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INTRODUCTION

Since the Supreme Court declared in 1973 that the Constitution grants women a limited right to an abortion,[1] the Justices have decided abortion cases with reference to such weighty matters as religious freedom,[2] the disadvantaged position of women in society,[3] and the proper role of the judiciary.[4] Understandably, the Supreme Court's writings on abortion deal extensively with these large themes. The Court, and certainly others, view abortion cases as rivaling *Brown v. Board of Education*[5] in their importance to the nation.[6] While the Court has focused on the big issues, however, it has neglected an equally important, if less emotionally compelling, one: namely, under what circumstances should a statute restricting access to abortion be invalidated "on its face"?

A litigant can attack the constitutionality of a statute either "on its face" or "as applied."[7] The effect of a judicial decision depends

1. *See* Roe v. Wade, 410 U.S. 113 (1973). This Note takes the existence of the constitutional right to an abortion as a given. It takes no position on whether *Roe* and cases reaffirming the right to an abortion are sound constitutional decisions, nor does it take any position on the extent to which legislatures should attempt to restrict access to abortion, if any.

2. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 565-72 (1989) (Stevens, J., concurring in part and dissenting in part) (reviewing the stance of the Roman Catholic Church, particularly St. Thomas Aquinas, in finding the preamble to a Missouri abortion law a violation of the Establishment Clause).

3. *See, e.g.,* Planned Parenthood v. Casey, 505 U.S. 833, 887-94 (1992) (plurality opinion) (discussing spousal abuse statistics and sociological studies of women); Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 541 (1990) (*Akron II*) (Blackmun, J., dissenting) (calling for protection of minor women who are "frightened and forlorn, lacking the comfort of loving parental guidance and mature advice." (citing Beal v. Doe, 432 U.S. 438, 463 (1977))).

4. *See, e.g., Akron II,* 497 U.S. at 520-21 (Scalia, J., concurring) ("Leaving this matter to the political process is not only legally correct, it is pragmatically so. . . . The court should end its disruptive intrusion into this field as soon as possible.").

5. 347 U.S. 483 (1954).

6. *See, e.g., Casey,* 505 U.S. at 867 (1992) (stating that *Brown* and the abortion cases are unique in that they called "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution").

7. *See, e.g.,* Michael C. Dorf, *Facial Challenges to State and Federal Statutes,* 46 STAN. L. REV. 235, 236 (1994). Attacks on the facial constitutionality of a state statute wind their way to the Supreme Court by one of two avenues: on appeal from an anticipatory action in the lower federal courts seeking to prevent enforcement of the statute, or on appeal from a state case in which the statute was actually enforced. This Note deals almost exclusively with the first category of cases, which are the most common in the abortion context. *See, e.g.,* Hodgson v. Minnesota, 497 U.S. 417 (1990).

greatly on which type of challenge is brought to the Court.[8] When the Supreme Court declares a state statute unconstitutional as applied to a particular defendant, the state cannot apply the statute to the defendant's protected conduct. The state may, however, continue enforcing the statute against all others.[9] When the Supreme Court upholds a facial challenge, however, enforcement must stop altogether.[10] Successful facial challenges, in short, nullify a state law.[11]

The standard by which to evaluate facial attacks on statutes that restrict women's access to abortion services has become a momentous issue for a variety of reasons. First, facial challenges, rather than as-applied challenges, are the norm in the abortion arena, as physicians and interest groups such as Planned Parenthood regularly seek to have state statutes struck down in their entirety.[12] Second, since *Planned Parenthood v. Casey*'s[13] strong reaffirmation of the existence of a constitutional right to an abortion in 1992, states defending laws that restrict women's access to abortion increasingly use the standard of review for facial attacks as a legal tool to pre-

8. *See* Dorf, *supra* note 7, at 236.

9. *See* Lawrence A. Alexander, *Is There An Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 542-43 (1985); Dorf, *supra* note 7, at 236. "As applied" challenges generally require the court to determine whether or not a challenger's activity was constitutionally protected. If so, the court interprets the law in a way that exonerates the challenger and in doing so "trim[s] down" the law to its constitutional size. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1192 (12th ed. 1991). This process is widely known as "severability."

10. *See* Dorf, *supra* note 7, at 236; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853 (1991).

11. This is a slight overstatement. Because the Supreme Court does not have the power to actually repeal state statutes, and because the meaning of state statutes is a matter of state law, *see, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992), state prosecutors theoretically can seek new, constitutionally permissible interpretations of a statute even after the Supreme Court has "struck down" a previous interpretation. *See* Dombrowski v. Pfister, 380 U.S. 479, 491 (1964) (finding Louisiana's Subversive Activities and Communist Control Law void on its face but stating that Louisiana could "assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding"); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492-508 (1954). They rarely do this. *See* Sandra Lynne Tholen & Lisa Baird, *Con Law is as Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 992 (1995) ("The practical effect of holding a statute unconstitutional 'on its face' is to render it completely inoperative.").

When a federal court other than the Supreme Court finds a state law facially invalid, the state does not even have to wait for a narrowing construction. Because the lower federal courts stand parallel to and not above state courts, state prosecutors may continue to enforce a statute in state court even after a lower federal court has found it facially invalid. *See, e.g.*, Women's Servs., P.C. v. Douglas, 653 F.2d 355, 358 (8th Cir. 1981) (stating that "a federal plaintiff's [successful] constitutional attack . . . would benefit *only* that plaintiff: 'the State is free to prosecute others who may violate the statute' " (quoting Doran v. Salem Inn, 422 U.S. 922, 931 (1975))). Even in these situations, however, states very rarely continue to prosecute violations of the statute. *See* Fallon, *supra* note 10, at 888 n.219.

12. *See, e.g.*, Fargo Women's Health Org. v. Sinner, 819 F. Supp. 862 (D.N.D. 1993) (asserting a facial attack to a North Dakota statute restricting abortion).

13. 505 U.S. 833 (1992).

serve the operation of their laws. Prior to *Casey,* many states had argued that *Roe* itself should be overturned.[14] Third, by definition, the standard for evaluating a facial attack determines how convincing the facial challengers' showing of unconstitutionality must be in order to win their case. The choice between a more or less stringent standard determines, in borderline cases, whether a constitutionally questionable statute will be struck down as a whole or remain vital, subject only to as-applied challenges brought by aggrieved individuals.[15]

Sensitive to the significant effect of facial invalidation generally, the Supreme Court in *United States v. Salerno*[16] announced a test, which this Note labels the "no-set-of-circumstances test," making it nearly impossible to succeed on a facial attack. Without citing precedent, the *Salerno* majority stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid.*"[17] *Salerno* created — or perhaps merely recognized — a bifurcated structure for evaluating facial attacks. On the first tier lie cases involving First Amendment rights, in which the overbreadth standard controls facial attacks. Under the First Amendment overbreadth doctrine, facial challengers succeed upon proof that a questioned statute is capable of a "substantial number" of unconstitutional applications.[18] On the second tier rest all other facial attacks, and they are governed by the no-set-of-circumstances test.[19]

The no-set-of-circumstances test has appropriately been called "draconian" in effect, rendering it nearly impossible to succeed on a facial challenge.[20] This is especially true in the abortion context. If the Supreme Court were faithful to *Salerno,* it would reject every

14. *Casey* held that a state can place a legislative ban on abortions after the point at which a fetus becomes viable. *See Casey,* 505 U.S. at 879. Before viability, the state can attempt to ensure that the woman's choice is informed, but it cannot place an undue burden on that choice. *See* 505 U.S. at 878. An undue burden is a provision with the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. *See* 505 U.S. at 878.

15. *See* Planned Parenthood v. Miller, 63 F.3d 1452, 1454-57 (8th Cir. 1995) (noting that the choice between two facial standards "may well determine the outcome of this case").

16. 481 U.S. 739 (1987).

17. 481 U.S. at 745 (emphasis added). Interestingly, this no-set-of-circumstances test was not at all central to the holding of *Salerno. See* Dorf, *supra* note 7, at 240-41.

18. *See, e.g.,* New York v. Ferber, 458 U.S. 747, 767-68 (1982).

19. *See Salerno,* 481 U.S. at 745 ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

20. *See* Dorf, *supra* note 7, at 239-40.

facial attack on statutes restricting access to abortions.[21] For instance, it would have to reject a facial challenge to a law declaring all abortions illegal because the law could be applied constitutionally to a woman who is eight months pregnant — that is, after all, one circumstance in which a state undoubtedly has the constitutional authority to prohibit an abortion.[22]

The Court has not followed that course. It has never made precisely clear, however, what standard it does use to evaluate the facial attacks before it in the abortion context.[23] *Planned Parenthood v. Casey* muddied the waters even more. The plurality decision used a standard of review markedly different from the no-set-of-circumstances test. In striking down Pennsylvania's husband-notification requirement[24] — and without breathing a word of its departure from *Salerno* — the plurality explained that the requirement was facially invalid for the following reason: "[I]n a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[25] This test shows much less deference to statutes than the no-set-of-circumstances test. Instead of having to prove the unconstitutionality of *every* conceivable application of a statute, the *Casey* plaintiffs only needed to show that a "large fraction" of applications would infringe on constitutional rights in order to invalidate the statute's provisions.[26]

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21. This does not mean, of course, that the law would remain a valid restriction against all women. It could only be narrowed, however, through as-applied challenges.

22. For instance, Guam passed a law preventing abortions unless two doctors independently confirm that the pregnancy poses a serious health risk to the woman. *See* Guam Socy. of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366, 1368 n.1 (9th Cir.), *cert. denied,* 506 U.S. 1011 (1992). Justice Scalia, dissenting from the denial of certiorari, argued that the lower courts incorrectly upheld the facial challenge because the Guam law could be applied constitutionally to the "set of circumstances" in which a woman in the post-viability stage of her pregnancy sought an abortion. *See* Ada v. Guam Socy. of Obstetricians and Gynecologists, 506 U.S. 1011, 1011-13 (1992) (Scalia, J., dissenting from denial of cert.). Scalia's analysis under *Salerno* is unquestionably correct because neither *Roe* nor *Casey* prevent the state from prohibiting such late-term abortions. "If there is a flaw in [Scalia's] argument, it lies with *Salerno* itself." Dorf, *supra* note 7, at 238.

23. *See infra* notes 46-69 and accompanying text.

24. The husband-notification requirement required a physician performing an abortion on a married woman to obtain a signed statement from the woman declaring that she had informed her husband that she was going to have an abortion. Exceptions were provided in cases of medical emergency, or where the woman provided an alternative signed statement declaring that her husband did not impregnate her, that her husband could not be located, that the pregnancy resulted from spousal sexual assault which she reported, or that notifying the husband would cause him or someone else to inflict bodily harm on her. *See* Planned Parenthood v. Casey, 505 U.S. 833, 887 (1992) (citing the Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. § 3209 (1990)).

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

26. Ironically, the break from *Salerno* came in an opinion which not only extolled the virtues of *stare decisis* but adhered to that doctrine. In an appropriately described "act of personal courage and constitutional principle," *Casey*, 505 U.S. at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), the members of the

The various opinions in *Casey* dealt largely with the question of whether to overrule *Roe v. Wade.*[27] They did not address at any great length the standard for evaluating facial challenges, which once again was relegated to sideline status in the most celebrated legal debate of the late twentieth century.[28]

Casey left lower federal courts to face the difficult question of whether *Casey* silently established a new standard of review for facial attacks on statutes restricting abortions or whether the no-set-of-circumstances test applies to abortion cases. The federal courts of appeals have come to divergent conclusions.[29] In *Barnes v. Moore,*[30] the Fifth Circuit noted that *Casey* "may have applied" a new standard, but ultimately followed *Salerno.*[31] The *Barnes* court further justified its decision by analogizing the statute at issue, which it did not strike down, to parts of the Pennsylvania statute found valid in *Casey,*[32] a technique which many courts adjudicating facial challenges have used.[33] In contrast, on remand, the Third

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plurality rested their reaffirmation of *Roe v. Wade* on *stare decisis* despite a palpable distaste for that decision. *See Casey,* 505 U.S. at 857 ("*Roe* . . . may be seen . . . as a rule (whether or not mistaken) of personal autonomy and bodily integrity."), 864 ("[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."), 869 ("A decision to overrule *Roe[ ]* . . . would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy.").

27. 410 U.S. 113 (1973).

28. Chief Justice Rehnquist noted the plurality's inconsistency with *Salerno* in a footnote. *See Casey,* 505 U.S. at 973 n.2 (Rehnquist, J., concurring in the judgment in part and dissenting in part). Justice Blackmun likewise recognized, but did not elaborate on, the fact that the plurality had used a novel test for facial attacks. *See Casey,* 505 U.S. at 924-25 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Those were the only two comments on the rather striking development that seems to have occurred.

29. For an extended discussion of the confusion over the facial challenge standard, see Tholen & Baird, *supra* note 11, at 1004-17 (1995). *See also, e.g.,* Planned Parenthood v. Miller, 63 F.3d 1452, 1457 (8th Cir. 1995).

30. 970 F.2d 12 (5th Cir. 1992).

31. *See* 970 F.2d at 14 n.2. The next two Fifth Circuit cases also followed *Salerno. See* Barnes v. Mississippi, 992 F.2d 1335 (5th Cir. 1993); Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992).

In *Sojourner T.,* the court said only that "the plaintiffs challenged the facial validity of the Statute. Thus, we must determine whether the plaintiffs are correct that the Statute cannot be construed and applied without infringing upon constitutionally protected rights." *Sojourner T.,* 974 F.2d at 30 (citing Rust v. Sullivan, 500 U.S. 173, 183 (1991)). The court, in striking the restrictive law, reached the wrong result under *Salerno.* The statute prohibited all abortions except those necessary to preserve the life or health of the unborn baby, to remove the dead unborn child, to save the life of the mother, or when conception occurred by rape or incest. The statute could be applied, however, with no constitutional infirmity to a healthy woman carrying a viable fetus that was not the product of rape or incest.

32. *See Barnes,* 970 F.2d at 14-15 ("[W]e conclude that the differences between the Mississippi and Pennsylvania Acts are not sufficient to render the former unconstitutional on its face.").

33. *See* Tholen & Baird, *supra* note 11, at 1011-12, 1021-22. For examples of this approach, see *Fargo Women's Health Org. v. Schafer,* 18 F.3d 526, 530 (8th Cir. 1994); *Jane L. v. Bangerter,* 809 F. Supp. 865 (D. Utah 1992), *affd. in part, reversed in part on other grounds,* 61 F.3d 1493 (10th Cir. 1995).

Circuit found that *Casey* set a new standard.[34] The Eighth Circuit, after initially avoiding the issue, also found that *Casey* "effectively overruled *Salerno* for facial challenges to abortion statutes."[35] At the Supreme Court level, two of *Casey*'s three-member plurality, Justices O'Connor and Souter, have stated that *Casey* overruled *Salerno,*[36] while Justices Rehnquist and Scalia, in contrast, have stated that *Salerno* should control abortion cases.[37]

This Note argues that *Planned Parenthood v. Casey* established a new standard for facial attacks on abortion laws and that it is the correct one to apply to any facial attack on state statutes that allegedly infringe on the constitutional right to have an abortion. Part I of this Note argues that the *Casey* test is in harmony with previous abortion decisions, and that these decisions have drawn heavily on the overbreadth doctrine used to adjudicate facial challenges based on the First Amendment. Part I then demonstrates why the theoretical justifications for the overbreadth doctrine suggest that it should be applied to abortion cases as well. Part II explains how a judicial analysis under the new *Casey* standard should proceed. It concludes that the *Casey* test's emphasis on the factual record makes it superior to current First Amendment overbreadth jurisprudence for use in abortion cases.

I. Overbreadth Doctrine is More Appropriate for Abortion Cases than the *Salerno* No-Set-of-Circumstances Test

Overbreadth, like obscenity, undoubtedly exists but is very difficult to define.[38] Most can agree on at least this much: the overbreadth doctrine allows a litigant to challenge the constitutionality of a statute, regardless of whether the litigant's own conduct is constitutionally protected, on the basis that the statute prohibits *other persons'* protected conduct.[39] This type of analysis is an exception to the often-invoked rule that "a person to whom a statute may constitutionally be applied may not challenge that statute on the

34. *See* Casey v. Planned Parenthood, 14 F.3d 848, 863 n.21 (3d Cir. 1994).

35. Planned Parenthood v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995).

36. *See Schafer*, 507 U.S. 1013 (O'Connor, J., concurring in order denying application for stay and injunction pending appeal).

37. *See* Ada v. Guam Socy. of Obstetricians and Gynecologists, 506 U.S. 1011, 1011-13 (1992) (Scalia, J., dissenting from denial of cert.).

38. *See* Alexander, *supra* note 9, at 542 ("The most notable fact about the [overbreadth] doctrine . . . is that what it is and what justifies it remain the subjects of controversy and confusion.").

39. *See id.* at 541-42; *see also, e.g.,* Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).

ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."[40]

For instance, in one overbreadth case, a defendant was charged under a Houston ordinance making it a crime to "interrupt any policeman in the execution of his duty."[41] The defendant had attempted to distract some police officers from arresting his friends.[42] Despite the fact that his own activity may very well not have been protected under the First Amendment, his overbreadth claim succeeded, and the ordinance was struck down on its face, because the ordinance could have applied to the protected speech of other people not before the court.[43] For example, a person who calmly utters a political statement might inadvertently "interrupt" a policeman, although that person's speech undoubtedly could not become the basis for a prosecution as it is clearly protected by the First Amendment.

It is true, of course, that the *Salerno* test for facial challenges — the no-set-of-circumstances test — allows a litigant to attack a law based on factual situations not immediately before the Court. The challenger is asked to prove, after all, that *every* conceivable application of the law will be unconstitutional. The no-set-of-circumstances test, however, differs from overbreadth in two vital respects. First, the overbreadth standard does not require proof that *every* application not before the court will be unconstitutional. It merely requires a showing that some significant number of unconstitutional applications will result. Second, because of the all-embracing nature of the no-set-of-circumstances test, a litigant

40. New York v. Ferber, 458 U.S. 747, 767-68 (1982) (citations omitted) ("What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle . . . ."); *see also* United States v. Raines, 362 U.S. 17, 21 (1960); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278 n.8 (1984) (citing cases). This rule derives from the presumption that any invalid application of a law may be "severed" from its valid applications.

It is also important to note that despite this prudential rule, the Article III-based standing requirement permits the Court to hear any case in which a litigant has a "personal stake" in the outcome. *See* Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 394 (1981) (citing Singleton v. Wulff, 428 U.S. 106, 112, 123 (1976); Warth v. Seldin, 422 U.S. 490, 499-500 (1975)). Thus, while a criminal defendant has standing to challenge a law she is prosecuted under, the prudential rule may prohibit that defendant from raising the constitutional concerns of other parties not before the court. *See generally* Note, *Standing to Assert Constitutional* Jus Tertii, 88 HARV. L. REV. 423 (1974). This Note does not address the possible "personal stake," or constitutional-level standing problems, which arise when a group such as Planned Parenthood challenges a law. *See* H.L. v. Matheson, 450 U.S. 398 (1981); *Singleton*, 428 U.S. at 112, 123; PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 123-25 (1988); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986).

41. Houston v. Hill, 482 U.S. 451, 455 (1987) (citing HOUSTON, TEX., CODE § 34-11(a) (1984)).

42. *See Hill*, 482 U.S. at 453.

43. *See Hill*, 482 U.S. at 458-67.

making a challenge under it would have to show that even *her own* activity was constitutionally protected. Thus, if the defendant above were to make a challenge based on the no-set-of-circumstances test, he would have been required to argue that even his own act of disrupting the policeman to save his friends was protected by the First Amendment. Thus, the no-set-of-circumstances test does not proceed, as overbreadth analysis does, without regard to the challenger's actions.

This Part explains that the *Casey* plurality used an overbreadth theory, rather than the no-set-of-circumstances test, and that it was right to do so.[44] Section I.A reviews Supreme Court abortion jurisprudence, including *Casey,* and concludes that an unarticulated overbreadth theory has, in fact, been used all along. The *Casey* standard, therefore, is consistent with, not a departure from, the Court's treatment of abortion cases. Section I.B examines the two theories said to underlie the overbreadth doctrine and shows that each of the theories indicates that overbreadth analysis should extend to the abortion context.

A. *The Supreme Court Has in Fact Applied Overbreadth to Abortion Cases*

Despite statements to the contrary,[45] the Court *has* used the overbreadth doctrine in abortion cases both before and after the development of the no-set-of-circumstances test in *Salerno.* In *Roe,* the plaintiff brought a facial attack against a Texas statute criminalizing most abortions.[46] After enunciating the trimester framework for analyzing restrictions on a woman's right to have an abortion,[47] the *Roe* majority appealed to the overbreadth doctrine:

> Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," *sweeps*

44. Although this section will refer to overbreadth as if it were one well-defined doctrine, in actuality there are many possible formulations. In Part II, this Note will argue that the formulation voiced in *Casey* is preferable to the current First Amendment overbreadth standard. *See infra* notes 110-43.

45. *See, e.g.,* Osborne v. Ohio, 495 U.S. 103, 112 (1990) (stating that overbreadth is exclusively a First Amendment concept).

46. *See* Roe v. Wade, 410 U.S. 113, 120 (1973). *Roe* held (i) that during approximately the first trimester of pregnancy, the abortion decision must be left to the pregnant woman and her physician, (ii) that after the first trimester, the state may regulate abortion procedures in ways reasonably related to its interest in the health of the mother, and (iii) that after the point of viability, approximately simultaneous with the start of the third trimester, the state may regulate and even proscribe abortion, except where necessary to preserve the life or health of the woman. *See Roe,* 410 U.S. at 164-65.

47. *See Roe,* 410 U.S. at 164.

too broadly. . . . The statute, therefore, cannot survive the constitutional attack made upon it here.[48]

Similarly, in *City of Akron v. Akron Center for Reproductive Health,*[49] the Court used a chilling-effect rationale — which, as noted below, derives from the overbreadth doctrine[50] — to strike down provisions of an Ohio abortion statute. The majority stated that Ohio's requirement that all abortions after the first trimester take place in a hospital had "the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks."[51] *Akron* found it important that a "vast majority" of unconstitutional applications would occur — it did not demand that *every* contemplated abortion after the first twelve weeks be inhibited.

In addition to *Akron* and *Roe,* other abortion cases arising before *Salerno* also used the overbreadth rationale.[52] If the Court had been using a *Salerno* no-set-of-circumstances test in these cases, it would have been forced to uphold the statutes. Even the most restrictive abortion laws, after all, can be applied constitutionally to a woman in the post-viability stage of her pregnancy and not facing a grave threat to her health.[53] Indeed, the use of overbreadth anal-

48. 410 U.S. at 164 (emphasis added); *see also* Ada v. Guam Socy. of Obstetricians and Gynecologists, 505 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of cert.) ("The Court's first opinion in the abortion area, *Roe v. Wade,* seemingly employed an 'overbreadth' approach — though without mentioning the term and without analysis." (citation omitted)). Lower court decisions on the same issue that pre-dated *Roe* also employed overbreadth analysis. *See Roe,* 410 U.S. at 154-55 (citing Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972); Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), *modified and affd.,* 410 U.S. 179 (1973); Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970); People v. Belous, 458 P.2d 194 (Cal. 1969); State v. Barquet, 262 So. 2d 431 (Fla. 1972)).

49. 462 U.S. 416 (1983).

50. *See infra* notes 72-82 and accompanying text.

51. *Akron,* 462 U.S. at 438 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 79 (1976)).

52. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 763, 769 (1986) (noting effect of state-distributed literature on rape victims without stating that any plaintiff was impregnated through rape and finding the statute that called for the distribution facially invalid); Bellotti v. Baird, 443 U.S. 622, 632 (1979) (quoting lower court's characterization of the case as an overbreadth issue); Collauti v. Franklin, 439 U.S. 379, 385, 390 (1979) (not reaching the "overbreadth" claim); *Danforth,* 428 U.S. at 71 (following *Roe* and using the chilling-effect rationale); Doe v. Bolton, 410 U.S. 179, 194 (1973) (explicitly using overbreadth analysis); *cf.* Singleton v. Wulff, 428 U.S. 106, 113-18 (1976) (noting that chilling effect justifies granting physicians *jus tertii* to assert the rights of patients). *But see* H.L. v. Matheson, 450 U.S. 398, 405-07 (1981) (considering only the as-applied challenge of an immature minor and refusing to rule on the statute's impact on mature minors). Justice Marshall, joined by Justices Blackmun and Brennan, dissented in *Matheson,* declaring that the Court should have ruled the law overbroad. *See Matheson,* 450 U.S. at 427 (Marshall, J., dissenting).

53. *See* Ada v. Guam Socy. of Obstetricians and Gynecologists, 506 U.S. 1011, 1011-12 (1992) (Scalia, J., dissenting from denial of cert.).

ysis in abortion cases prior to *Salerno* is nearly indisputable.[54] As with the sun's daily rising, some, like the tired farmhand, may lament it,[55] others, like the rooster, relish it,[56] and others simply accept it.[57] Very few indeed deny it.[58]

Strangely, the establishment of the *Salerno* test did not significantly reduce the Supreme Court's use of overbreadth analysis in abortion cases. Justice O'Connor first invoked the no-set-of-circumstances rule in a concurrence in *Webster v. Reproductive Health Services*.[59] While her *Salerno* analysis was analytically sound, the argument was largely ignored.[60] Justice Blackmun, joined by Justices Brennan and Marshall, responded in a footnote without explaining his reasons for rejecting the apparently good law, stating simply "I disagree" with this approach.[61] *Salerno* graduated to a plurality opinion in *Ohio v. Akron Center for Reproductive Health (Akron II)*.[62] In *Akron II,* however, *Salerno* was used

54. *See* Barnes v. Mississippi, 992 F.2d 1335, 1347 n.10 (5th Cir. 1993) (Johnson, J., dissenting); Fallon, *supra* note 10, at 859.

55. *See, e.g., Ada,* 506 U.S. at 1011-13 (Scalia, J., dissenting from denial of cert.).

56. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 539-41 (1989) (Blackmun, J., dissenting) (arguing that Missouri statute establishing beginning of life at conception will have chilling effect on those seeking abortion).

57. *See Webster,* 492 U.S. at 560 (Stevens, J., dissenting) ("[T]he record identifies a sufficient number of unconstitutional applications to support the Court of Appeals' judgment invalidating those provisions.").

58. Justice O'Connor is the only member of the court to have done this. In *Webster,* she noted the possibility that the statute in question could conceivably limit the use of certain forms of contraception in a manner unconstitutional under *Griswold.* O'Connor believed, however, that "all of these intimations of unconstitutionality are simply too hypothetical to support the use of declaratory judgement procedures and injunctive remedies in this case." *Webster,* 492 U.S. at 523 (O'Connor, J., concurring in part and concurring in the judgment). "*Maher, Poelker,* and *McRae* stand for the proposition that some quite straightforward applications of the Missouri ban . . . would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional." *Webster,* 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment). The cases O'Connor cites all uphold government restrictions on abortion funding. In none of them, however, does the Court note even one possible unconstitutional application of the statutes. Thus, in those cases, the Court never had to decide whether to use overbreadth or a *Salerno*-type standard. *See Harris v. McRae,* 448 U.S. 297 (1980); *Maher v. Roe,* 432 U.S. 464 (1977); *Poelker v. Doe,* 432 U.S. 519 (1977).

59. *See Webster,* 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment).

60. The neglect of the *Salerno* rule is particularly troubling in *Webster,* an abortion case unique in its lengthy argument over whether the Court should have reached the abortion issue at all. *See Webster,* 492 U.S. at 520-21 (plurality), 523-26 (O'Connor, J., concurring in part and concurring in the judgment), 532-37 (Scalia, J., concurring in part and concurring in the judgment), 542, 554 (Blackmun, J., concurring in part and dissenting in part), 560-61 (Stevens, J., concurring in part and dissenting in part).

61. *Webster,* 492 U.S. at 539 n.1 (Blackmun, J., concurring in part and dissenting in part).

62. 497 U.S. 502, 514 (1990) ("In addition, because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'" (quoting *Webster,* 492 U.S. at 524 (O'Connor, J., concurring in part and dissenting in part))).

merely as makeweight; discussion of the rule did not extend one full paragraph.[63] The *Salerno* rule continued its ascent in *Rust v. Sullivan,*[64] which involved a facial attack on federal regulations restricting abortion counselling. The Court cited the no-set-of-circumstances standard at the beginning of its discussion, and remained aware throughout the opinion of the case's status as a facial attack.[65] Despite these few mentions of *Salerno,* the Court continued to employ overbreadth analysis in its abortion decisions, even if it did not explicitly admit to doing so.[66]

The *Casey* decision, rather than sweeping the issue under the rug, however, as other cases might be said to have done, laid out a new standard that draws on overbreadth principles. The distinguishing characteristic of overbreadth analysis, as noted above, is that it allows litigants to challenge a law, regardless of what their own (actual or contemplated) behavior is, on the basis that the law will unconstitutionally restrict some significant number of persons not before the court. Accordingly, *Casey* upheld the challengers' argument against the husband-notification provision based on its conclusion that the requirement would act as an unconstitutional burden on a large fraction of women.[67] In order to uphold the fa-

63. *See Akron II,* 497 U.S. at 514.

64. 500 U.S. 173 (1991).

65. Interestingly, *Rust* contains at least one sign that the Court may have been ready to temper the *Salerno* test, perhaps in order to be able to apply it more regularly without making a radical change in the Court's approach to abortion cases. *Rust* declares that the regulations survive the facial challenge because they can be applied to "a set of individuals without infringing upon constitutionally protected rights." *Rust,* 500 U.S. at 183. It may have been in the mind of the Court that the "set of individuals" test — a phrase susceptible to later refinement — could be crafted to less "draconian" effect than the no-set-of-circumstances test, which upholds a law capable of being applied to only *one* person constitutionally.

66. *See* Belloti v. Baird, 443 U.S. at 627 n.5 (stating that "[i]t is apparent from the District Court's opinions, however, that it considered the constitutionality of [the abortion statute] as applied to all pregnant minors who might be affected by it," and accepting that "the rights of this entire category of minors properly were subject to adjudication" even though no immature minors were before the court). In *Hodgson v. Minnesota,* 497 U.S. 417 (1990), the Court found no legitimate state interest served by a two-parent notification provision as applied to families in which one notified parent would not notify the other. *See Hodgson,* 497 U.S. at 450. It also found legitimate state interests disserved in the case of dysfunctional families. *See Hodgson,* 497 U.S. at 450-51. The Court, however, as well as the district court below, did not establish that any of the plaintiffs came from dysfunctional families or families in which a notified parent would not notify the other. *See Hodgson,* 497 U.S. 417; Hodgson v. Minnesota, 648 F. Supp. 756, 759 (D. Minn. 1986). Rather, the Court based its conclusion of unconstitutionality on the effect the law was having on the general population, and made no attempt to relate those findings back to the plaintiff class. *See Hodgson,* 497 U.S. at 437-39. The district court likewise failed to do so. *See Hodgson,* 648 F. Supp. at 768.

67. *See* Dorf, *supra* note 7, at 276 ("The *Casey* plurality thus applied 'substantial overbreadth' analysis."). In some cases, courts will allow a party to assert the rights of *one particular person not before the court,* such as his medical patient, without entertaining an overbreadth argument in which the party can point to the effect that a statute will have on virtually anyone. *See* Singleton v. Wulff, 428 U.S. 106, 113-18 (1976) (allowing a physician to assert the rights of his patient); Barrows v. Jackson, 346 U.S. 249 (1953) (allowing a white seller of land to assert the constitutional rights of a prospective African-American buyer).

cial attack under the no-set-of-circumstances test, the plurality would have needed to conclude that the notification provision amounted to an unconstitutional barrier for *all* women, which it explicitly refused to do.[68]

While the historical use of overbreadth analysis in abortion cases is fairly clear, a resurgent force has discovered the discrepancy between *Salerno* and *Casey* and asserts that the *Salerno* standard should control.[69] A cynic might declare that some judges are using the nearly impossible to satisfy *Salerno* test as a tool — a kind of last-ditch measure — to preserve the enforceability of new abortion laws which violate the undue-burden standard.[70] Whatever the reason, a new dispute has emerged.

B. *Overbreadth Theory Supports its Use in Abortion Cases*

Although most agree that the overbreadth doctrine exists, the justifications offered for the doctrine are conflicting at best and simply not understood at worst.[71] This section briefly summarizes the two primary justifications and demonstrates their consistency with the thesis advanced here — that some form of overbreadth analysis

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This is called standing to assert *jus tertii*. *See* BATOR ET AL., *supra* note 40, at 169-70. Though this conceivably may have occurred in *Casey*, none of the adjudicating courts required the clinics or their physicians to prove that the husband-notification provision would operate as a restriction on any of their patients. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion); Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991); Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990).

68. *See Casey*, 505 U.S. at 894 (accepting respondents' argument that ninety-five percent of married women notify their husbands voluntarily).

69. *See* Ada v. Guam Socy. of Obstetricians and Gynecologists, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of cert.); Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992), *affd. in part, reversed in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995).

70. *Cf.* Allen v. Wright, 468 U.S. 737, 782 (1984) (Brennan, J., dissenting) ("More than one commentator has noted that the causation component of the Court's standing inquiry is not more than a poor disguise for the Court's view of the merits of the underlying claim."). At least in one instance, a Justice's position on the *Salerno-Casey* debate seems to be self-contradictory. Justice Scalia, who now believes *Salerno* calls for a restrained approach to adjudication of abortion laws, *see Ada*, 506 U.S. at 1011-13 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)), once declared in the same context that the court should not "be run into a corner before . . . grudgingly yield[ing] up our judgment." Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., concurring). In that case, Justice Scalia argued — at a time when the overturning of *Roe* seemed eminently possible — for a reconsideration of abortion law in light of the fact that Missouri's abortion statute would "sometimes" act as an unconstitutional restraint on physicians. *Webster*, 492 U.S. at 536-37. After *Casey*, however, which has somewhat solidified *Roe*, Justice Scalia has stated that the fact that a law will sometimes operate unconstitutionally is not a reason to entertain a facial challenge. *See Ada*, 506 U.S. at 1011-13 (Scalia, J., dissenting from denial of cert.).

71. *See, e.g.*, Alexander, *supra* note 9, at 542 ("The most notable fact about the [overbreadth] doctrine, however, is that what it is and what justifies it remain the subjects of controversy and confusion."); Fallon, *supra* note 10, at 853 ("More than fifty years after its inception, First Amendment overbreadth doctrine remains little understood." (citation omitted)).

should be applied to abortion cases. Section I.B.1 explains why the "third-party-standing" rationale supports the extension of overbreadth analysis to the abortion context, and section I.B.2 does the same for the "valid-rule-of-law" theory.

1. *The "Third-Party-Standing" Theory Requires Extension to Laws Infringing Abortion Rights and Beyond*

The overbreadth doctrine, according to some, allows litigants "third-party standing" — an opportunity to assert the rights of hypothetical persons not before the court.[72] This view finds ample authority to support it in the Supreme Court's regular characterization of the overbreadth doctrine as a unique standing rule.[73]

Writers and judges justify the standing rule as being necessary to protected against a theorized, and dreaded, "chilling effect."[74] To illustrate with an actual — albeit extreme — case, a chilling effect would occur if a ban on "all First Amendment activity" at the Los Angeles airport caused some travelers to forgo wearing shirts emblazoned with political messages or to forgo engaging in other expression protected by the First Amendment at the airport. Because these people never break the rule in the first place, they are never prosecuted, and courts never hear the constitutional arguments that the chilled parties would make against the law.[75] The standing component of the overbreadth doctrine vindicates the constitutional claims of these people by allowing other litigants to raise them.[76]

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72. *See, e.g.,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1023 (2nd ed. 1988); David S. Bogen, *First Amendment Ancillary Doctrines,* 37 MD. L. REV. 679, 705 (1978); Fallon, *supra* note 10 at 867-70; Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 692 (1978). This type of third-party standing can be distinguished from *jus tertii,* standing to assert the rights of *identifiable* third parties.

73. *See, e.g.,* Alexander v. United States, 509 U.S. 544, 555 (1993) ("The 'overbreadth' doctrine . . . is a departure from traditional rules of standing."); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("[T]he court has altered its traditional rules of standing to permit — in the First Amendment area — 'attacks on overly broad statutes . . . .' ").

74. *See generally* Schauer, *supra* note 72.

75. The chilling effect has most poetically been analogized to the sword which Dionysus hung by a single hair over legendary courtier Damocles' head to demonstrate the precarious nature of happiness. *See* JUDY PEARSALL & BILL TRUMBLE EDS., THE OXFORD ENCYCLOPEDIC DICTIONARY (2d ed. 1995). Like the chilling effect, "the value of a Sword of Damocles is that it hangs — not that it drops." Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

76. This line of reasoning can be found in several cases. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518, 521 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 619-20 (1971) (White, J., dissenting); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); United States v. Robel, 389 U.S. 258 (1967); *see also* Schauer, *supra* note 72, at 685 ("[T]he concept of the chilling effect has grown from an emotive argument into a major substantive component of First Amendment adjudication. . . . [T]he potential deterrent effect of a vague, or more com-

It is hard to believe that restrictive abortion laws do not have a chilling effect which is equal to, if not greater than, restrictive speech laws.[77] Typically, women seek the aid of a doctor when attempting to obtain an abortion. The clinics that women visit perform abortions on a regular basis;[78] therefore, those institutions are likely to be well-informed of state abortion law. Thus, if a woman seeking an abortion does not initially know of the restrictions her state places on abortions, she will meet with people whose aid is vital to the implementation of her decision, who will require that she comply with state restrictions on abortion.[79] The abortion procedure all but ensures that the chilling effect will be very icy when directed toward women seeking to have an abortion.[80] Furthermore, because of the emotional nature of the abortion debate, the media heavily cover the passage of restrictive abortion laws, making it likely that pregnant women will have some knowledge of the state law that applies to them.

Even those women who are undeterred by knowledge of the law may be chilled from asserting their rights as a result of the brevity of the gestation period.[81] A woman's constitutional right to an abortion lasts less than six months; a lawsuit can last much longer. That is, by the time a woman becomes pregnant — and, therefore, has an incentive to go to court to vindicate her rights — she may well feel it is already too late to redress the infringement on her rights.

This subsection confronts three major arguments for limiting chilling-effect theory to First Amendment cases.[82] The first argu-

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monly, an overbroad statute, was seen as reason enough to bend traditional rules of standing." (citation omitted)).

77. *See* BATOR ET AL., *supra* note 40, at 188 (questioning the limitation of the chilling effect rationale to the First Amendment area).

78. *See* THE NEW OUR BODIES, OURSELVES 299 (Jane Pineus & Wendy Sanford eds., 2d ed. 1984) (noting that most first-trimester abortions are performed in clinics with a focus on abortion).

79. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981) (suit brought after doctor insisted that minor woman comply with parental-notification law).

80. *See* Dorf, *supra* note 7, at 271 (noting that the introduction of third parties increases the susceptibility of a woman to the chilling effect). A woman who forgoes a visit to the doctor out of fear that her constitutionally permissible abortion is illegal has already felt the chill.

The preceding discussion vindicates one scholar's prophecy that "it is not far-fetched to imagine that there are many cases in which those whose conduct is most subject to chill will number among those who are most knowledgeable about decisional as well as statutory law." Fallon, *supra* note 10, at 887. This assertion derived from the logical thought that the extent of public awareness of any given state statute depends on the nature of the statute. *Id.* at 885.

81. *See* Roe v. Wade, 410 U.S. 113, 125 (1973).

82. The fact that chilling-effect theory applies outside of the First Amendment context has been contemplated by other authorities. *See* Fallon, *supra* note 10, at 884 n.192 ("Much of my argument concerning the proper contours of First Amendment overbreadth doctrine would support a doctrine of equal sweep in cases involving alleged infringements of other fundamental rights.").

ment against the expansion of chilling-effect theory is that it wrongly assumes citizens know the content of the laws on the books.[83] Though persuasive, this criticism applies to First Amendment cases more so than abortion cases. The paragraphs above explain why a woman is virtually certain to become aware of the content of state law regarding abortion restrictions. In contrast, when a state passes a law abridging free speech, it may receive some media attention, but no governmental or private agent will inform a speaker of the law just as the speaker is about to open her mouth. Nor will an agent always be around to enforce compliance with the law, as occurs in the abortion context, by silencing the speaker just at the moment she decides to utter her constitutionally protected remarks.

The second argument against extension of the chilling-effect theory can be stated simply: Because overbreadth is "strong medicine,"[84] the judiciary should use it sparingly and in small doses.[85] If this argument is valid, it can only justify heightening the standard for successful overbreadth challenges across the board.[86] It cannot rightly be used to discriminate between constitutional rights unless one right is more important than others.[87]

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83. *See id.* at 885; Martin H. Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 Nw. U. L. Rev. 1031, at 1040-41 (1984); Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U. L. Rev. 532, 546 (1974). This argument, very persuasive in this form, holds even more weight in the case of a statute that has been saved from an overbreadth challenge by a limiting construction placed on it by state courts because citizens are not at all likely to possess any knowledge of state judicial decisions. *See* Fallon, *supra* note 10, at 885.

84. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). This therapeutic metaphor has captured the imagination of courts and commentators alike. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 122 (1990) (quoting *Broadrick*, 413 U.S. at 613); New York v. Ferber, 458 U.S. 747, 769 (1982) (quoting *Broadrick*, 413 U.S. at 613); Redish, *supra* note 83, at 1040 (quoting *Broadrick*, 413 U.S. at 613). Efforts to deviate from it have not succeeded. *See* Goguen v. Smith, 471 F.2d 88, 97 (1st Cir. 1972) ("[O]verbreadth technique is a powerful weapon which . . . should be applied gingerly.").

85. A similar argument, which suffers identical problems, is that the overbreadth doctrine causes federal courts to exceed their proper authority. *See* Younger v. Harris, 401 U.S. 37, 52 (1971) ("Procedures for testing the constitutionality of a statute 'on its face' . . . are fundamentally at odds with the function of the federal courts in our constitutional plan.").

86. *See Ferber*, 458 U.S. at 769 ("[W]e have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.' *We have, in consequence, insisted that the overbreadth be 'substantial'* before the statute involved will be invalidated on its face." (citation omitted) (emphasis added)).

87. One could, of course, suggest the First Amendment be our stopping point out of simple fear of the slippery slope. It is true that the argument made here with regard to abortion rights could be extended to any other fundamental right embodied in the Fourteenth Amendment — for example, the right to use contraception. This Note does not address those cases. It should alleviate the fears of the wary to note that, in this context, the slope, while perhaps steep, is very short. *See* Dorf, *supra* note 7, at 269 (arguing that overbreadth, at its extreme, would extend only to First Amendment rights and privacy rights).

Admittedly, this issue has already come up in "right to die" cases, *see* People v. Kevorkian, 447 Mich. 436, 467-68 n.33 (1995) (noting that the choice between *Salerno* and *Casey* must be made if the right to die is recognized); Compassion in Dying v. Washington, 49 F.3d

This leads directly to the third argument for limiting overbreadth to the First Amendment context: the right of free expression is indeed a "preferred" right and therefore deserves the greatest protection.[88] While the preeminence of the First Amendment is often asserted without much discussion,[89] those assertions do not justify limiting overbreadth analysis to the First Amendment context. One argument regarding the pre-eminence of the First Amendment states that a deprivation of the right of expression works an injustice to an *entire community* that fails to hear censored speech, while deprivation of other individual rights merely damages the *individual* concerned.[90] The premise of this argument is flawed. Often, a citizen exercises his right of free speech before an extremely limited audience, and often there is no audience at all.[91] Likewise, and more importantly, when a government deprives a person of the right to an abortion, many people may be affected. Consider, for instance, an indigent, single woman who desires an abortion so that she might better provide for her already-born children. If she is prevented from having an abortion — whatever one may think of that decision — her children and other family members, her boyfriend, employer, and possibly state and federal relief programs, among others, would all be significantly affected. Even assuming a community-wide effect of free speech deprivation and an individual effect of other deprivations, however, the conclusion that, therefore, expression rights deserve special protection does not easily follow. The rights in the First and Fourteenth Amendments are individual rights.[92] Thus, their importance to the con-

586, 591 (9th Cir. 1995) (refusing to apply *Salerno*), as well as Establishment Clause cases, *see* Ingebretsen v. Jackson Public School District, 864 F. Supp. 1473, 1483 (S.D. Miss. 1994) (holding that "the rigid dictates of *Salerno* do not apply in Establishment Clause cases," which are covered by the three-part *Lemon* test); Walker v. San Francisco Unified Sch. Dist., 741 F. Supp. 1386, 1398 (N.D. Cal. 1990) (choosing to apply the *Lemon* test rather than *Salerno*). Under the *Lemon* test, a statute violates the Establishment Clause if it (i) does not have a secular purpose, (ii) if its principal or primary effect is to inhibit religion, or (iii) if it fosters an " 'excessive government entanglement with religion.' " *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Commn.,* 397 U.S. 664, 674 (1974)).

88. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (mentioning the preferred position of freedoms of press, speech, and religion); Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 852 (1970) ("[P]referred status is the ultimate rationale of the overbreadth doctrine . . . .").

89. *See, e.g.,* Fallon, *supra* note 10, at 884 n.192. But see a discussion of this issue in the very informative article, Edmond Cahn, *The Firstness of the First Amendment,* 65 YALE L.J. 464 (1956).

90. *See* Note, *Inseparability in Application of Statutes Impairing Civil Liberties,* 61 HARV. L. REV. 1208, 1209 (1948).

91. *See* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the First Amendment protects the private possession of obscene material).

92. *See* GUNTHER, *supra* note 9, at lxvi-lxvii.

cerned individuals is a better yardstick by which to judge their significance than the ripple effect on a community when those rights are denied.[93] On that individual level, it is safe to say that, at any given time, a woman may consider her right to an abortion more important than her right to free speech.[94]

A second justification given for the preeminence of expression rights is that laws abridging rights other than those found in the First Amendment may give impetus to a movement to change the unjust law, while a law impairing free speech "restricts the processes by which the law is altered."[95] Admitting that this statement will be true in some rare cases — for instance, if a law restricted political rallies at the state capital building — it is most often not true. Consider *Jews for Jesus,*[96] in which First Amendment activity at the Los Angeles airport was banned. The invalidated law did not prevent the Jews for Jesus organization from protesting the airport restrictions at City Hall, or obtaining signatures for a petition against it, or for voting for a politician who promised to fight to repeal the restriction.

While the preeminence of the First Amendment might not justify restricting overbreadth analysis to the First Amendment, one alternatively might argue that overbreadth analysis should not be used in abortion cases because the abortion right is of particularly small consequence. Indeed, statements in judicial decisions leave room to believe that the right to choose to have an abortion is of less moment than any other fundamental right. For instance, even Justice Blackmun, the author of *Roe*, characterizes the abortion right as "limited."[97] Furthermore, states are permitted to express a preference for childbirth rather than abortion.[98] The foregoing might be considered a principled basis for not extending over-

93. *See* Cahn, *supra* note 89, at 479 (arguing against the practice of balancing free speech rights against the interest of the community). If the community benefit of an individual's speech ranks as highly as this argument suggests, it is unclear why a state could not compel speech of certain individuals that is of particular benefit to the community. We know, however, that the recognized right not to speak, *see* Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *inter alia,* would render the compulsion invalid. *But see* Schauer, *supra* note 72, at 691 (arguing that speech is unique in that the courts actually think of it as an affirmative good); LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 9-10, 107 (1986) (stating that free speech theory has traditionally focused on the value of the speech, not its importance to an individual).

94. *See* Dorf, *supra* note 7, at 265 (citing Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992)).

95. Note, *supra* note 90, at 1209.

96. Jews for Jesus, Inc. v. Board of Airport Commrs., 661 F. Supp. 1223 (C.D. Cal. 1985), *affd.,* 785 F.2d 791 (9th Cir. 1986), *affd.,* 482 U.S. 569 (1987).

97. Webster v. Reproductive Health Servs., 492 U.S. 490, 555 (1989) (Blackmun, J., concurring in part and dissenting in part).

98. *See Webster,* 492 U.S. at 504-07.

breadth analysis to abortion cases. But the fact that states can indicate a preference for childbirth does not make the abortion right any different from the right of free expression; the state, after all, can express a preference for certain forms of speech, such as speech promoting democracy, in its funding decisions.[99] Also, references to abortion as a limited right merely recognize that it must be weighed against the fetus's right to life. This, too, is no different from the First Amendment context, in which the right to free speech must be balanced against the rights of the community.[100]

Even if First Amendment rights are to be considered most important, or abortion rights least important, neither view justifies limiting the overbreadth doctrine to First Amendment jurisprudence. Here, unlike cases that have spawned announcements of the "preferred position" of the First Amendment, the First Amendment is not being pitted against another right such as the abortion right.[101] Extending overbreadth analysis to abortion laws does not denigrate the First Amendment in any way; it merely recognizes that rights found within the Fourteenth Amendment due process clause need to be safeguarded as well.

2. *The "Valid-Rule-of-Law" Theory Also Requires Extension to Abortion Cases*

The valid-rule-of-law theory, an alternative justification for overbreadth analysis, is the "third-party-standing" theory's only major competitor. Valid-rule-of-law theory insists that the overbreadth doctrine has no relation to standing rules at all.[102] As its name suggests, it begins with the premise that all litigants have the right to be judged by a valid rule of law.[103] It further notes that some constitutional rules of law, but not others, make the validity

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99. *See Webster*, 492 U.S. at 509.

100. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1063-65 (2d ed. 1991) (reviewing the balancing approach to the First Amendment); *see also* Jerold H. Israel, Elfbrandt v. Russell: *The Demise of the Oath?*, 1966 SUP. CT. REV. 193, 217-19 (stating that the overbreadth doctrine applies when the governmental interest sought to be implemented is too insubstantial, or at least insufficient in relation to the inhibitory effect on First Amendment freedom).

101. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding that free speech rights have preeminence over property rights); Tucker v. Texas, 326 U.S. 517 (1946) (same).

102. *See* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 39 ("In sum, overbreadth analysis is concerned with the substance of constitutional review; it does not rely on any distinctive standing component."); Monaghan, *supra* note 40, at 283. For a modified version of Monaghan's approach, see Robert Allen Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982). *But see* Robert Allen Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962) (arguing that in overbreadth doctrine cases, the Supreme Court allows parties to assert the rights of others). Monaghan's approach has been labeled an "attempt to discredit" overbreadth analysis. *See* Alexander, *supra* note 9, at 542.

103. *See* Monaghan, *Overbreadth*, *supra* note 102, at 3.

of statutes dependent on whether they apply constitutionally to people other than the litigant. For instance, state legislatures must use the least restrictive means possible when restricting protected speech.[104] One of the most convincing ways for a litigant to prove that the legislature did not use the least restrictive means possible is to demonstrate that the statute would prohibit the speech of a great number of people. Of course, these people will not be parties to the action in which the litigant makes this claim. According to the valid-rule-of-law theory, then, it is the constitutional rule of law at issue — here, the least-restrictive-means test — that makes it possible for the litigant to show that parties not before the court will be adversely affected, and not a special standing rule.[105] If she can do so convincingly, she will have proved that the law is rotten at its core and, therefore, incapable of sustaining her conviction.

In most instances, the applicable law does not make cases outside the court relevant to the validity of the law; after all, most government regulations are not subjected to a least-restrictive-means test. For that majority of cases, impermissible applications are chipped away only through as-applied challenges.[106] But whenever the rule of law requires a significant connection between the means and the ends of the statute, overbreadth analysis should be used: "This congruence requirement is of central importance not only in the First Amendment context but wherever any standard of review other than the rational basis test is mandated by the applicable substantive constitutional law. Overbreadth challenges are, therefore, not confined to First Amendment adjudication."[107]

While *Casey* established a standard that does not match the rigor of strict scrutiny,[108] the undue-burden standard requires more

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104. *See id.*

105. "Judicial conclusions of overbreadth or of the availability of less restrictive alternatives are equivalents. They are simply different statements that other, more finely tuned means exist to vindicate any presumably valid state policies." *Id.* at 38 n.157 (citations omitted). *But see* National Treasury Employees v. United States, 990 F.2d 1271, 1274-75 (D.C. Cir. 1993) (arguing that the number of invalid applications required by overbreadth analysis is probably greater than the number of invalid applications required under the least-restrictive-means test, thus suggesting a difference between the two).

106. *See, e.g.,* United States v. Raines, 362 U.S. 17, 22 (1960); Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Monaghan, *supra* note 102, at 4.

107. Monaghan, *supra* note 102, at 4; *see also* Redish, *supra* note 83, at 1034 (arguing that it is surely correct that the overbreadth doctrine applies outside the First Amendment context).

108. Justice Scalia noted that the deferential undue-burden standard tolerates direct regulation of protected activity to a greater degree than the strict scrutiny test. *See* Planned Parenthood v. Casey, 505 U.S. 833, 988 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). Possibly anticipating its expansion to other contexts, Justice Scalia called the undue-burden standard "quite dangerous." *Casey,* 505 U.S. at 988 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Blackmun also asserted that application of strict scrutiny would have required the Court to strike down provisions which were upheld. *See Casey,* 505 U.S. at 932-35 (Blackmun, J., dissenting); *cf.* City of Akron v.

than mere rationality and certainly requires adoption of less restrictive alternatives in some cases.[109] The valid-rule-of-law theory, then, holds that overbreadth challenges may quite correctly be brought against restrictive abortion laws, whether or not the complaining party has engaged in protected activity. The challenger would only have to show that, in some cases, the restrictions will operate as an undue burden. The availability of less restrictive means, if proven, would demonstrate that the law is invalid and demand victory for the challenger.

II. *Casey*'s Large-Fraction Test is the Most Appropriate Form of Overbreadth Analysis for Abortion Cases

Above, this Note defined overbreadth analysis as a doctrine which allows challengers to invalidate a law, regardless of the challenger's own activity, on the basis that some significant number of other people will be unconstitutionally restricted by the law. This definition leaves many questions unanswered, such as how many persons' protected conduct need be infringed before a court will declare a law unconstitutional, how convincing the challenger's proof of this infringement must be, and the like. Because these questions can be answered in a variety of ways, overbreadth analysis can take on many different forms.[110] In its First Amendment cases — purportedly the only context in which overbreadth challenges are allowed[111] — the Supreme Court has developed particular answers to those questions. This Note will refer to the more general theory as simply "overbreadth analysis," and the particular First Amendment formulation as "*Broadrick* overbreadth analysis," after the case that formulated it.[112]

While this Note has argued that facial challenges to restrictive abortion statutes should be, and have been, measured by an overbreadth standard rather than the *Salerno* standard, it remains to be considered exactly what species of overbreadth analysis should be employed in such cases.[113] *Broadrick* overbreadth analysis invali-

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Akron Ctr. for Reproductive Health, Inc., 426 U.S. 416, 463 (1983) (O'Connor, J., dissenting) (arguing that the undue-burden analysis does indeed use strict scrutiny, but only after a threshold determination that the statute in question constitutes an undue burden).

109. *But see Casey*, 505 U.S. at 988-90 (Scalia, J., dissenting) (noting the difficulty in defining a "due" burden).

110. *Cf.* Fallon, *supra* note 10, at 868 n.94 ("I do think it implausible, or at least misleading, to claim that the Constitution requires exactly the overbreadth doctrine that we have now, or indeed an overbreadth doctrine defined by any specific set of doctrinal rules.").

111. *See, e.g.*, United States v. Raines, 362 U.S. 17, 21 (1960).

112. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1972).

113. There is more than one possible formulation of the overbreadth doctrine. *See supra* note 44 and accompanying text; *cf. Ferber*, 458 U.S. at 768 n.21 ("Overbreadth challenges are only one type of facial attack.").

dates statutes capable of a substantial number of impermissible applications judged in relation to the statute's sweep.[114] The *Casey* overbreadth standard — invalidating statutes which operate unconstitutionally in a large fraction of the relevant cases — is but an alternative formulation of the overbreadth doctrine. This section explains how an analysis under the *Casey* standard should proceed. In doing so, it concludes that the careful attention to facts required under the *Casey* standard suggests that it is superior to *Broadrick* overbreadth analysis for use in abortion cases.

The *Casey* standard invalidates statutes that operate unconstitutionally in a "large fraction" of the cases in which they are "relevant."[115] Admittedly, the course of a proper review under this standard is less than self-evident. The three controlling principles of the test, however, can provide a basis for consistent and judicious application of a *Casey* standard of overbreadth analysis. Section II.A describes the first guiding principle of *Casey,* an attempt to discover the actual effect that a challenged statute is having, or will have, in our society. Section II.B lays out the second (and related) principle, the *Casey* test's exclusive focus on those people whose conduct the statute may influence. Third, as section II.C explains, although the plurality used mathematical language in referring to a large fraction of cases, the test does not strive for scientific precision. Judges who give due respect to these principles may fashion a coherent body of abortion law which protects the abortion right upheld in *Casey* while correcting for problems associated with *Broadrick* overbreadth analysis.

A. *The Factual Record Should Be Extremely Important to a Court Applying the* Casey *Test*

In order to determine whether the Pennsylvania statute at issue would operate unconstitutionally in a large fraction of the cases in which it was relevant, the *Casey* plurality exhaustively reviewed factual data regarding spousal abuse and other sociological studies, ultimately concluding that a husband-notification provision would seriously affect the decision of some women to choose an abortion.[116] While some have attributed the lengthy factual review to

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114. New York v. Ferber, 458 U.S. 747, 770 (1982); *see also Broadrick,* 413 U.S. at 615; Haig v. Agee, 453 U.S. 280, 309 n.61 (1981) (arguing that overbreadth challenges may not be made by those whose conduct falls into the "hard core" of the protected area). For a history of the overbreadth doctrine, see Fallon, *supra* note 10, at 863-64; Redish, *supra* note 83, at 1031.

115. *See* Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992) (plurality opinion).

116. *See Casey,* 505 U.S. at 887-92. The Supreme Court was actually reviewing the District Court's 387 findings of fact. *See* Planned Parenthood v. Casey, 744 F. Supp. 1323, 1329-72 (E.D. Pa. 1990).

the nature of the undue-burden test,[117] the very nature of the large-fraction test also demands intense attention to facts.

For an illustration, assume that the Supreme Court decided that Pennsylvania's twenty-four hour waiting period acted as an undue burden on one specific group: poor women who must travel far to obtain an abortion.[118] If Utah thereafter passed a restrictive abortion law with an identical twenty-four hour waiting period requirement, and a facial attack was brought against it, precedent would obviate the need for courts to determine whether the statute places an undue burden on poor women who must travel far to get an abortion in Utah.

Nonetheless, if the *Casey* standard for facial attacks were employed, those challenging the Utah statute on its face would still have to show that it acts as an unconstitutional restriction in a large fraction of the cases in which it is relevant.[119] They could do this most effectively by entering (what would be favorable) factual evidence regarding the economic circumstance of women in Utah who seek abortions (impoverished), the costs of abortion in Utah (high), and the location of abortion providers in Utah (few and far between). These *facts* best answer the question before the Court: Will the provision often *operate* unconstitutionally in practice in Utah? Under the *Casey* standard, unlike *Broadrick* overbreadth analysis, it is not enough for a party or judge to hypothesize a "substantial" number of women who, on account of their financial condition, will be burdened by the waiting period. A judge must instead determine how many of those women really exist, and what fraction of the abortion-seeking population that would not other-

117. They are not incorrect to do so; the undue-burden test does in fact require courts to entertain the elusive, fact-based question of whether a law places a "substantial obstacle" in front of a woman who has chosen to undergo an abortion procedure. *See* Tholen & Baird, *supra* note 11, at 980.

118. The Court noted that it was a "close[ ] question" whether the 24-hour waiting period placed an undue burden on those women who must travel far to obtain an abortion, those who face increased exposure to harassment by anti-abortion protestors, those with the fewest financial resources, and those who have difficulty explaining their whereabouts to husbands, employers, or others. *See Casey,* 505 U.S. at 885-86. A more developed factual record may yet persuade the Court that a 24-hour waiting period acts as an undue burden towards some women. *See Casey,* 505 U.S. at 887 ("*[O]n the record before us* . . . we are not convinced that the 24-hour waiting period constitutes an undue burden." (emphasis added)). *But see* Dorf, *supra* note 7, at 276 (incorrectly stating that the Court found the 24-hour waiting provision to be an undue burden towards rural and poor women, but not a large enough number of women to justify facial invalidation).

119. *See* Fargo Women's Health Org. v. Schafer, 113 S. Ct. 1668, 1669 (1993); *Casey,* 505 U.S. at 895. Of course, in the case of an as-applied challenge, a Utah court would only need ask whether the woman before it is poor.

wise wait twenty-four hours they represent.[120] The best way to do that is by a review of reliable statistics.[121]

Thus, the *Casey* standard requires courts to concern themselves with the peculiarities of geography,[122] job setting,[123] and other pertinent circumstances surrounding any allegedly unconstitutional statute's operation.[124] The fact that the economic condition of women varies from state to state means that a finding on the constitutionality *vel non* of identical statutes might not carry over from one state to the next under the large-fraction test.[125] Courts adopting the *Casey* standard have often foregone a state-specific factual analysis, however, for the much easier, though incorrect, method of using *Casey*'s judgment on particular Pennsylvania provisions as a dispositive judgment of the overbreadth of another state's analogous restrictions.[126]

Of course, the above should not be taken to mean that the contours of the right to an abortion vary across states under the *Casey* test. Rather, the class of persons towards whom the statute acts unconstitutionally — a group whose characteristics are uniform

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120. To understand why abortion-seeking women who would not otherwise wait 24 hours are the denominator of the *Casey* fraction, see *infra* notes 135-39 and accompanying text.

121. *See Schafer,* 113 S. Ct. at 1669 (O'Connor, J., concurring in denial of stay and injunction pending appeal) (noting that the *Casey* large-fraction standard requires a review of the facts). The reliability of statistics, of course, will be hotly litigated in a court using the *Casey* standard.

122. The small number of abortion clinics in a given state might, for example, make a statutory 24-hour waiting period burdensome to a greater number of women in that state than in Pennsylvania. Therefore, lower courts have been misguided in analogizing to the provisions upheld in *Casey* without looking at the realities of life in the forum state.

123. A ban on political activity by government employees may be particularly "chilling" if, for instance, the supervisors of those employees informally enforce the ban. In such a situation, *see, e.g.,* Broadrick v. Oklahoma, 413 U.S. 601, 617-18 (1972), the state employees are likely to be deterred from "speaking," and unlikely ever to raise First Amendment concerns in a defense to a state prosecution.

124. *See supra* note 80. The fact that a woman must consult an informed doctor and medical staff before obtaining an abortion suggests that restrictive statutes will "chill" the exercise of her right.

125. For a discussion of the disparity of abortion availability across states and counties, see Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion,* 73 N.C. L. REV. 1323, 1470-75 (1995).

126. *See* Judges, *supra* note 125, at 1454 n.447; Tholen & Baird, *supra* note 11, at 1003; Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard - Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis,* 73 WASH. U. L.Q. 295, 309 n.94 (1994). Plaintiffs in a case challenging a restrictive Mississippi abortion statute apparently recognized that the *Casey* overbreadth standard required a state-specific factual inquiry. The plaintiffs unwisely chose to use some down-home language in making their correct argument:

> In their post-*Casey* supplemental brief, plaintiffs reduce their argument to the amorphism "Mississippi ain't Pennsylvania[,]"[ ] stating, "The record in this case proves what all know empirically: Mississippi ain't Pennsylvania." This speaks volumes about the invalidity of their challenge to the Mississippi Act on its face; in fact, no more really need be said.

Barnes v. Moore, 970 F.2d 12, 15 n.5 (5th Cir. 1992). The court here was perhaps too angry to get the law right.

throughout the nation — simply might be so large in one particular state, and so dubious in another, that the interest in protecting parties not before the court can justify the extreme remedy of facial invalidation in only the first case. In the other, that interest is not of sufficient volume to outweigh the government's interest in enforcing its law against those who are not protected.[127]

Casey's focus on the *actual number* of unconstitutional applications that will arise differs from *Broadrick* overbreadth analysis, which allows parties and courts to base a constitutional conclusion on hypothetical situations. This difference arises from the fact that *Broadrick* overbreadth analysis deals with applications which a statute is "capable of," realistic or not, while the *Casey* standard deals with the actual "operation" of a law.[128] Admittedly, some overbreadth opinions attempt to ground their analysis in reality.[129] Nonetheless, the Court continues to posit hypotheticals without empirical basis,[130] and no overbreadth analysis has gone into the factual detail that *Casey* did.

Intense factual review may place a certain tax on judicial economy. It may also cause courts to dispute the validity of statistics among themselves in a way more suited to a legislature than a judiciary.[131] Nonetheless, a reliance on available facts should calm a sometimes-voiced fear about the overbreadth doctrine: it is "too abstract."[132] Few complaints of abstractness will be heard from those who have waded through the 387 factual findings in *Casey*.[133]

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127. Of course, even the notion that the extent of a specific person's constitutional protection depends on where she lives is not foreign to the Constitution. *See* Miller v. California, 413 U.S. 15 (1973) (making obscenity exception to the First Amendment dependent, *inter alia,* on community standards).

128. *See* Planned Parenthood v. Casey, 505 U.S. 833, 893-95 (1992) (plurality opinion).

129. *See* City of Houston v. Hill, 482 U.S. 451, 458 n.6 (1987) (noting that although evidence regarding the actual application and enforcement of the law is not necessary for facial invalidation, such evidence has been found to be probative of the law's potential for unconstitutional application, that is, probative of its overbreadth) (cited in Rachel N. Pine, *The Role of Facts in Judicial Protection of Fundamental Rights,* 136 U. PA. L. REV. 655, 699 n.192 (1988)); Hodell v. Irving, 481 U.S. 704, 723-25 (1987) (Stevens, J., concurring) (rejecting the use of hypotheticals); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1983) (stating that plaintiffs must demonstrate a realistic danger that the challenged ordinance would compromise First Amendment freedoms).

130. *See* Osborne v. Ohio, 495 U.S. 103, 108-11 (1993).

131. *Cf.* Craig v. Boren, 429 U.S. 190, 224 (1976) (Rehnquist, J., dissenting) ("[T]he legislature is not required to prove before a court that its statistics are perfect.").

132. *See* Fallon, *supra* note 10, at 861. Despite this fear, Professor Fallon accepts overbreadth analysis in First Amendment cases. He does not explain, or even argue, how overbreadth is any less abstract in the First Amendment context than others. Instead, he makes a judgment, not thoroughly explained, that abstractness is sufferable when First Amendment rights are involved because those are the most important. *See id.* at 884 n.192.

133. *See* Planned Parenthood v. Casey, 744 F. Supp. 1323, 1329-72 (E.D. Pa. 1990). Moreover, the Court has been more concerned with tying its findings to the facts of the world in other areas of the law. When deciding whether a "rational basis" supports a statute, the Justices often speculate on the hypothetical rational basis a legislature might have had for

Of course, it is possible to imagine situations in which reliable statistics are not available. For instance, a future challenger might claim that materials provided by the state to women choosing to have an abortion were so graphic and disturbing that they created an undue burden on the right to have an abortion for a large fraction of relevant women. In that case, statistics probably could not capture accurately the number of women who faced an undue burden, as that estimate would rely so heavily on mental processes. Likewise, certain statistics — such as those regarding instances of rape — may be inherently unreliable.

The plurality, unfortunately, gives no direction on what to do when statistics prove unhelpful. Justice Blackmun proposed a sensible solution to this problem by noting that the *Casey* overbreadth test should be made with reference to expert testimony, empirical studies, *and common sense.*[134] The Court should simply use its own understanding of the world as a guide in determining whether the statute will operate unconstitutionally in a large fraction of cases. Where statistics are unhelpful, therefore, the analysis of abortion cases should closely resemble *Broadrick* overbreadth doctrine, the First Amendment analysis that does not require a close attention to factual investigation. This approach, however, should be used only as a last resort.

B. *The Large Fraction Standard Requires an Exclusive Focus on Relevant Cases*

The second, and most important, principle of *Casey* overbreadth analysis is an extension of the first. The standard demands not only a focus on the actual effect of a statute, it demands attention to the challenged statute's effect on a specific group of people: *those who desire to engage in protected activity proscribed by the particular provision being tested, or, in other words, those whose conduct will*

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passing certain legislation rather than consider its actual purpose. The Court very nearly accepted the argument that when conducting this inquiry, which it does quite often, it should look to find the actual basis rather than a posited one. *See* GUNTHER, *supra* note 9, at 621 n.9. The argument for a focus on the legislature's articulated purpose was posed in Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). Some members of the Court accepted the "real world" focus outright, *see* GUNTHER, *supra* note 9, at 621 n.9, and others balked, presumably only out of the fear of imposing requirements on the legislative body, *see id.* In the overbreadth area, by contrast, a concern with facts does not saddle state legislatures with additional responsibilities, and thereby result in an unwise intrusion into the legislative realm. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (citation omitted)).

134. *See* Planned Parenthood v. Casey, 505 U.S. 833, 925 (1992) (Blackmun, J., concurring).

actually be changed by the existence of the law.[135] That is, the denominator of the large fraction must be ascertained. Defining this group has proved troublesome.[136]

In *Casey,* the Court emphatically rejected Pennsylvania's argument that the husband notification provision passed the large-fraction test because the great majority of pregnant women voluntarily notify their husbands of their desire to have an abortion. It was willing to accept that only one percent of women seeking abortions would not notify their husbands voluntarily. The Court noted, however, that:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on *those whose conduct it affects.* For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[137]

Thus, in the Utah example above, a court could not find the statute constitutional because poor women are a small fraction of all women in Utah and, thus, do not constitute a large fraction of the cases. The group restricted by the law is those women who, absent the law, would not have waited twenty-four hours for an abortion. A court, therefore, must ask what percentage of *women who would not otherwise wait twenty-four hours* before getting an abortion suffer an undue burden because of their poverty. After shifting its focus, a court may well find that poor women make up a large fraction of those who are restricted.[138]

It is here that the *Casey* standard makes its great departure from standard overbreadth analysis. *Casey* asks simply: Will this statute prevent citizens who desire to act in protected ways from doing so? The way *Casey* gets right to this question, indeed the great virtue of the *Casey* test, lies in its immediate removal of the irrelevant cases — those cases in which the chilling effect has no conceivable chance to operate.

In contrast to *Casey, Broadrick* overbreadth analysis uses the entire population regulated by the challenged statute as its frame of reference. The number of impermissible applications is to be

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135. *See* 505 U.S. at 894-95.

136. *See, e.g.,* Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482, 1489 (D. Utah 1994).

137. *Casey,* 505 U.S. at 894 (emphasis added) (citation omitted).

138. It may be, for instance, that those with enough money to do so tend to see a doctor more than once before having an abortion, thus independently creating a 24-hour waiting period.

judged in relation to the statute's entire sweep. Using this formulation of overbreadth analysis, Pennsylvania's husband-notification provision would not have been struck down. While *Casey* logically looked first to those who might be chilled, *Broadrick* overbreadth analysis looks first to all pregnant married women; any woman with a husband, after all, is within the sweep of the husband-notification provision. Ninety-five percent of married women notify their husbands voluntarily,[139] thus, the challenge would have failed under *Broadrick*.

The major flaw with this approach is that it allows the statute's sweep — which may have little connection to the amount of chilling taking place — to control the analysis. For example, assume Pennsylvania passes a criminal statute regulating one million people. As a result, 5000 people change their behavior to conform with the law; most were in compliance with it already. Of the 5000 who altered their behavior, 4800 ceased engaging in constitutionally protected activity; the conduct of the other 200 was not protected. By most measures, 4800 is not a large number when compared to one million. Thus, a challenge under *Broadrick* would fail. Nonetheless, the chilling effect in this case worked nearly to the limit. The *Casey* standard recognizes this by using the group of 5000 — the group that was actually chilled — as the starting point of the analysis. By any measure, 4800 over 5000 is a large fraction. This, of course, leads to the next question: Precisely what is a large fraction?

C. *The Large Fraction Test Cannot Be Performed With Mathematical Accuracy*

If the plurality believed that their reference to a large fraction of cases demanded scientifically precise analysis, Justice Rehnquist would have been right to criticize it as he did:

> The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a "large fraction" of those cases in which women prefer not to notify their husbands . . . . This assumption is not based on any hard evidence, however. And were it helpful to an attempt to reach a desired result, one could just as easily assume that the battered women situations form 100 percent of the cases where women desire not to notify, or that they constitute only 20 percent of those cases.[140]

This passage mistakenly implies a kind of mathematical exactitude to the term "large fraction." Any overbreadth theory will have a high-water mark that, when exceeded, signals a constitutional viola-

139. *See Casey*, 505 U.S. at 894.

140. *Casey*, 505 U.S. at 973-74 n.2 (Rehnquist, J., concurring in the judgment in part and dissenting in part). Justice Rehnquist called for the continued vitality of *Salerno*. *See Casey*, 505 U.S. at 972-73.

tion.[141] Just because we can only estimate the water level at any given time, and that it cannot be measured with certainty, is irrelevant.[142] Certainly, the elusive nature of that inquiry has not stopped the Court from applying it in First Amendment cases. The *Casey* standard recognizes the inherent imprecision and corrects it as much as possible, that is, by forcing judges to justify their decisions with proven factual circumstances whenever possible. Indeed, despite the dissent's remarks, the *Casey* plurality did base its findings on hard evidence.[143]

CONCLUSION

With *Roe,* the Supreme Court became the nation's primary arbiter of abortion rights.[144] Subsequent Supreme Court opinions mapped a rocky rather than smooth course, suggesting the Court

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141. *See* BATOR ET AL., *supra* note 40, at 193 (noting the speculative nature of the overbreadth inquiry); Fallon, *supra* note 10, at 893 ("The hard question, normatively as well as doctrinally, is how the substantiality of a statute's overbreadth ought to be gauged."); *see also* C. Douglas Floyd, *The Justiciability Decisions of the Burger Court,* 60 NOTRE DAME L. REV. 862, 907 (1985) (noting the empirical nature of the overbreadth inquiry and the Burger Court's failure to determine to what extent a judgment on overbreadth should be qualitative or quantitative). On the question of what number of unconstitutional applications is "substantial," see National Treasury Employees Union v. United States, 990 F.2d 1271, 1274-75 (D.C. Cir. 1993) (arguing that the number of invalid applications required is probably greater than the number of invalid applications required under the least-restrictive-means test); Redish, *supra* note 83, at 1064 (stating that the substantiality requirement is satisfied if a majority of applications are unconstitutional), *see also* Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1563-66 (7th Cir. 1986) (Coffey, J., dissenting) (discussing the relation between the two standards).

142. Another commentator has perhaps said it best:

> [W]hile it is true that there are behavioral assumptions that provide the basis for chilling effect analysis, the lack of any ability to quantify or test these assumptions does not diminish the significance of the chilling effect as a substantive doctrine. The doctrine flows from the relationship between our recognition of the inevitability of error and our preference for a particular type of error; and it is the existence of this relationship, rather than the scientific accuracy of the predictions of human behavior, which justifies the formulation of substantive rules in this area.

Schauer, *supra* note 72, at 688-89.

143. *See Casey,* 505 U.S. at 891-93 (citing AMA COUNCIL ON SCIENTIFIC AFFAIRS, VIOLENCE AGAINST WOMEN (1991); Nancy M. Shields & Christine R. Hanneke, *Battered Wives Reactions to Marital Rape, in* THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 131, 144 (David Finkelhor et al. eds., 1983); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 27-28 (1984); Tracy Bennet Herbert et al., *Coping with an Abusive Relationship: I. How and Why do Women Stay?,* 53 J. MARRIAGE & FAM. 311 (1991); B.E. Aguirre, *Why Do They Return? Abused Wives in Shelters,* 30 J. NATL. ASSN. SOC. WORKERS 350, 352 (1985)); James A. Mercy & Linda E. Saltzman, *Fatal Violence Among Spouses in the United States, 1976-85,* 79 AM. J. PUB. HEALTH 595 (1989); *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources,* 101st Cong. 3 (1990); Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction,* 51 J. MARRIAGE & FAM. 41, 44 (1989).

144. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1988) (Scalia, J., concurring). *Roe* in fact generated, more than it built upon, the national abortion controversy. *See* Earl M. Maltz, *Abortion, Precedent, and the Constitution,* 68 NOTRE DAME L. REV. 11, 27 (1992).

might nullify the abortion right at any moment.[145] Our nation, ever watchful of the federal courts' abortion decisions — and driven to a fever pitch by the emotional nature of the debate — would certainly find any case disposed of based on the standard for evaluating facial attacks anticlimactic. Nonetheless, that issue is, analytically speaking, central to the abortion cases. The standard determines how "active" the federal courts will be in striking down overly restrictive state statutes[146] — an issue just as important, if less absorbing, than the litany of other concerns that abortion cases raise. Since *Casey,* a decision which has momentarily solidified the Court's position on abortion rights, it has become an even more important argument for those who wish to preserve the facial validity of laws restricting access to abortion.

Overbreadth analysis has been applied in abortion cases, and should continue to be applied in the form of the *Casey* test. Besides its harmony with prior decisions, use of the large-fraction test acknowledges that restrictive abortion statutes hang like a sword, chilling behavior that has been declared constitutionally protected — regardless of the fact that "some of us as individuals find abortion offensive to our most basic principles of morality."[147] The alternative *Salerno* no-set-of-circumstances test lays to the side. In the abortion context, that standard is impossible to meet, and, therefore, can be used as camouflage reasoning that denies the abortion right in fact while preserving it in theory. Furthermore, the *Salerno* test finds no pedigree in Supreme Court decisions on abortion. It has no place in an area of the law where personal inclinations already threaten to dominate.

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145. *See* Walter Dellinger & Gene Sperline, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989) (noting the imperilled status of the right to an abortion).

146. *See* M. Chester Nolte, *Invalid for Vagueness or Overbreadth: Challenging Prohibitions of Protected Speech,* 30 WEST'S EDUC. LAW REP. 1017-18 (suggesting that the overbreadth standard is a question of judicial activism).

147. *Casey,* 505 U.S. at 850.