned prior precedent in guise of as-applied challenge).

Court's rollback of individual rights disguised as technical interpretations of procedural rules, although not in the "as-applied" and "facial" challenge context.

First, in *Hein v. Freedom from Religion Foundation, Inc.*, the Court rejected an Establishment Clause challenge to President George W. Bush's "Faith-Based and Community Initiatives" program, deploying standing doctrine as an impediment to the protection of individual rights.<sup>68</sup> In *Hein*, the challengers asserted that an executive office program directed federal funds to religious organizations in violation of the Establishment Clause.<sup>69</sup> Although taxpayers generally do not have standing to challenge government expenditures, prior precedent, *Flast v. Cohen*, created an important exception to this rule to allow taxpayer standing if government spending contravenes the Establishment Clause.<sup>70</sup> Without such an exception to the restriction on taxpayer standing, the right guaranteed by the Establishment Clause would essentially have no remedy in many cases.<sup>71</sup> Although *Hein* involved spending by the executive rather than the congressional spending at issue in *Flast*, the Seventh Circuit, in an opinion by Judge Richard Posner, held that the *Flast* exception must still apply.<sup>72</sup> Otherwise, the executive would be free to violate the Establishment Clause with impunity.<sup>73</sup>

The Roberts Court rejected the lower court's position, but not by overruling *Flast* and openly declaring that government could tax and spend for religious purposes as Justice Scalia was wont to do.<sup>74</sup> Instead, Justice Alito's plurality opinion drew some rather fine distinctions, holding that

---

68. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

69. *See id.* at 2559.

70. *See Flast v. Cohen*, 392 U.S. 83 (1968).

71. *See, e.g.*, Carl H. Esbeck, *What the Hein Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 MISS. L.J. 199, 212 (2008) (stating that *Flast* exception is necessary to guarantee the right protected by the Establishment Clause). It is possible that an individual with a more direct injury resulting from the government's religiously based spending could establish standing to challenge the spending, but such a plaintiff will likely be harder to find in many situations. *See Ira C. Lupu et al., Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and The Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115, 116–19 (2008) (discussing the fate of various pending cases that involved taxpayer standing in the immediate aftermath of *Hein*).

72. *See Freedom From Religion Found., Inc. v. Chao*, 433 F.3d 989, 994–97 (7th Cir. 2006).

73. *See id.* at 995 ("If the conferences at issue in this case are, as the plaintiffs charge, intended to promote religion, the fact that their cost is slight relative to the budgets of the various departments that sponsor them does not make that cost incidental. Otherwise, indeed, there would be no federal taxpayer standing in any case.")

74. *See Hein*, 127 S. Ct. at 2584 (Scalia, J., concurring in the judgment) (criticizing plurality opinion and arguing that "*Flast* should be overruled.")

executive spending differed from congressional spending such that the *Flast* exception should not apply and taxpayer standing should be denied.<sup>75</sup> Justice Scalia, who agreed with the result in the case, nevertheless scathingly attacked the plurality's reasoning, arguing that its approach "creat[ed] utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently."<sup>76</sup> Although not openly overruling established precedent protecting individual rights, the Roberts Court manipulated technical rules of standing to render it much more difficult to protect substantive constitutional rights.

Second, in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court imposed procedural hurdles to make it harder for workers to sue their employers for unequal pay in violation of Title VII.<sup>77</sup> *Ledbetter* rejected the EEOC's longstanding position that, in a disparate pay claim under Title VII, each inadequate paycheck restarts the clock for statute of limitations purposes.<sup>78</sup> The EEOC's interpretation protects the rights of victims of pay discrimination who are unaware of their disparate pay for long periods of time, a common occurrence in the private sector. For example, Lily Ledbetter did not discover her unequal pay until she was almost sixty years old and an anonymous note informed her that she had been making substantially less salary than male co-workers for many years.<sup>79</sup> At the trial court, Ledbetter prevailed and won both back pay and punitive damages for the full length of time she received disparate paychecks.<sup>80</sup>

In a 5-4 decision, the Roberts Court reversed the award in her favor and held that the statutory limitations period for a disparate pay claim must be read stringently to require that each claim of unequal pay be filed within 180 days of the unequal paycheck, or the claim would be forfeited. The

---

75. Interestingly, the challengers attempted to come within the purview of *Flast* by arguing that their case was an "as-applied" challenge to general Congressional appropriations statutes. *See id.* at 2567 (majority opinion). Justice Alito declared, "Characterizing this case as an "as-applied" challenge to these general appropriations statutes would stretch the meaning of that term past its breaking point." *Id.*

76. *Id.* at 2573 (Scalia, J., concurring in the judgment) ("Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future . . . . Either *Flast* was correct, and must be accorded the wide application that it logically dictates, or it was not, and must be abandoned in its entirety.").

77. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

78. *See id.* at 2177 n.11.

79. *See* Valerie Dowdle, *Medill News Service*, <http://otd.oyez.org/cases/2006/ledbetter-lilly-v-goodyear-tire-rubber-co-05292007> (last visited February 27, 2009).

80. *Ledbetter*, 127 S. Ct. at 2166.



Court justified its “cramped interpretation of Title VII” as a necessary reading of technical rules provided by the statute.<sup>81</sup> The Court’s strident application of procedural rules regarding timely filing of discrimination lawsuits had the serious substantive consequence of limiting the ability of victims of pay discrimination to obtain relief.<sup>82</sup>

In sum, the Roberts Court’s less than coherent approach to as-applied and facial challenges appears to be yet another example of the Court’s retreat from substantive protection of individual rights, cloaked in procedural jargon.<sup>83</sup> I applaud Borgmann’s effort to make more explicit the connection between the seemingly technical issue of litigation posture and the protection of substantive rights.<sup>84</sup> Borgmann makes an important contribution to the debate that will inevitably continue regarding facial challenges by emphasizing the broader impact that disfavoring facial challenges will have on courts’ ability to protect vulnerable populations and vulnerable rights.<sup>85</sup>

## II. Finessing Facial Challenges—Rights As Remedies

Borgmann convincingly argues that “the Roberts Court’s priorities when addressing rights-infringing laws have been the opposite of what constitutional norms demand.”<sup>86</sup> Borgmann’s analysis raises for me a critical pragmatic question: given the Court’s already well-developed hostility to facial challenges and the likelihood that the composition of the Court will not shift to a more individual rights-friendly attitude in the near

---

81. *Id.* at 2188 (Ginsburg, J., dissenting).

82. Justice Ginsburg dissented, urging Congress “to correct this Court’s parsimonious reading of Title VII.” *Id.* Congress recently enacted the Lily Ledbetter Fair Pay Act, rejecting the Roberts Court’s narrow reading of Title VII protections. *See* Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

83. Similar claims of the disingenuous use of “procedural” rulings have been made about the Burger and Rehnquist Courts. *See, e.g.,* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections To Substantive Rights*, 92 VA. L. REV. 633, 635 n.2, 688–89 (2006) (discussing the Warren, Burger, and Rehnquist Courts’ use of justiciability doctrines to further policy priorities); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 899 (2008) (“[T]he Burger and Rehnquist Courts redeployed standing to further a different set of purposes than those motivating the establishment of New Deal standing or than those motivating the broadening of standing in the Warren Court.”). Although this claim is not new, the Roberts Court seems particularly adept at obscuring its substantive agenda with procedural maneuvers.

84. *See generally* Borgmann, *supra* note 2.

85. *See generally id.*

86. *Id.* at 589–90.

future,<sup>87</sup> what approach should civil rights litigants take to improve their chances of success?

Justice O'Connor already suggested one approach in her *Ayotte* opinion.<sup>88</sup> *Ayotte* essentially finessed the question of the appropriate standard for reviewing facial challenges as a question of remedy.<sup>89</sup> The remedy question is deeply intertwined with the as-applied versus facial challenge question, although the two issues are analytically distinct.<sup>90</sup> To use Borgmann's taxonomy, rather than bringing a pre-enforcement challenge seeking total invalidation, litigants could bring a pre-enforcement challenge seeking limited invalidation of a subset of applications of the statute and frame the suit as an "as-applied" challenge rather than as a "facial" challenge.<sup>91</sup> Although courts and commentators seem rather confused about the terminology, most courts would consider this challenge to be "as-applied" rather than "facial."<sup>92</sup> For example, if an abortion restriction lacks a health exception, perhaps the best way for challengers to work around *Carhart* would be to establish as plaintiffs a narrower class of women with medical need for a health exception and seek an injunction invalidating the statute "as applied" to those women, in accordance with severability rules.<sup>93</sup> As explained above, *Carhart* unfortunately forecloses such an approach to challenging "partial-birth" abortion bans. However, seeking limited injunctive relief "as-applied" to all women with medical

---

87. See Tony Mauro, *Despite Obama Victory, Will Supreme Court Justices Sit Tight?* (Nov. 11, 2008), [www.law.com](http://www.law.com) (stating that speculation on Supreme Court retirements all center around the moderate-liberal wing of the Court, including Justices Stevens, Souter, and Ginsburg).

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

89. See Borgmann, *supra* note 2, at 576 ("Centering the decision on the remedy, rather than on the nature of the challenge and what the plaintiff must prove to support it, permitted the unanimous Court to avoid the divisive question of whether it should apply the *Salerno* rule in this abortion case.").

90. See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 158 (1998) (arguing that debate surrounding facial challenges is essentially a debate about appropriate remedies); Metzger, *supra* note 13, 887–88 (arguing that difference between facial and as-applied challenges is exaggerated and that key question is in fact question of statutory severability).

91. Some view suits seeking limited invalidation of a subset of applications as a type of facial challenge. See Metzger, *supra* note 13, at 881–82 (stating that "until *Salerno* uprooted the traditional orthodoxy, facial challenges were understood to include such context-specific challenges to general rules because as-applied challenges were defined in fairly narrow terms").

92. See Borgmann, *supra* note 2, at 569–70; Metzger, *supra* note 13, at 882 (stating that post-*Salerno*, "facial" challenges are defined only as claims seeking total invalidation while "as-applied" challenges include limited attacks on a statute as unconstitutional in a particular range of cases as well as fact-based, case-specific challenges).

93. Of course, the court could ultimately decide to invalidate the entire statute if legislative intent suggests the statute is not severable. See *Ayotte*, 546 U.S. 320.

need could work for ensuring that courts mandate health exceptions in other types of abortion restrictions, such as parental involvement laws or laws requiring 24-hour waiting periods.

The remedy approach is, however, less than ideal. Seeking limited injunctive relief rather than pursuing a “facial” challenge urging total invalidation would be a retreat that may result in less protection for individual rights.<sup>94</sup> Furthermore, as Borgmann argues, the remedy approach permits legislatures to flout constitutional rights and leave the courts to clean up their mess.<sup>95</sup> The *Ayotte* method of finessing the facial challenge question as a question of what remedy to apply does little to keep legislatures from “thumb[ing] their nose at the U.S. Constitution” and forcing the courts to waste resources trying to correct the constitutional defect.<sup>96</sup> Although the remedy approach could provide some protection for individual rights in an environment hostile to facial challenges, I wholeheartedly agree with Borgmann that facial challenges, rather than limited injunctive remedies, are the better means to deter legislative misconduct and to provide more robust protection of constitutional rights.

## Conclusion

The Roberts Court’s “as-applied” approach to individual rights mandates piecemeal litigation that will be more costly for the courts, will reduce the significance of individual decisions, and, most consequentially, will “reduce[] the precedential value of Supreme Court decisions regarding

---

94. For example, this approach will be unlikely to work in the equal protection context which tends towards “facial” review, i.e., total invalidation or total validation. See Franklin, *supra* note 30, at 712–13 (discussing *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), and arguing that even the proverbial “busload of nuns” are unlikely to win an as-applied challenge to voter identification law); see also David Gans, *supra* note 13, at 1353–56 (arguing that facial challenges are a better means of protecting abortion rights as well as certain other individual rights). But see Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 38, 456–61 (2002) (arguing for partial invalidation rather than total invalidation whenever “a federal court can use a narrow ruling to fully protect individual rights without imposing on legitimate state activity”).

95. See Borgmann, *supra* note 2, at 598–609.

96. See *id.* at 610; see also *Ayotte*, 546 U.S. at 331 (noting the risk that a remedial approach could provide an incentive for the “legislature [to] set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied”) (internal quotations omitted); Note, *After Ayotte: The Need to Defend Abortion Rights With Renewed “Purpose”*, 119 HARV. L. REV. 2552, 2563 (2005) (arguing that “it is socially disadvantageous to raise adjudicative costs for no other purpose than to allow legislators to express their dissatisfaction with” a particular right).

laws that infringe important rights.”<sup>97</sup> A decision that applies only to the litigant before the Court fails to safeguard others affected by the same rights-infringing legislation. All the Roberts Court seems to want to offer in its constitutional adjudication is a one ticket ride, à la *Bush v. Gore*.<sup>98</sup> However, case-specific adjudication is not how the Court has historically given effect to constitutional norms, nor does this approach sufficiently protect fundamental rights.<sup>99</sup> The Court’s abstract analysis regarding the appropriate rules for determining whether it should “entertain” as-applied or facial challenges ignores how these procedural rules affect substantive rights. Borgmann makes a strong and thoughtful case that courts must consider the negative impact that denying facial challenges will have both on the individual rights at stake and on courts’ and legislatures’ duty to protect constitutional norms.

---

97. Borgmann, *supra* note 2, at 598.

98. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances”); see also Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, 115 HARV L. REV. 170, 268–73 (2001) (discussing criticism of *Bush v. Gore*’s attempt to limit its ruling to a “one-way, nonrefundable railroad ticket, good for this day and this destination only”). Of course, *Bush v. Gore* is an extreme example, but bears some similarity to the notion of constitutional adjudication as being almost always as-applied. See *Carhart*, 127 S. Ct. at 1639 (“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 . . . [a]s-applied challenges are the basic building blocks of constitutional adjudication.”) (internal quotations omitted).

99. Borgmann, *supra* note 2, at 598.

\* \* \*