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Legislating from the Bench: AYOTTE Ruling Sets Dangerous New Precedent

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INTRODUCTION

Few topics are as divisive and controversial in this nation as abortion. Yet, in *Ayotte v. Planned Parenthood of Northern New England*, the most recent abortion case to reach the Supreme Court, the Justices delivered a unanimous decision. The case involved several provisions of a New Hampshire law that sought to regulate a minor's access to abortion. In addition to reiterating the need for health exceptions in anti-abortion statutes, the *Ayotte* Court was asked to consider which remedy is appropriate when a statute lacks such an exception. Ultimately, the Court suggested that judges, rather than legislators, might be given the task of "fixing" an unconstitutional statute. This would be achieved through the process of judicial "interpretation" rather asking the legislature to redraft and re-vote on the proposed law.

The Court reached this point by stretching the concept of "severing" unconstitutional provisions from the original statute. In other words, when portions of a statute violate the Constitution, common practice suggests that the entire statute need not necessarily be nullified. When possible, courts might sever the unconstitutional portion of the statute while leaving the remainder intact.

As explained in this article, the *Ayotte* Court suggested taking this process a step further, even if the statute could not be saved by neatly severing an unconstitutional section. Instead, the Supreme Court directed lower court judges to determine whether they could find any other way to reinterpret the original statute in a manner that would make it constitutional.

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This article will show that the *Ayotte* Court correctly addressed the substantive abortion issue (health exception requirement), but erred on the issue of remedy. The substantive legal standards and application of those precedents in *Ayotte* will be examined, demonstrating the unconstitutional aspects of the statute at issue. The Supreme Court's approach to a remedy will also be presented, along with several concerns regarding the Court's decision to remand the case rather than strike down the statute.

The Court had an opportunity to strike down the unconstitutional law and thereby force the state legislature to redraft a better statute. However, the Court was reluctant to do so. The remedy the Court did use in this case could create a dangerous slippery slope of unfortunate consequences, and these consequences should not be overlooked in the midst of the social controversy surrounding the topic of abortion itself.

EVOLUTION OF ABORTION LAW

The Constitutional Right to Privacy

Since the 1970s, the federal courts have consistently interpreted the Constitution's right of privacy to include a woman's right to choose an abortion.[1] But where specifically does the Constitution – which never mentions the word "privacy" – provide such a right? The federal courts have inferred the right to privacy from a variety of sources, mainly from the Fourth, Fifth, Ninth, and the Fourteenth Amendments.[2] When it comes to abortion, the Supreme Court has found the right of privacy broad enough to encompass a woman's decision to terminate her pregnancy.[3]

The issue of abortion was first presented to the Supreme Court in 1973 in *Roe v. Wade.* Jane Roe, an unmarried pregnant woman, brought suit against Henry Wade, District Attorney of Dallas County. She argued that Texas'

[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *See, e.g., id.* at 152: "In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment (citations); in the Fourth and Fifth Amendments (citations); in the penumbras of the Bill of Rights (citations); in the Ninth Amendment (citations); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment (citations)."
[3] *Roe*, 410 U.S. at 153.

criminal abortion statutes were unconstitutional.[4] The Supreme Court, led by Justice Blackmun, found that these abortion-prohibiting statutes violated the right to privacy. The Court created a three-part legal standard based on trimesters, which granted various degrees of protection to pregnant women.[5] The *Roe* Court held that during the period before the fetus is viable (that is, capable of surviving outside the mother's womb), a woman had the right to choose an abortion without undue interference from a state.[6] During the period subsequent to viability, however, the state was given leeway to regulate and even prohibit abortion – except where it was necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[7]

After this groundbreaking decision, the Court ruled in 1979 that minors, too, must have access to abortions.[8] The majority concluded that a child, merely on account of her minority, is not beyond the protection of the Constitution.[9] Furthermore, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor.[10]

The "Undue Burden" Standard

In 1992, *Roe* was modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[11] The majority in *Casey* upheld the general spirit of the right to abortion, as specified in *Roe*, but did away with Roe's trimester framework. Instead, the *Casey* Court shifted the focus to the "undue burden standard," which requires that a State may not impose an undue burden, or a substantial obstacle, on a woman's choice to have an abortion.[12]

[4] *Id.* at 120.
[5] *Id.* at 164.
[6] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).
[7] *Roe*, 410 U.S. at 165.
[8] *Bellotti v. Baird*, 443 U.S. 622 (1979).
[9] *Id.* at 633.
[10] *Id.* at 642.
[11] *Casey*, 505 U.S. at 833.
[12] *Id.* at 837.

Planned Parenthood v. Casey

The phrase *undue burden* evolved into a legal standard in 1992 in *Casey*, when Justice O'Connor stated that an undue burden exists, and therefore a provision of an abortion law is invalid, when the law has a "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[13] *Casey* also recast the right to abortion, originally viewed as a fundamental constitutional right, into a constitutional liberty interest. Because of this, states did not need to show a compelling interest in order to prohibit any sort of abortion (as was the case in *Roe*), but instead, states need merely show that a restriction on abortion does not impose an undue burden on a woman's right to choose.[14] Thus, the focus of litigation has shifted from the states' reasons for regulating abortions to the *effect* of those regulations on a woman's practical ability to seek a pre-viability abortion without an "undue" burden on her decision.

Stenberg v. Carhart

In 2000, the Supreme Court ruled in *Stenberg v. Carhart* that a Nebraska statute banning a particular type of abortion was unconstitutional.[15] In particular, the Nebraska statute banned a type of partial birth abortion called D&X. However, this type of partial birth abortion can be safer for many women than the alternate abortion procedures that were not prohibited by Nebraska law. Thus, since some women would not be guaranteed the safest possible abortion method, the plaintiff argued that the statute endangered the health of women seeking an abortion.[16] Hence, the issue in this case was whether outlawing D&X partial birth abortions violated the undue burden standard set by the *Casey* Court: if "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," then the regulation in question would be unconstitutional.[17]

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[13] *Id.* at 877.

[14] *Id.* at 869-71.

[15] *Stenberg v. Carhart,* 530 U.S. 914, 929 (2000). Partial birth abortions occur when a physician partially delivers the unborn child before terminating its viability. *Id.* at 973.

[16] *Id.* at 971.

[17] *Id.* at 938, 952.

The *Stenberg* Court held that the Nebraska statute violated the *Casey* standard because it lacked a means of providing the safest possible abortion to a woman if her health was at risk. In other words, the Nebraska abortion regulation lacked a health exception. As a result, the statute posed an undue burden on a woman's right to choose an abortion.[18] The *Stenberg* decision illustrates three concepts of relevance to future cases: life and health exceptions, rarity of occurrence, and severability.

(1) Life and Health Exception

The life and health exception precedent had its genesis in *Roe*. In *Roe*, the Supreme Court held that women should not be forced to sacrifice their lives or health to bear children.[19] *Casey* reaffirmed part of *Roe's* holding when the Court stated that post-viability abortions could not be completely prohibited if needed to preserve the life or health of the mother.[20] The *Casey* Court reasoned that the lack of a health exception to a statute would pose an undue burden to the woman; the Court stated, "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden…."[21] Justice Breyer further stated, "this court has made clear that a state may … not endanger a women's health when it regulates abortion [and has] repeatedly invalidated statutes that, in the process of regulating the methods of abortion, imposed significant health risks."[22]

Because the Nebraska statute denied some women the right to pursue the safest type of partial birth abortion when their health was in danger, the Court ruled that the statute lacked the necessary health exception.[23] Thus, the *Stenberg* Court interpreted the undue burden standard as providing that an abortion law may not impose an undue burden on any woman, it may not place a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus, and it must include both a life and health exception.

[18] *Id.* at 929.
[19] *Roe*, 410 U.S. at 162-63.
[20] *Casey*, 505 U.S. at 878.
[21] *Id.*
[22] *Stenberg*, 530 U.S. at 931.
[23] *Id.* at 934.

(2) Rarity of Occurrence

Furthermore, the Supreme Court in *Stenberg* addressed the issue of rarely occurring and rarely needed abortion procedures.[24] The Court held that even though a procedure is rarely used and may be needed for health reasons in only a few instances, that procedure must still be made available for any woman who needs an abortion to protect her health or her life.[25] The Court reasoned as follows: "[That] a *rarely used* treatment might be necessary to treat a *rarely occurring* disease that could strike anyone the state cannot prohibit a person from obtaining treatment by pointing out that most people do not need it."[26]

In this case, Nebraska argued that only in very few cases could the D&X procedure be safer than other methods of abortion not prohibited by the State.[27] However, the Court rejected this reasoning and clarified that rarity of occurrence is not relevant. The Court held that if prohibition of the procedure means women must chose a more dangerous method of abortion, no matter how few their numbers, this is tantamount to denying those women the right to choose an abortion itself. Such an outcome violates the undue burden standard.[28]

(3) Severability

Severability is not a substantive legal standard such as undue burden, health exceptions, or rarity of occurrence. Rather, severability is a consideration of remedy. Severability is based upon a theory that a statute is made up of many

[24] *Id.* at 923-25.

[25] *Id*. There are two separate issues involved in the *Stenberg* Court's examination of rarity of occurrence. The Court addressed the rarity of a particular abortion procedure's *usage*, and held that even if the procedure is rarely *used*, the procedure cannot be prohibited if a woman needs it to protect her health or her life. The Court also addressed the rarity of *need*, and held that even if only one woman *needs* a particular procedure to protect her health or her life, the procedure cannot be prohibited. Thus, rarity of occurrence of usage or need does not negate the effect of a law that places an undue burden on any woman.

[26] *Id.* at 934 (emphasis added).

[27] *Id.* at 933.

[28] *Id.* at 934.

independent clauses, each of which are distinct.[29] When a court decides that only a particular clause or section in a statute is unconstitutional, the court may 'sever' and enjoin that part of the statute deemed unconstitutional, leaving the rest of the statute in force.

The process of applying severability to a statute has been in use by the Supreme Court since the early days of the Republic.[30] For example, in *Marbury v. Madison* in 1803, Chief Justice Marshall held that only part of Section 13 of the Judiciary Act of 1789 was unconstitutional.[31] The remaining portion of the Judiciary Act of 1789 remained intact and enforceable.[32]

Over the years, the Supreme Court has elaborated on the notion of severability, clarifying that it is only permissible to apply severability if the remaining portions of a statute, when viewed on their own, stay true to the original legislative intent. However, legislative intent can be difficult to ascertain in some cases. For instance, some statutes are not made up of completely independent clauses; that is, the clauses rely on each other for enforcement, and each clause is important to the meaning of the particular statute as a whole. Thus, modern courts face some difficulty when trying to determine whether severability should be applied to certain statutes or whether such statutes must be declared unconstitutional in their entirety. [33]

Today, Congress and state legislatures often include what is called a 'severability clause' in a statute to denote that the legislature intends that severability should be applied if any portion is deemed unconstitutional.[34] However, if Congress has not included such a clause, the court must resort to

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[29] *See, e.g.,* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. on Legis. 227 (2004).

[30] *Id.* at 232-33.

[31] *See, e.g., Marbury v. Madison*, 5 U.S. 137, 172-173 (1803).

[32] Shumsky, *supra,* at 232.

[33] *Id.* at 238-39.

[34] In the late 1800's, the first severability clause appeared, and by the early 1900's severability clauses had become commonplace. *Id.* at 234-36. An example of a severability clause is found in the New Hampshire Act from the *Ayotte* case. The severability clause for that Act reads as follows: "If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications." *Ayotte*, 126 S.Ct. at 969 (citing §132:28).

examining extrinsic sources (beyond the text of the statute) to determine legislative intent.[35] The possibility that the court might mistake legislative intent in its rulings can create tension with regard to the separation of legislative and judicial power set out by our constitutional structure.

The *Stenberg* Court, in holding that the lack of a health exception in the Nebraska statute was unconstitutional, did not consider the possibility of applying severability to the statute. The Court stated that it had "repeatedly invalidated statutes that in the process of regulating the methods of abortion imposed significant health risks,"[36] and then ruled that the Nebraska Statute was facially, as opposed to partially, unconstitutional for lacking a health exception.[37] Thus, the substantive defect in the Nebraska abortion statute (lack of a health exception) was remedied without use of severability as a remedial device.

Thornburgh v. American College of Obstetricians and Gynecologists

Although *Thornburgh v. American College of Obstetricians and Gynecologists* pre-dated the *Casey* opinion, an analysis of its facts provides useful background on the issues at hand.[38] The *Casey* Court affirmed *Thornburgh's* approach to an abortion law that lacked a sufficient health exception.[39] *Thornburgh* dealt with a number of provisions of the Pennsylvania Abortion Control Act.[40] Disputed aspects of the Act ranged from statutory provisions such as informed consent to reporting requirements for abortion. The first relevant provision of the Act concerned the degree of care required for women going through post-viability abortions.[41] The second provision of importance concerned the so called "second physician" requirement.[42]

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[35] Shumsky, *supra,* at 238-39.

[36] *Stenberg*, 430 U.S. at 931.

[37] *Id.* at 945-46. A 'facial' defect means that application of the statute is deemed unconstitutional in its entirety.

[38] *Thornburgh v. A.M. Coll. Of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

[39] *Casey,* 505 U.S. at 870, 874, 876-83.

[40] *Thornburgh,* 476 U.S. at 750.

[41] *Id.* at 768.

[42] *Id.*

The *Thornburgh* Court's ruling on these two issues reinforced the main points discussed in *Stenberg*. First, statutes that impose health risks have been struck down in the past. Second, a health risk affecting only a small number of women does not shield the statute from the requirement of a health exception. Regardless of the rarity of occurrence, a health exception is necessary in order for an abortion statute to be constitutional.

The first relevant provision of the Pennsylvania Act required "the exercise of that degree of care 'which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted.'"[43] This provision effectively exposed women to a greater health risk because it required women to choose the abortion method that best protected the life of the unborn child, not the method of abortion most apt to protect a woman's own life. Because the law lacked an adequate health exception for instances in which the mother's health would be put at risk, the Court found not only this provision, but the entire Act, to be unconstitutional.[44]

The second relevant provision of the Pennsylvania Abortion Control Act concerned a "second physician" requirement which also exposed women to an increased health risk. This provision required a second physician be present during an abortion.[45] According to the Pennsylvania law, a second physician must be present for post-viability abortions and it would be that physician's responsibility to "take control of the child ... and take all reasonable steps necessary in his judgment to preserve the child's life and health." [46] The Court held the second physician requirement to be unconstitutional because "the statute must contain an exception for the situation where the health of the mother [is] endangered by delay in arrival of the second physician."[47]

The Court's discussion of the "second physician" requirement reinforces the approach taken in *Stenberg,* where that Court declared that even if a law only creates a medical risk for a small number of women, the law must still provide a health exception for those women. Although only a few women in emergency situations would have their constitutional rights violated by the second physician requirement, the requirement was still held to be

[43] *Id.*
[44] *Id.* at 769.
[45] *Id.*
[46] *Id.* at 770.
[47] *Id.*

unconstitutional because all women are entitled to a heath exception in order to protect their health in emergency situations, no matter how rarely such situations may occur.

Furthermore, in this discussion, the Court implicitly rejected the notion that a judge can reinterpret the law to render the statute constitutional. If the Court had read some of the arguably ambiguous language in favor of a health exception, as the State requested, then the statute might have been viewed as constitutional after all.[48] However, the Court did not take such an approach, nor did the Court discuss 'severing' any portion of the statute.[49] Severing the "second physician" requirement might have corrected one of the flaws in the statute, but it would not have addressed the other flaw (the greater emphasis on child's health than mother's health). In this latter case, one could argue that there was nothing to sever: there simply was no health exception protecting the mother. Thus, the statute was deemed facially unconstitutional because an abortion law that places a woman's health at risk is unconstitutional.

REASONING USED IN THE AYOTTE CASE

Ayotte dealt with the constitutionality of the New Hampshire Parental Notification Prior to Abortion Act (New Hampshire Act), which was passed in June of 2003.[50] The New Hampshire Act prohibits physicians from

[48] According to the Act, post-viability abortions should use an abortion technique that "provides the best opportunity for the unborn child to be born alive unless with good faith judgment that technique would present a significantly greater risk to the life or health of the pregnant woman." *Id.* at 768. The Supreme Court agreed with the appellate court, which had stated that Pennsylvania's inclusion of the word "significantly" in front of "greater risk" in the text of the Act, is "patently not surplusage" and is not irrelevant to the Legislature's meaning and intent for the Act. *Id.* at 769. The word choice provides a health exception only in cases of severe or "significant" medical risk; however, no such exception exists for women who face only moderate risk in their health.

[49] For instance, the Court did not interpret the words "significantly greater medical risk" to mean "meaningfully greater risk," which the State argued was an acceptable inference. Ultimately, because women may face an increased medical risk in order to protect the life of the unborn child during abortion procedures, the Court ruled that this section of the Pennsylvania Abortion Control Act was facially invalid. *Id.*

[50] *Ayotte*, 126 S. Ct. at 965.

performing an abortion on an unemancipated minor until 48 hours after written notice has been delivered to the minor's parent or guardian.[51] The Legislature stated that the intent behind the Act was to "further the compelling state interests of protecting minors against their own immaturity, fostering the family structure and preserving it as a viable social unit, and protecting the rights of parents to rear children who are members of their household."[52] The Plaintiffs, Dr. Wayne Goldner and three clinics, brought suit against the New Hampshire Attorney General, arguing that the New Hampshire Act is unconstitutional because it fails "to allow a physician to provide a prompt abortion to a minor whose health would be endangered."[53]

There are three exceptions to the New Hampshire Act. First, the Act provides that notice is not required if the abortion provider certifies that an abortion is necessary to prevent *death* and if "there is insufficient time to provide the required notice."[54] Second, the Act provides that notice is also unnecessary if the parent or guardian *certifies in writing* that he or she had already been notified.[55] *Judicial bypass* is the third and final option for avoiding parental notice under this law.[56] In the case of a judicial bypass, the judge possesses the power to authorize the abortion if he or she determines that the minor is "mature and capable of giving informed consent."[57]

In short, the New Hampshire Act contains a *life* exception, as it provides that notice is not required in those situations in which an immediate abortion is necessary to preserve the life of the mother. However, the Act completely lacks a *health* exception, which would, in this case, provide that notice is not required in those situations in which a doctor determines that an immediate abortion is necessary to preserve the health of the mother.

[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 964-65.
[55] *Id.* at 964.
[56] *Id.* at 965.
[57] *Id.*

District and Appellate Court Rulings

Before reaching the Supreme Court, *Ayotte* was reviewed by both the district and appellate courts using the substantive legal standards previously discussed. Both courts struck down the New Hampshire Act in its entirety and enjoined its enforcement.[58] The district court ruled that the Act was unconstitutional because it lacked the required health exception.[59] The court cited *Stenberg* for the proposition that "the governing standard requires an exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother."[60] The district court also stated that according to *Casey***,** laws that regulate abortion cannot put a woman's health in danger without thereby presenting an undue burden. Thus, the district court deemed the New Hampshire Act unconstitutional because it lacked a health exception for emergency situations in which a woman's health would be endangered while waiting for parental notice or a judicial bypass.[61]

[58] At the district court level, three separate issues were raised regarding the constitutionality of the New Hampshire Act. The plaintiffs claimed that the New Hampshire Act was unconstitutional because it lacked a health exception, the death exception was too narrow, and the confidentiality requirement for the judicial bypass option was insufficient. *Planned Parenthood of N. New England v. Heed*, 296 F. Supp. 2d 59, 62-67 (D. N.H. 2003).

[59] *Heed*, 296 F.Supp. 2d at 64.

[60] *Id.* at 63.

[61] *Id.* at 65-66. According to this provision of the New Hampshire Act, a physician can perform an abortion without notification only to prevent death in situations where there is not enough time to deliver parental notice. The petitioners argued that this death exception was too narrowly drawn because "physicians cannot predict the course of medical complications with enough precision to comply with that requirement." Consequently, if a physician is unsure that death will occur during the 48-hour waiting period, he or she may be hesitant to provide an abortion without parental notification for fear of both criminal and civil penalties. The petitioners also argued that in some cases, abortion may not be the only way to save the life of the mother, but it may be the safest way. The statute did not allow for abortions in these scenarios. After hearing these arguments the district court concluded that the death exception was in fact too narrow because it violated due process rights and prevented doctors from relying on their good faith judgment. *Id.* The court then declined to rule on the third issue which questioned whether or not the judicial bypass procedure protected the confidentiality of the minor involved. *Id.* at 65-67.

In addition, the district court briefly discussed the idea of severability and determined that it was not an appropriate remedy for the lack of a health exception.[62] The court pointed out that there were no portions of the New Hampshire Act that could be removed or severed to remedy the lack of health exception.[63] Therefore, the district court declared the Act unconstitutional in its entirety.[64]

The appellate court's reasoning was nearly identical to that of the district court.[65] In summary, the appellate court found the New Hampshire Act unconstitutional because it lacked a health exception and because the death exception was too narrow.[66] As such, the appellate court affirmed the district court's ruling that the Act should be struck down in its entirety.

Supreme Court Opinion

The *Ayotte* case received a great deal of attention because abortion is a controversial issue, both legally and socially. Justice O'Connor began the Supreme Court's opinion by clarifying: "[W]e do not revisit our abortion precedents today…."[67] However, the Court did briefly reiterate that states might have an interest in regulating a minor's access to abortion and, when doing so, a health exception is necessary.[68]

[62] *Id.* at 67. In this case, the Court concluded that removing the unconstitutional death exception would not amount to any beneficial change to the statute because the remaining portions of the law would still fail to sufficiently protect the health of women in emergency situations. *Id.*

[63] *Id.*

[64] *Id.* at 68.

[65] *Planned Parenthood v. Heed*, 390 F.3d 53 (1st Cir. 2004).

[66] *Id.* at 54.

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

[68] Initially, there were two substantive issues before the Court. The first issue addressed whether or not the district court and the court of appeal erred in holding that the New Hampshire Act was facially invalid because it did not contain a health exception and because the death exception was drawn too narrowly. The second issue addressed which legal standard should have applied in analyzing the constitutionality of the Act. However, the Supreme Court did not entertain serious argument on these substantive issues and they were therefore barely discussed in the opinion. *Id.* at 965-66.

The Court identified the *Casey* 'undue burden' precedent as the relevant legal standard, and the parties on both sides agreed with the Court that the lack of a sufficient health exception, which may pose an undue burden on a woman's right to choose abortion in rare cases, was a constitutional defect in the New Hampshire Act.[69]

The parties did differ, however, in their views of how the Court should remedy the lack of a health exception in the New Hampshire law. Thus, the Supreme Court's opinion addressed the issue of the appropriate relief "when a statute restricting access to abortion *may* be applied in a manner that harms women's health."[70] The Court considered whether the proper remedy for a statute lacking a health exception should be to facially invalidate the entire statute, or whether the Court should find a narrower remedy that would sever only the unconstitutional aspect of the statute.[71]

The *Stenberg* case, by way of example, was distinguished, because the parties to that case had never specifically asked the Court to consider a narrow remedy rather than striking down the abortion statute in its entirety.[72] Ultimately, the *Ayotte* Court hoped to "enjoin only the unconstitutional applications of [the New Hampshire Act] while leaving other applications in force, or to sever [the Act's] problematic portions while leaving the remainder intact."[73]

The *Ayotte* Court reasoned based on three premises. The Court first stated that, "generally speaking, when confronting a constitutional flaw in a statute, [the Court tries] to *limit the solution* to the problem," and the normal rule is to hold a statute partially invalid rather than facially invalid.[74]

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[69] *Id.* at 967.

[70] *Id.* at 967 (emphasis added).

[71] *Id.* at 969. Succinctly stated at the opening of the opinion, Justice O'Connor described the Court's approach as follows: "We do not revisit our abortion precedents today, but rather address a question of remedy: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief." *Id.* at 964.

[72] *Id.* at 969.

[73] *Id.* at 967.

[74] *Id.* (emphasis added).

In this regard, the Court hoped to respect the legislative effort that goes into the creation of state statutes. Severing only the unconstitutional portions of a statute would allow the other, constitutional, aspects to remain undisturbed.[75]

The Court discussed the second premise when it stated that, "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewriting state law to conform it to constitutional requirements' even as we try to salvage it."[76] Here, the Court held that it should not 'rewrite the law' but instead clearly articulate *how and when a statute does and does not apply*. This principle opened the door for enforcement of the New Hampshire Act that would apply in most, but not necessarily all, factual situations.

Finally, the Court's third premise stated that the Court "cannot 'use its remedial powers to circumvent the *intent of the legislature*.'"[77] The Court wondered whether the legislature would have "preferred what is left of its statute to no statute at all,"[78] and answered that since the New Hampshire Act contained a severability clause, it was likely that the legislature would have preferred a narrow remedy as opposed to a "blunt remedy."[79] However, the Court recognized some dispute on this point and remanded to the lower court to further examine the record as to legislative intent.[80] Thus, in the *Ayotte* opinion, the Supreme Court declared that it might be unnecessary to strike down the entire abortion statute due to its lack of a health exception.[81] The Court concluded that it might be possible to limit the solution to the narrowest remedy possible since "only a few applications of New Hampshire's parental notification statute would present a constitutional problem."[82]

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[75] The Court did *not* suggest any particular language that ought to be severed (removed) from the text of the New Hampshire Act.

[76] *Ayotte*, 126 S.Ct. at 968.

[77] *Id.* (emphasis added).

[78] *Id.*

[79] *Id.* at 969. The New Hampshire Act's severability clause provides that "if any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications." *Id.* (citing § 132:28).

[80] *Id.* at 969.

[81] *Id.* at 967.

[82] *Id.* at 969.

The Supreme Court's ruling raised the possibility that the lower courts might limit the Act's application to certain women, but not others. So long as the lower courts remained "faithful" to their interpretation of "legislative intent," they could "issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application."[83] Individual plaintiffs would then be left to file suit if they believe that the statute has been applied to them unconstitutionally. In effect, the Supreme Court applied what it called 'severability,' but did not actually 'sever' (i.e., remove) any language from the New Hampshire Act.

ANALYSIS

Prior substantive precedents such as *Casey, Stenberg* and *Thornburgh* demonstrate that the lack of a sufficient health exception in an abortion law, which may pose an undue burden on a woman's right to choose in rare cases, is a constitutional defect. Furthermore, past practice as to remedy has been to strike down the defective law in its entirety. In *Ayotte,* a unanimous Supreme Court properly respected these substantive precedents and recognized that the New Hampshire Act was unconstitutional because it lacked a meaningful health exception. However, the Court's willingness to apply a narrow 'severability' remedy to the New Hampshire Act raises several concerns.

A Proper Ruling on Substantive Issues

The *Ayotte* opinion reiterates that the Supreme Court has "previously invalidated an abortion statute in its entirety because of [the lack of a health exception]."[84] In *Thornburgh*, the Court ruled that the degree of required care for post-viability abortions and the "second physician" requirement each created some increased risk to the health of the mother. *Thornburgh* demonstrated that a law which poses a health risk, even in only a few situations, still requires a health exception. Likewise, the New Hampshire Statute considered in *Ayotte* created some increased risk for women by requiring a 48-hour waiting period for parental consent. Thus, because the New Hampshire statute puts the health of women at risk just as *Thornburgh*'s Pennsylvania statute did, the *Ayotte* Court was correct in treating the lack of a health exception as a constitutional defect.

[83] *Id.*
[84] *Id.* at 969.

Furthermore, the *Ayotte* Court recognized that in *Stenberg*, Nebraska's law was found unconstitutional because it lacked a health exception. *Stenberg* explicitly states: "[Our] cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks."[85] Just as the partial birth abortion law in *Stenberg* posed an unconstitutional health risk in a few isolated circumstances, the New Hampshire statute in *Ayotte* is also unconstitutional in only a few scenarios. These involve situations in which minors would suffer health risks if they did not obtain an abortion before the 48-hour waiting period required by the statute.

Therefore, for the vast majority of minors, the New Hampshire Act would be constitutional. However, the Supreme Court made it clear in *Stenberg* that just because a statute only poses a health risk for a handful of women, it does not mean that those women are not entitled to have their health protected. As stated in *Stenberg*, a "rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone – the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it."[86]

Comparison of the New Hampshire Act in *Ayotte* to the statutes at issue in *Stenberg* and *Thornburgh* demonstrates that the New Hampshire Act failed the *Casey* 'undue burden' test. The lack of a meaningful health exception in the New Hampshire Act creates an undue burden on those rare women whose health would be endangered. Without a health exception to prevent this outcome, the New Hampshire Act is unconstitutional. The Supreme Court and the lower courts were correct to treat the substantive issues in this manner.

Problems with the Court's Ruling as to Remedy

The *Stenberg* and *Thornburgh* Courts acknowledged every woman's right to have her health protected and thus accordingly struck down the Nebraska and Pennsylvania statutes lacking health exceptions. These courts did not attempt to 'fix' the statutes by adding in health exceptions, even though the laws only needed to be altered in narrow circumstances. The Supreme Court struck down these statutes in their entirety. According to Justice

[85] *Stenberg,* 530 U.S. at 931.
[86] *Id.* at 934.

O'Connor, the parties in those cases did not ask the Court to consider any other remedy.[87]

As Justice O'Connor explained, however, the State of New Hampshire specifically asked the Court to consider a narrower remedy in *Ayotte*.[88] After considering the principles previously discussed, the Court determined that the entire statute need not be nullified on the basis of its few potentially unconstitutional applications. While the text of the Act still lacks a health exception, the courts now have the power to grant amnesty to health care providers and persons who undergo an abortion if they are judicially deemed to have qualified for such an exception.

In reaching this outcome, the Supreme Court stretched the notion of severability in a dangerous manner. Severability can be applied to a statute when an unconstitutional clause within the statute can be removed or severed. However, severability in this traditional sense cannot apply to *Ayotte.* The New Hampshire Act is unconstitutional because it *lacks* a health exception. No amount of severing could thus remedy the unconstitutionality of the Act, because there is nothing unconstitutional to be severed. The Act is unconstitutional, not because of an unconstitutional provision that can be severed out, but because the Act lacks a health exception which needs to be *added*. The district court correctly recognized this problem when it stated that "the lack of a health exception renders the entire Act unconstitutional and therefore severing parts of it would not remedy the deficiency."[89]

This practice of *writing in* provisions, so as to render a defective statute constitutional is dangerous and unreasonable. In *Thornburgh,* the Supreme Court stated that the language of a statute is not "patently surplusage" because "legislative intent [is] reflected in that language."[90] Therefore, the Court cannot and should not ignore the express language of a statute. Even in *Ayotte,* the Supreme Court stated: "[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewriting state law to conform it to constitutional requirements' even as we try to salvage it."[91]

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[87] *Ayotte*, 126 S.Ct. at 969.
[88] *Id.*
[89] *Heed*, 296 F.Supp. 2d at 67.
[90] *Thornburgh,* 476 U.S. at 769.
[91] *Ayotte*, 126 S.Ct. at 968.

However, the *Ayotte* opinion suggests that courts now have the authority to alter the language of a statute through judicial interpretation in order to make it constitutional. This is not the role of the courts. Courts have the power of judicial review; courts can strike down an unconstitutional law or statute. However, courts should not have the power to re-write a statute in order to make it constitutional.

With the *Ayotte* opinion, the Supreme Court has significantly shifted the power to 'interpret' and 'apply' the will of the people from legislative bodies to the judiciary. *Ayotte* stands for the proposition that courts should enjoin only the unconstitutional applications of a statute while leaving other applications in force. The Supreme Court has given the judiciary authority to alter statutes designed by the legislature, even if the alteration goes farther than simply 'severing' (removing) troublesome language. This raises the danger that the will of the people could be compromised, for judges now have the authority to alter legislation with no check at all from any other branch of government.[92]

Although the Supreme Court has directed that 'legislative intent' should be taken into account, there is no guarantee that legislative intent will be interpreted properly in disputed cases, or that the intent of all legislators would be identical. Even if individual legislators choose to testify in court cases, which is unlikely, the judicial process is not designed to give each legislator the same input that would be available in the legislative process. Our constitutional structure provides for more separation between the legislative and judicial functions than this.

The Supreme Court's approach in *Ayotte* also creates several practical problems. First, leaving the New Hampshire Act on the books in its original form (without the addition of a textual health exception) will create confusion for both abortion providers and women seeking emergency abortions in New Hampshire. Neither abortion providers nor the women who may need emergency procedures will know for certain whether those procedures would

[92] A law that reaches the courts has already been passed, so the executive branch cannot veto any judicially-created alterations. The legislature has already passed the law so it cannot vote against any changes the court might make. Although the legislature could conceivably repeal the law in question, both practical and political considerations are likely to deter this course of action. The greatest respect for the constitutional separation of powers will be achieved by leaving the process of drafting (and redrafting) laws to the legislative branch.

be viewed as valid exceptions to the state law. Rather than asking legislative bodies to redraft these laws and provide clear guidance to citizens, the Court is paving the way for a nation of laws that can only be understood through a complex course of legal research. This chaos alone should be viewed as an unconstitutional 'undue burden' on a woman's right to choose an abortion to protect her health.

Second, case by case application of the New Hampshire Act could lead to ongoing challenges in court. Each set of facts may be different, and the process of litigating each 'exception' to the Act would be expensive and time-consuming for both the parties and the taxpayers. Just as the *Thornburgh* Court viewed the second physician requirement as an unreasonable delay, requiring minors to put off having an abortion while waiting for the Court's permission is also an unreasonable delay. Any unreasonable delay to an emergency abortion when a woman's health is at risk poses an undue burden and is therefore unconstitutional.

Third, the Court is inviting future legislatures to do sloppy work in drafting their laws. In a very brief reference at the end of the opinion, the *Ayotte* Court concedes:

> [W]e are wary of legislatures who would rely on our intervention, for "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. *United States* v. *Reese*, 92 U.S. 214, 221 (1876). "This would, to some extent, substitute the judicial for the legislative department of the government." *Ibid*.[93]

The Court should have taken this concern much more seriously. Although Justice O'Connor raises a valid point, her opinion does not heed this warning. New Hampshire's Legislature cast an unconstitutionally broad 'net' and the Court allowed the statute to survive by 'stepping inside' to 'announce to whom the statute may be applied.'

Finally, the Court's unanimous approach to the *Ayotte* case sends a dangerous signal to future courts. The Supreme Court has signaled that unconstitutional laws should be reinterpreted by judges, whenever possible, in

[93] *Ayotte*, 126 S.Ct. at 968.

order to achieve an acceptable result. In essence, judges all over the country are receiving the message that their role is not merely to 'interpret, apply, and occasionally un-make laws,' but to 're-make' laws as well. Nothing in the *Ayotte* Court's ruling will limit this principle to abortion cases. To the contrary, the Court rests its decision upon broad principles that could apply to any type of unconstitutional law. Now, life-tenured federal judges all over the country have been given the green light to 'legislate from the bench' whenever unconstitutional laws come their way.

CONCLUSION

In 2003, the New Hampshire Legislature sought to regulate access to abortions within its borders. However, in case after case, from *Casey* to *Stenberg* to *Thornburgh*, the U.S. Supreme Court had consistently stated that an abortion law lacking a health exception is unconstitutional. The *Stenberg* and *Thornburgh* Courts clearly ruled that even if application of the law is unconstitutional only in rare emergency situations, those women must be protected. Therefore, the New Hampshire Act, which lacked a sufficient health exception, did not survive constitutional scrutiny.

Rather than striking down the Act in its entirety, as had been done in prior cases, the Supreme Court's unanimous opinion in *Ayotte v. Planned Parenthood of Northern New England* opened the doorway for a new approach. If the lower court could confirm that the Legislature would be comfortable with a judicially-enforced health exception, the law would be preserved in its current form. The *Ayotte* Court referred to this as 'severability,' even though no language would ever be 'severed' (removed) from the original statute. In allowing for this narrow remedy, the Court hoped to give more deference to the New Hampshire Legislature as the democratic body representing New Hampshire's citizens.

The job of the legislative branch (at the federal or state level) is to create laws. Ironically, the opinion handed down by the Court in *Ayotte* speaks of deference to the legislature and cautions against judicial intervention in the legislative process. However, despite acknowledging these concerns, the Court is seeking to 'fix' an unconstitutional law rather than leaving this job to the legislature. Unelected, life-tenured judges should not assume unchecked authority to rewrite legislation. The best way to ensure that legislative intent and the will of the people are preserved in revising an unconstitutional statute is

to leave that process to the legislature. The very notion of 'checks and balances' is a cornerstone of our constitutional democracy, and we should not lose sight of this fundamental principle by allowing judges to 'legislate from the bench,' even in the interest of resolving a controversial abortion dispute.