APPLYING CONSTITUTIONAL DECISION RULES VERSUS INVALIDATING STATUTES *IN TOTO*

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PROFESSOR Nicholas Quinn Rosenkranz's groundbreaking articles, *The Subjects of the Constitution*[1] and *The Objects of the Constitution*,[2] propose a new model of judicial review in which courts considering constitutional challenges should first determine *who* has violated the Constitution.[3] While Rosenkranz's insightful framework could influence many doctrines of constitutional law, such as ripeness,[4] standing,[5] severability,[6] incorporation,[7] and possibly even substantive constitutional decision rules,[8] his approach may have its most profound impact on the way courts and commentators view facial and as-applied challenges.[9] Indeed, the United States Courts of Appeals for the Third and Seventh Circuits have already quoted Rosenkranz's discussion of facial challenges.[10]

According to Rosenkranz's theory, "a 'facial challenge' is nothing more nor less than a claim that Congress (or a state legislature)

[1] Nicholas Quinn Rosenkranz, The Subjects of the Constitution, 62 Stan. L. Rev. 1209 (2010) [hereinafter Rosenkranz, Subjects].

[2] Nicholas Quinn Rosenkranz, The Objects of the Constitution, 63 Stan. L. Rev. 1005 (2011) [hereinafter Rosenkranz, Objects].

[3] Id. at 1006 ("Thus, every constitutional inquiry should begin with the subject of the constitutional claim. And the first question in any such inquiry should be the *who* question: *who has allegedly violated the Constitution*?").

[4] Rosenkranz, Subjects, supra note 1, at 1245–46.

[5] Id. at 1246–48.

[6] Id. at 1248–50.

[7] Rosenkranz, Objects, supra note 2, at 1052–67.

[8] See, e.g., Rosenkranz, Subjects, supra note 1, at 1278–79 ("The question is whether—from the *ex ante perspective of Congress making the law*—the activity to be regulated, as a whole, substantially affects interstate commerce. If congressmen are to be accused of violating their oaths and Congress is to be accused of violating the Constitution, the doctrinal test must be one that they could have applied when making the law.").

[9] See, e.g., id. at 1230–35.

[10] Diop v. ICE, 656 F.3d 221, 233 n.10 (3d Cir. 2011) (quoting Rosenkranz, Subjects, supra note 1, at 1230–35); Ezell v. City of Chi., 651 F.3d 684, 697 (7th Cir. 2011) (quoting Rosenkranz, Subjects, supra note 1, at 1238).

has violated the Constitution,"[11] and "[i]t makes no sense to speak of 'as-applied' challenges to legislative actions."[12] In other words, challenges to legislative action "are 'facial' in the important sense that . . . the constitutional violation must be visible on the *face* of the statute,"[13] and "the merits of the constitutional claim cannot turn at all on the facts of enforcement."[14] In contrast, Rosenkranz asserts that as-applied challenges are simply challenges to *executive* action, and "unlike in a 'facial challenge,' the facts of execution will be relevant to an assessment of the merits—indeed . . . those facts *will* be the constitutional violation."[15]

This Article argues that there is a fundamental flaw with Rosenkranz's approach—a flaw often repeated by both courts and other scholars: the failure to grapple sufficiently with the difference between the object of a Court's constitutional inquiry (the text of the challenged law, for example), and the remedy a court will order when it finds that the object is constitutionally infirm (invalidating the statute *in toto*, for example). To explain why understanding this distinction is critical, we focus upon the overlooked fact that modern constitutional adjudication proceeds in two distinct steps that are relevant to our analysis.[16] First, a court must identify and apply the constitutional decision rule that the Supreme Court has said is applicable to the particular constitutional challenge at issue—for example, strict scrutiny for racial classifications or the undue-burden test for abortion restrictions. Second, if a court finds that the governmental actor has violated the relevant constitutional decision rule, then the court must further identify the proper remedy for the constitutional violation. In other words, the court must determine whether to invalidate the statute at issue *in toto*—that is, in whole—or only in part. As this Article will elucidate, successful challenges under some of the Supreme Court's constitutional deci-

[11] Rosenkranz, Subjects, supra note 1, at 1238.
[12] Id. at 1236.
[13] Id. at 1238.
[14] Id. at 1236.
[15] Id. at 1239.
[16] As Rosenkranz correctly points out, there is actually a prior step: determining whether the plaintiff has standing to bring his constitutional challenge and whether the case is ripe. Id. at 1245–50. This first step, while interesting, is outside of the scope of this Article.

sion rules will always result in one particular remedy, but this is usually not the case.

The failure to consider the distinctions and relationships between decision rules and remedies has caused much confusion. Courts and commentators have equivocated when using the term "facial challenge." Sometimes they refer to the object of the inquiry on the merits under the relevant constitutional decision rule (that is, an examination of the text—the "face"—of a statute). But more often they speak of the remedy (that is, invalidation of a statute *in toto*, also known as invalidation of a statute "on its face"). Rosenkranz appears to assume that if the statute's text is the object of the inquiry under the relevant constitutional decision rule, then a successful challenge under that decision rule must result in *in toto* invalidation of that statute. This does not follow as a matter of logic and is inconsistent with precedent.

Rosenkranz could respond that it does not matter to him that his framework is inconsistent with what the Court has actually done because he is proposing a normative method of constitutional interpretation. Fair enough. But we think it is useful—indeed, critical—to create a framework that makes sense of what the Supreme Court has actually said about the method and structures of constitutional adjudication. That neither Rosenkranz nor any of the other legal scholars who have discussed facial, as-applied, and overbreadth challenges have identified a comprehensive framework that is consistent with the Supreme Court's *actual* practice is notable. It is the goal of this Article to fill that void.[17]

In articulating an easy-to-apply structure to the issues surrounding facial, as-applied, and overbreadth challenges, we rely upon

[17] Thus, we will not attempt to set forth a comprehensive theory of judicial review, although normative questions regarding the authority of courts to invalidate statutes through facial or as-applied challenges will undoubtedly turn on such a theory. For instance, a textualist theory of judicial review would entail that an "invalidated" law remains on the books as a law, but it must give way when it conflicts with the Constitution. See Jonathan F. Mitchell, Stare Decisis and Constitutional Text, 110 Mich. L. Rev. 1, 8–11, 25–35 (2011). But a pragmatist view of judicial review could give courts the authority to veto, or wholly eliminate, unconstitutional statutes or portions of statutes. Id. at 25–35. In different cases, the Supreme Court may very well be oscillating between these theories of judicial review. Nevertheless, this Article attempts to bring coherence to what the Supreme Court has said and held, rather than start from first principles.

two categories of Supreme Court-created rules: decision rules (which determine whether the governmental actor has violated the Constitution) and invalidation rules (which determine whether the relevant statute should be invalidated *in toto*). The interaction between these two categories of rules can account for the Court's doctrines on facial, as-applied, and overbreadth challenges. As this Article explains in detail, the Supreme Court has created some decision rules that examine the statutory text passed by Congress and can only result in *in toto* invalidation under the Court's default invalidation rule, some decision rules that look only to the statute's text but only result in *in toto* invalidation in some circumstances under the Court's default invalidation rule, and some decision rules that consider how the executive enforced the statute and only rarely result in *in toto* invalidation under the Court's default invalidation rule. In addition, the Court has also created an alternative invalidation rule known as overbreadth, which allows for *in toto* invalidation in more circumstances than the Court's default invalidation rule. This Article aims to show that it is this interaction between constitutional decision rules and invalidation rules that explains the Court's often confusing doctrines in this area and provides a robust taxonomy to account for future constitutional developments.

Part I begins by reviewing the Supreme Court's incomplete explanation of facial, as-applied, and overbreadth challenges and demonstrates how these doctrines continue to cause confusion among lower courts and commentators. This Part closes with a discussion of Rosenkranz's attempt to clear up this confusion by suggesting that challenges to legislative action are always "facial," whereas challenges to executive action are always "as-applied" or "as-executed."

Part II explains the relationship between constitutional decision rules and invalidation rules. First, Section II.A discusses the concept of constitutional decision rules and explains how these doctrines allow courts to apply the Constitution's provisions to actual cases and controversies. It then explains two different types of constitutional decision rules, seizing on an insightful portion of Rosenkranz's framework: textual decision rules, which look at whether the legislature violated the Constitution, and enforcement

decision rules, which look at how an executive has enforced a law against a particular litigant.

Subsection II.B.1 explains the Court's default invalidation rule under *United States v. Salerno*, which provides that a statute is invalid *in toto* if "no set of circumstances exists under which the Act would be valid."[18] Subsection II.B.2 uses the *Salerno* invalidation rule to further refine the Court's textual decision rules. For example, pure facial decision rules are textual decision rules that, where satisfied, will always lead to invalidation under *Salerno*. In contrast, hybrid decision rules allow courts the option of finding that only part of a statute is unconstitutional, and in those instances, the proper remedy is only *partial* invalidation; at the same time, these hybrid decision rules also allow courts to find that *Salerno* is satisfied in some circumstances such that *in toto* invalidation would be proper. Subsection II.B.3 then explores the interaction between *Salerno* and enforcement decision rules. The Subsection argues that in rare cases—when a legislature passes a statute that gives the executive authority to act only in an unconstitutional manner—a court can still invalidate the statute under *Salerno*.

Section II.C applies the principles developed in the Article to the contested area of Commerce Clause jurisprudence. This Section begins by offering a coherent account of the Court's use of hybrid decision rules to permit both facial and as-applied challenges to congressional action under the Commerce Clause. This Section closes by explaining how the interaction between decision rules and invalidation rules operates in the ongoing litigation regarding the individual mandate in the Affordable Care Act. Section II.D briefly addresses the ongoing scholarly debate about whether to view partial invalidation as a species of severability analysis, and argues that this debate does more to obscure than to edify.

Part III tackles the overbreadth doctrine, explaining that overbreadth is an alternative invalidation rule that allows courts to strike down statutes *in toto* without satisfying *Salerno*. Section III.A explains how this understanding of overbreadth as an invalidation rule brings forth a robust and novel justification for why the Court has applied this doctrine to Free Speech Clause claims: the

[18] United States v. Salerno, 481 U.S. 739, 745 (1987).

Court believes that its free speech decision rules underenforce the Free Speech Clause because the decision rules make it very difficult to satisfy the *Salerno* invalidation rule. More specifically, many statutes that unconstitutionally restrict a significant amount of speech will cover some wholly unprotected speech, so it is often not possible to apply the strict scrutiny (or the intermediate scrutiny) decision rule to the entire statute. This, in turn, makes it virtually impossible for many litigants to satisfy the *Salerno* invalidation rule. Because the Supreme Court has determined that the practical inability to invalidate statutes *in toto* is a serious problem for proper enforcement of the Free Speech Clause, it has decided to allow *in toto* invalidation under overbreadth even when *Salerno* is not satisfied.

Finally, Section III.B addresses how this novel understanding of overbreadth can apply to the controversial areas of abortion and Second Amendment challenges. The analysis in this Section does not attempt to address controversial questions of what decision rules should apply. Instead, it simply outlines the considerations the Court may take into account in deciding whether an overbreadth invalidation rule is appropriate in these areas of law.

I. BROAD CONFUSION AMONG COURTS AND COMMENTATORS OVER FACIAL, AS-APPLIED AND OVERBREADTH CHALLENGES

The Supreme Court has explicitly acknowledged that there is much confusion over the definitions and attributes of facial, as-applied, and overbreadth challenges.[19] This is quite astounding considering that many of the Court's high-profile cases have turned on disputes over the intricacies of these doctrines.[20] Although the stakes over the interaction between these doctrines are high, the Court has cautiously avoided many questions involving facial, as-

[19] United States v. Stevens, 130 S. Ct. 1577, 1587 (2010).

[20] See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 892–93 (2010); Boumediene v. Bush, 553 U.S. 723, 821 (2008) (Roberts, C.J., dissenting); Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007); United States v. Booker, 543 U.S. 220, 318 (2005) (Thomas, J., dissenting in part); Romer v. Evans, 517 U.S. 620, 643 (1996) (Scalia, J., dissenting); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 972 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

applied, and overbreadth challenges. Consequently, these doctrines continue to perplex lower courts and commentators.

The Supreme Court adopted the terms "facial challenge" and "as-applied challenge" more out of happenstance than by plan. For years, the Supreme Court had addressed questions regarding whether a statute is unconstitutional "on its face" or "as applied" to the particular plaintiff.[21] But it took the Supreme Court a long time to start attaching the label of "challenge" to these constitutional arguments. The concept of litigants raising constitutional "challenges" crept into Supreme Court opinions over time, with Justice Brewer in 1892 being the first Justice to refer to "challenges" to statutes.[22] The phrase "facial challenge" did not appear in the U.S. Reports until 1971, in a separate opinion by Justice White.[23] Justice White appeared to use the phrase "facial challenge" interchangeably with an inquiry into whether a statute was

[21] See, e.g., Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921) ("That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another."); Gladson v. Minnesota, 166 U.S. 427, 429 (1897) (noting that the defendant argued that "the statute under which the complaint is made is unconstitutional on its face, not falling within the legitimate scope of the police power of the state, consequently being a taking of the property of this railroad company without due process of law; that, even if it is not unconstitutional on its face, it is unconstitutional as applied to the train in controversy"); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."); Poindexter v. Greenhow, 114 U.S. 270, 295 (1885) ("And it is no objection to the remedy in such cases that the statute, whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the constitution of the United States.").

[22] See Rosenkranz, Subjects, supra note 1, at 1230–31.

[23] Lemon v. Kurtzman, 403 U.S. 602, 665 (1971) (White, J., concurring in the judgment in part and dissenting in part) ("Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment in No. 89 for the reasons given below."); see Rosenkranz, Subjects, supra note 1, at 1232 & n.69.

constitutional "on its face."[24] And the phrase "'as applied' challenges" did not make the U.S. Reports until 1974 when Justice White used that phrase in the footnote of a majority opinion.[25]

During the following decade, the Court used the phrase "facial challenge" sparingly and without controversy.[26] The imprecise use of the phrase "challenge," though, was the precursor to the current confusion over facial, as-applied, and overbreadth challenges.[27] Indeed, the Supreme Court only recently explained that the distinction between facial and as-applied inquiries is "the breadth of the remedy employed by the Court, not what must be pleaded in a complaint."[28]

The Court first attempted to define the standard for a successful facial challenge in 1982, in *Village of Hoffman Estates v. Flipside*.[29] *Hoffman Estates* distinguished between facial challenges and First Amendment overbreadth challenges.[30] Under the overbreadth doctrine, when a litigant brings a First Amendment Free Speech Clause challenge to a statute, the Court can invalidate the statute *in toto* if a substantial amount of the statute's coverage is unconstitutional.[31] In contrast, *Hoffman Estates* explained that a statute could only be invalidated *in toto* under a typical facial challenge if the challenged statute was unconstitutional "in all of its applica-

[24] See *Lemon*, 403 U.S. at 665 (White, J., concurring in the judgment in part and dissenting in part) ("The Court strikes down the Rhode Island statute on its face.").

[25] Storer v. Brown, 415 U.S. 724, 737 n.8 (1974).

[26] See, e.g., Brown v. Glines, 444 U.S. 348, 356 n.13 (1980); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 761 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Alexander v. Ams. United Inc., 416 U.S. 752, 757 (1974).

[27] Rosenkranz, Subjects, supra note 1, at 1230–32.

[28] Citizens United v. FEC, 130 S. Ct. 876, 893 (2010).

[29] 455 U.S. 489, 489 (1982).

[30] See id. at 494–95 ("In a facial challenge to the [First Amendment] overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

[31] Id.; see also Broadrick v. Okla., 413 U.S. 601, 615–16 (1973).

tions."[32] In other words, a facial challenge would fail if a court could conceive of any constitutional application of the challenged statute, although that would not be sufficient to reject an overbreadth challenge.

Five years later,[33] in the watershed case *United States v. Salerno*, the Court famously stated that a facial challenge could only succeed if "no set of circumstances exists under which the [challenged] Act would be valid."[34] *Salerno* contrasted this facial challenge standard with the free speech overbreadth challenge standard.[35]

Shortly after *Salerno*, the Court adjudicated a series of high-profile abortion cases starting with *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[36] As this Article will explain later,[37] *Casey* changed the Court's abortion constitutional decision rule in a way that made challenges to abortion restrictions unlikely to satisfy *Salerno*'s standard for *in toto* invalidation. This prompted some Justices to seek an alternative path for invalidating *in toto* statutes restricting abortions. In the years following *Casey*, Justices Stevens, Souter, and Ginsburg rejected *Salerno*'s standard for facial challenges—in all cases, not just abortion cases.[38] Justice Stevens even

[32] *Hoffman Estates*, 455 U.S. at 494–95; see also Steffel v. Thompson, 415 U.S. 452, 474 (1974) (a statute is "invalid *in toto*" if it is "incapable of any valid application").

[33] One year after *Hoffman Estates*, there was a minor dispute about facial challenges in *Kolender v. Lawson*. 461 U.S. 352, 353 (1983). *Kolender* held that the overbreadth doctrine applied when a statute was challenged as being unconstitutionally vague under the First Amendment. Id. at 353–54. *Kolender*, though, made the sweeping statement that "we permit a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct.'" Id. at 358 n.8 (quoting *Hoffman Estates*, 455 U.S. at 494). *Kolender* quoted *Hoffman Estates* for this proposition, but *Hoffman Estates* had used this language in discussing overbreadth challenges—not the generic standard for facial challenges. See *Hoffman Estates*, 455 U.S. at 494 ("[In a First Amendment case,] a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.").

[34] 481 U.S. 739, 745 (1987).

[35] Id.

[36] 505 U.S. 833 (1992); see id. at 972–73 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part) (criticizing the majority for failing to apply *Salerno*).

[37] See infra Subsection III.B.1.

[38] See, e.g., City of Chi. v. Morales, 527 U.S. 41, 55 (1999) (opinion of Stevens, J., joined by Souter and Ginsburg, JJ.); Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of the petition for certiorari) (quoting

argued that the standard for facial challenges should be replaced with the standard for overbreadth challenges.[39] In contrast, Chief Justice Rehnquist, Justice White, Justice Scalia, and Justice Thomas championed *Salerno*'s no-set-of-circumstances test as the only way to strike down statutes *in toto* outside of the free speech context.[40] This confusion over the proper standard for facial versus overbreadth challenges continues to this day. In 2010, the Supreme Court in *United States v. Stevens* explicitly stated that it "is a matter of dispute" whether *Salerno*'s no-set-of-circumstances or overbreadth's plainly-legitimate-sweep test is the proper facial challenge standard.[41]

While the issues regarding facial versus as-applied challenges have been less unwieldy, they have led to similar confusion. Since the recent emergence of the concept of "facial challenges," the Court has stated that "facial challenges to legislation are generally disfavored"—so as-applied challenges are, in some way, favored.[42]

Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 236, 238 (1994)); see also Fargo Women's Health Org. v. Schaefer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., joined by Souter, J., concurring) (arguing that *Salerno*'s facial challenge standard does not apply to abortion cases under *Casey*).

[39] Troxel v. Granville, 530 U.S. 57, 85 (2000) (Stevens, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgments) (explaining that the statute was not facially invalid because it had a "plainly legitimate sweep" under *Broadrick v. Oklahoma*'s overbreadth standard).

[40] *Morales*, 527 U.S. at 78–80 (Scalia, J., dissenting); *Janklow*, 517 U.S. at 1178 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from the denial of the petition for certiorari); Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1011–12 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from the denial of the petition for certiorari); *Casey*, 505 U.S. at 972–73 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part); see also Reno v. ACLU, 521 U.S. 844, 893–94 (1997) (O'Connor, J., joined by Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (stating that *Salerno* applied outside of the First Amendment context).

[41] United States v. Stevens, 130 S. Ct. 1577, 1587 (2010); see also Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008).

[42] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (quoting FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 223 (1990) (plurality opinion)); see also Citizens United v. FEC, 130 S. Ct. 876, 932 (Stevens, J., concurring in part and dissenting in part) ("Facial challenges are disfavored." (quoting *Grange*, 552 U.S. at 450)); *Morales*, 527 U.S. at 111 (Thomas, J., dissenting) (stating that discrimination claims "are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds"); *Finley*, 524 U.S. at 617 (Souter, J., dissenting).

The Court has justified this observation by pointing to "the fundamental principle of judicial restraint that courts should 'neither anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[43] But the Court has never authoritatively defined what constitutes an as-applied challenge. Recently, in *Doe v. Reed*, the Court seemed to explain that all constitutional challenges asking for relief that would "reach beyond the particular circumstances of [the] plaintiffs" were facial challenges.[44] This articulation, though, seems to raise more questions than answers. After all, the term "facial" challenge initially referred to applying a constitutional decision rule that looks at the *face* of a statute, and a court could grant relief that extends to third parties beyond the plaintiffs in a suit without examining the entire coverage of a statute or the face of the statute.

Unsurprisingly, lower courts are in a state of disarray over the interaction between facial, as-applied, and overbreadth challenges. As one Fifth Circuit judge recently noted, "[c]ontroversy among Supreme Court Justices and doubt among the lower courts regarding the 'no set of circumstances' language has persisted since that phrase first appeared in *United States v. Salerno* . . . ."[45] In the high-profile litigation regarding the Minimum Essential Coverage Provision of the Affordable Care Act ("ACA"), one district court questioned whether *Salerno* is the appropriate standard for whether a statute can be invalidated *in toto*,[46] while the deciding vote on the Sixth Circuit relied heavily on *Salerno* to uphold the law.[47]

A canvassing of the circuit opinions since 2010 confirms that courts remain hopelessly befuddled in this area. Some have confi-

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[43] *Grange*, 552 U.S. at 450 (internal quotation marks omitted) (quoting Ashwander v. TVA, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y.C. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))).

[44] Doe v. Reed, 130 S. Ct. 2811, 2817 (2010).

[45] Sonnier v. Crain, 613 F.3d 436, 462–63 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part).

[46] See Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010) ("A careful examination of the Court's analysis in *Lopez* and *Morrison* does not suggest the standard articulated in *Salerno*.").

[47] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 566 (6th Cir. 2011) (Sutton, J., concurring in the judgment); see also infra Subsection II.C.2.

dently applied the *Salerno* standard for *in toto* invalidation,[48] while others have held that this standard remains open.[49] One court suggested that facial challenges are "discouraged,"[50] while another explained that "[a]lthough there is judicial disfavor of facial challenges, there is no proscription on such challenges."[51] A different court said that "[i]n recent years, the Supreme Court has sharply distinguished between facial and as-applied challenges, stringently limiting the availability of the former,"[52] whereas multiple Fifth Circuit opinions have cited the Supreme Court's recent *Citizens United v. Federal Elections Commission* opinion as evidence that there is no sharp line between facial and as-applied challenges.[53] The Second Circuit questioned whether "the identified test" for prevailing on "a facial challenge" is "only a variation on as-applied analysis."[54] A split panel of the Ninth Circuit attempted to reconcile overbreadth challenges, *Salerno*, and strict scrutiny, but with little success.[55] And a split panel of the Fifth Circuit disputed the interaction between *Salerno*, its alternatives, and intermediate scrutiny—*three times* in the same case (once in the panel opinion,[56] then

[48] Sonnier v. Crain, No. 09-30186, 2011 WL 452085, at *1–2 (5th Cir. 2011) (per curiam) (order denying petition for panel rehearing) (on file with the Virginia Law Review Association), withdrawn, 634 F.3d 778 (5th Cir. 2011); Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206, 1208 n.4 (11th Cir. 2010) (per curiam).

[49] United States v. Comstock, 627 F.3d 513, 518–19 (4th Cir. 2010); Gen. Elec. Co. v. Jackson, 610 F.3d 110, 117 (D.C. Cir. 2010); Int'l Women's Day March Planning Comm. v. City of San Antonio, 619 F.3d 346, 355–56 (5th Cir. 2010); Lozano v. City of Hazelton, 620 F.3d 170, 202 n.25 (3d Cir. 2010).

[50] Gallagher v. Magner, 619 F.3d 823, 841 (8th Cir. 2010).

[51] Educ. Media Co. at Va. Tech. v. Swecker, 602 F.3d 583, 588 n.3 (4th Cir. 2010).

[52] IMS Health Inc. v. Mills, 616 F.3d 7, 24 n.19 (1st Cir. 2010).

[53] In re Cao, 619 F.3d 410, 439 (5th Cir. 2010) (en banc) (Jones, C.J., concurring in part and dissenting in part) ("[T]he line between facial and as-applied challenges is not well defined.") (internal quotations omitted); Sonnier v. Crain, 613 F.3d 436, 463 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part) ("[T]he Supreme Court in *Citizens United v. FEC* has contradicted the erroneous idea that there is one single test for all facial challenges.").

[54] United States v. Farhane, 634 F.3d 127, 138–39 (2d Cir. 2011).

[55] United States v. Alvarez, 617 F.3d 1198, 1215–18 (9th Cir. 2010); id. at 1235 (Bybee, J., dissenting).

[56] *Sonnier*, 613 F.3d at 443–49; id. at 449–70 (Dennis, J., concurring in part and dissenting in part).

in an opinion denying panel rehearing,[57] and again in an opinion granting panel hearing in part[58]). The dissenting judge in the denial of panel rehearing also argued that Justice Stevens' "plainly legitimate sweep" test for facial invalidity is different from overbreadth analysis and *Salerno*.[59]

Scholars have attempted to sort out this confusion, but serious complications and confusion remains the order of the day. The foundational work for virtually all of these commentaries is Professor Henry Monaghan's "valid rule requirement" theory. Under this theory, all individuals have the right not to be subject to unconstitutional laws and can argue against application of unconstitutional laws to their conduct, even if their conduct could have been banned under a different, hypothetical statute.[60] Monaghan expounded this theory while explaining the overbreadth doctrine and argued that a litigant's invocation of overbreadth was nothing more or less than a claim that the statute was invalid and thus could not lawfully be applied to him.[61] On this reading, overbreadth is part of the First Amendment's substantive requirements.[62]

Perhaps the most complete synthesis of facial and as-applied challenges—derived from Monaghan's "valid rule" theory—comes from Professor Richard Fallon.[63] Fallon argued that that the categories of "facial" and "as-applied" challenges lack explanatory force; rather, facial or as-applied invalidation is a consequence of the doctrinal tests the Court has created and used in as-applied litigation. Under this view, "the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge," but as-

[57] Sonnier v. Crain, No. 09-30186, 2011 WL 452085, at *1–2 (5th Cir. 2011) (per curiam) (order denying petition for panel rehearing) (on file with the Virginia Law Review Association), withdrawn, 634 F.3d 778 (5th Cir. 2011); id. at *2–6 (Dennis, J., dissenting from the denial of panel rehearing).

[58] Sonnier v. Crain, 634 F.3d 778, 778–79 (5th Cir. 2011) (per curiam); id. at 779 (Dennis, J., concurring in part and dissenting in part).

[59] *Sonnier*, 2011 WL 452085, at *3–6 (Dennis, J., dissenting from the denial of panel rehearing).

[60] Henry P. Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3, 8–12 (1981).

[61] Id. at 24.

[62] Id.

[63] Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321 (2000).

applied challenges can result in *in toto* invalidation.[64] Indeed, Fallon argued that the nature of the underlying constitutional decision rule—as applied to a particular litigant—will always determine whether "the statute is found unconstitutional solely as applied, in part, or in whole."[65] For Fallon, these decision rules reflect different constitutional values and defy any one-size-fits-all characterization.[66]

Fallon's thesis benefited greatly from the groundbreaking work of Marc Isserles, who diagnosed that some decision rules measure statutes on their faces and thus always lead to "facial" invalidation of statutes.[67] Isserles argued that there are two kinds of "facial" challenges: (1) overbreadth challenges, which proceed by identifying a sufficient number of unconstitutional applications, and (2) "valid rule facial challenges," which identify a defect in the statute such that it has no constitutional applications under the Supreme Court's decision in *Salerno*. In Isserles's formulation, *Salerno* does not provide a test for invalidation but rather is a mere *description* of what happens when a court decides that a statute states an invalid rule.[68]

Fallon's thesis was, in many ways, a response to the work of Professor Matthew Adler.[69] Adler had argued that all constitutional challenges are "facial" in that they consider whether a particular statute violates the Constitution. To Adler, there is no such coherent concept as constitutional rights, *per se*, but rather only "rights against rules"—such that, as under Monaghan's theory, every litigant has the right not to have an unconstitutional law applied against him even if he could have been sanctioned under some other law for the same conduct.[70] Thus, the key inquiry for Adler was whether the statute itself is "facially" unconstitutional. Adler addressed the notion of as-applied challenges—as opposed to facial

[64] Id. at 1321.
[65] Id. at 1339.
[66] Id.
[67] Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359 (1998).
[68] Id. at 363–64, 386.
[69] Fallon, supra note 63, at 1366–68.
[70] Matthew D. Adler, Rights Against Rules: The Moral Structure of American Constitutional Law, 97 Mich. L. Rev. 1, 37–38 (1998).

challenges—by explaining that once the court finds a constitutional violation, it faces a range of choices between "facial invalidation, a partial invalidation, an extension, a partial invalidation plus a partial extension, or a predicate-change without a scope change."[71] Adler then posited that the choice between *in toto* and partial invalidation is a moral one, which weighs the costs and benefits of invaliding the law versus "revising" it while leaving the remainder intact.[72]

The latest contributor to this dialogue about facial, as-applied, and overbreadth challenges is Nicholas Rosenkranz. Rosenkranz urges the adoption of a model under which the availability of facial or as-applied challenges turns on the governmental actor that can violate the constitutional provision raised by the litigant.[73] Under Rosenkranz's theory, if a constitutional provision binds Congress, any inquiry is "facial" *both* in that it focuses exclusively on the text that Congress enacted (not on any facts of enforcement) *and* in that it can only lead to *in toto* invalidation of that statute.[74] For example, because the First Amendment is a prohibition against Congress making a particular type of law ("Congress shall make no law . . . ."),[75] any inquiry under the First Amendment is "facial." Conversely, where the constitutional provision binds the President (or state executive), the inquiry is "as-applied" *both* in that it focuses only upon the facts of enforcement *and* in that it cannot lead to *in toto* invalidation of any statute under which the executive was acting.[76] Thus, because the Fourth Amendment's prohibition against unreasonable searches and seizures only limits executive action, any challenge under that Amendment is an "as-applied" challenge—or, more accurately, an "as-executed challenge."[77] As to overbreadth, Rosenkranz's argument closely followed Monaghan's, noting that overbreadth invalidation was appropriate under the

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[71] Id. at 125.
[72] Id. at 126–27.
[73] Rosenkranz, Subjects, supra note 1, at 1221.
[74] Id. at 1229–38, 1246–49; see also id. at 1238 ("In short, facial challenges are to constitutional law what res ipsa loquitur is to facts—in a facial challenge, *lex ipsa loquitur*: the law speaks for itself.").
[75] U.S. Const. amend. I.
[76] Rosenkranz, Subjects, supra note 1, at 1239.
[77] Id. at 1240–42, 1249–50.

First Amendment because any law that violated the First Amendment had to be struck down on its face.[78]

All of these commentators add significantly to our understanding of constitutional adjudication but none of them fully capture the interaction between: (1) what Fallon and Isserles properly identified as the decision rules the Court uses to determine whether the Constitution has been violated by Rosenkranz's constitutional actor and (2) what Adler noted was the separate inquiry of the "remedy" for this violation. Only by understanding how these inquiries are both different and necessarily intertwined can we begin to develop an accurate taxonomy of the way the Supreme Court has decided constitutional questions relating to facial, as-applied, and overbreadth challenges. The goal of this Article is to put forward just such a descriptive analysis.

II. CONSTITUTIONAL DECISION RULES AND REMEDIES

When courts and commentators refer to "facial challenges," they frequently conflate two distinct aspects of constitutional adjudication: (1) the object of the inquiry when determining whether a constitutional violation has occurred (perhaps the statutory text or maybe the facts of how the statute was enforced or applied to a particular litigant) and (2) the remedial question of whether a statute should be invalidated *in toto* or only in part.[79] In addressing the former inquiry, the Supreme Court sometimes has discussed whether a defect can be found simply by examining the "face"—

[78] Id. at 1252–55.

[79] Cf. Beeman v. Anthem Prescription Mgmt., LLC, 652 F.3d 1085, 1097 (9th Cir. 2011) (noting that defendant had to satisfy *Salerno*'s no-set-of-circumstances test for *in toto* invalidation because "[d]efendants challenge neither the specific manner in which the statute applies to them nor a particular instance of the statute's application"—not because "[d]efendants' argument is based on nothing more than 'the words of the statute'"); Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 228 (2d Cir. 2006) ("Facial and as-applied challenges differ in *the extent to which* the invalidity of a statute need be demonstrated (facial, in all applications, as-applied, in a personal application). Invariant, however, is the *substantive rule of law* to be used. In other words, *how* one must demonstrate the statute's invalidity remains the same for both types of challenges, namely, by showing that a specific rule of law, usually a constitutional rule of law, invalidates the statute, whether in a personal application or to all.").

that is, the plain text—of a statute.[80] More often, though, the Court has analyzed whether a statute should be struck down "on its face"—that is, invalidated *in toto*. These two inquiries are not necessarily the same; indeed, they are often profoundly different. The former deals with whether the Constitution has been violated (and by whom) and the latter deals with the remedy for a constitutional violation.

The identification of constitutional defects is guided by what many scholars have identified as "constitutional decision rules."[81] These are rules that the Supreme Court has created to turn the Constitution's text into doctrines that courts can readily apply to actual cases or controversies. Fallon and Isserles rely heavily upon this notion to craft their theories as to as-applied, facial, and overbreadth "challenges."[82] As will be explained below, some constitutional decision rules direct courts to examine the statute passed by the legislature while others look to how enforcement of the statute by the executive affects the parties before the court. Rosenkranz's central insight therefore is correct and extremely important—some constitutional decision rules will necessarily involve an inquiry into the executive's enforcement of a law, while others will look only to the statute's text.[83] However, what Fallon and Isserles overlook (and what Adler grasped only in passing), is that the remedial *effect* when a court finds a constitutional defect is controlled by what

[80] See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 452 (1972) (examining the "face of the statute" to determine its purpose); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (examining "the statute on its face," and applying doctrine "to the face of the statutes," to determine whether sanction was punitive); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 308 (1961) ("We find ample evidence both on the face of the statute and . . . in its legislative history that a technical usage was intended."); United States v. Raines, 362 U.S. 17, 20 (1960) ("[T]he [district] court ruled that since, in its opinion, the statute on its face was susceptible of application beyond the scope permissible under the Fifteenth Amendment, it was to be considered unconstitutional in all its applications."); Smith v. Cahoon, 283 U.S. 553, 562 (1931) ("The statute on its face makes no distinction between common carriers and a private carrier such as the appellant.").

[81] See, e.g., Mitchell N. Berman, Constitutional Decisional Rules, 90 Va. L. Rev. 1, 9 (2004); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1214–15 (1978).

[82] Fallon, supra note 63, at 1339; Isserles, supra note 67, at 363–64, 386.

[83] See Rosenkranz, Subjects, supra note 1, at 1236 ("[W]hen an action (or 'Act') of Congress is challenged, *the merits of the constitutional claim cannot turn at all on the facts of enforcement*.").

we will call *invalidation rules*. That is, the Supreme Court has not said—as Fallon would have it—that a court need only articulate the application of the constitutional decision rule to the case at hand and leave the implications of that decision for future cases.[84] Rather, the Court has held that under certain conditions, the failure to abide by the constitutional decision rule is so severe that the court should declare the statute wholly invalid, such that it will be invalid in future cases as well.

Rosenkranz, in contrast, missteps by failing to distinguish accurately and sufficiently the object of the relevant constitutional decision rule from the remedial question of whether to invalidate a statute *in toto*. Rosenkranz seems to suggest that: (1) all successful challenges under decision rules that look to the statute passed by the legislature must result in *in toto* invalidation of the statute; and (2) no successful challenges that look to the executive's enforcement of a statute can result in *in toto* invalidation of that statute.[85] While this Article does not address the normative question of whether the Court should adopt Rosenkranz's approach, it explains that the Court has regularly acted contrary to Rosenkranz's framework.

As this Part will show, the Supreme Court has created decision rules under which a court can find that the face of the statute unconstitutionally covers some conduct, without analyzing whether the statute also constitutionally covers other conduct. A court can identify this defect simply by examining the face of the statute under the relevant decision rule, as the court need only examine the statute's text to determine its coverage—not the particular way in which the executive enforced the statute in the case at bar. In such circumstances, courts can hold that the statute is unconstitutional only as to a portion of the statute's coverage, so the entire statute will not be invalid under the Supreme Court's *Salerno* invalidation

[84] Fallon, supra note 63, at 1321.

[85] See Rosenkranz, Subjects, supra note 1, at 1248 ("If Congress violated the Constitution by making a law, basic remedial principles suggest that the Court should accord the violation no legal effect and should instead restore the law to the pre-violation status quo."); id. at 1249 ("Matters are entirely different if the President has violated the Constitution in the execution of a statute. In such a case, the statute should not be declared 'a nullity;' indeed, the statute itself is constitutionally blameless.").

rule. On the flip side, a statute also can be invalidated *in toto* under the *Salerno* invalidation rule even when the relevant constitutional decision rule directs courts to examine the executive's enforcement of the particular statute—as opposed to only the statutory text. This situation will be quite rare, but if *any and all* executive enforcement of a statute would always result in a constitutional violation—that is, would violate the relevant decision rule—the statute can be invalidated *in toto* under *Salerno*.

A. The Object of the Inquiry Under a Constitutional Decision Rule: Textual Versus Enforcement Decision Rules

In *The Subjects of the Constitution*, Rosenkranz explained that it can be misleading to speak of the Constitution being "violated"—in the passive voice.[86] The more precise question is whether a particular actor violated the Constitution—in the active voice.[87] For purposes of this Article, though, Rosenkranz's critical insight only gets us so far. After all, the Constitution's text rarely explains *how courts are supposed to decide* whether a government actor—such as Congress, the President, or a state legislature—has violated a constitutional provision.[88] Put another way, when a court asks whether Rosenkranz's governmental actor has violated the Constitution, the court will have to interpret the Constitution's text, as it will rarely find a ready-made answer spelled out in the Constitution.

To translate constitutional text into judicial judgments that resolve constitutional cases and controversies, the Supreme Court has created various constitutional decision rules to enforce the Constitution's provisions and constrain lower courts as they adjudicate constitutional disputes.[89] To admit that courts create (and,

[86] Id. at 1230.

[87] Id. at 1230–31.

[88] See, e.g., Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 57 (1997) ("Identifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely.").

[89] See Berman, supra note 81, at 4–18; Sager, supra note 81, at 1213. In creating these decision rules, the Court may be explicitly or implicitly underenforcing or overenforcing the textual constitutional guarantees. Scott A. Keller, How Courts Can Pro-

indeed, must create) constitutional decision rules is not to reject or even question Rosenkranz's proper insistence that such rules must be faithful to, and derive as close as possible from, the constitutional text. But even the most dedicated textualist Justice will find it necessary to articulate the *rules* courts should use to evaluate the complex interactions between the Constitution and the real world. It is the articulation and understanding of these decision rules that is the critical *first* step in understanding facial, as-applied, and overbreadth challenges.

The Equal Protection Clause provides an apt illustration of the need to develop decision rules. The text of this clause provides: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[90] Asking courts to apply these simple, yet broad, words directly to the myriad governmental actions that they may implicate, without any intermediating interpretations or decision rules, would be impractical and lead to unpredictable results. In an attempt to respond to this problem, the Supreme Court has created rules based upon tiers of scrutiny, such as "strict scrutiny," "intermediate scrutiny," and "rational basis" review.[91] The Court uses a different level of scrutiny to analyze a governmental actor's actions depending on the type of classification that actor makes. Similarly, in crafting its decision rules for enforcing the Due Process Clause—which simply provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law"[92]—the Court has created various decision rules, which apply in different situations and to different governmental actors. For example, many due process claims regarding judicial processes are analyzed under the *Mathews v. Eldridge* balancing

tect State Autonomy from Federal Administrative Encroachment, 82 S. Cal. L. Rev. 45, 53–59 (2008) (discussing how current doctrine does not enforce federalism or nondelegation principles); Sager, supra, at 1218 (discussing under-enforcement of the Equal Protection Clause).

[90] U.S. Const. amend. XIV, § 1.

[91] See generally City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985); Scott A. Keller, Depoliticizing Judicial Review of Agency Rulemaking, 84 Wash. L. Rev. 419, 459–62 (2009).

[92] U.S. Const. amend. XIV, § 1.

test,[93] whereas the decision rule for abortion substantive due process claims asks whether a statute places an undue burden on a woman's ability to obtain an abortion.[94]

As Rosenkranz correctly explained, some of the Supreme Court's decision rules direct courts to examine legislative action (like the text of the statute passed by the legislature or the circumstances surrounding that enactment), and others require courts to examine executive or judicial action (the particular facts surrounding the enforcement of the statutory or constitutional text). From this starting point, we can identify two broad categories of decision rules: textual decision rules and enforcement decision rules.

Textual Decision Rules. The Supreme Court has created a host of decision rules that require courts to examine the statutory text enacted by the legislature or the circumstances surrounding that text's enactment. This naturally follows in light of Rosenkranz's astute observation that Congress is the subject of many constitutional provisions.[95] And as Monaghan famously explained, every person has the right not to be subject to an unconstitutional law—that is, a law that violates a textual decision rule.[96]

Scholars like Fallon[97] and Isserles[98] have catalogued the Court's many textual decision rules in detail. A few examples show that various decision rules direct courts to examine the statute at issue and not the facts of enforcement:[99]

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[93] See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[94] Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion)).

[95] See Rosenkranz, Subjects, supra note 1, at 1238.

[96] Monaghan, supra note 60, at 9.

[97] Fallon, supra note 63, at 1344–46.

[98] Isserles, supra note 67, at 440–51.

[99] The particular enforcement facts may matter for determining whether the plaintiff has raised an Article III case or controversy. But they will not matter in deciding the merits under these decision rules.

- Commerce Clause: Under its Commerce Clause power, Congress may not pass a law unless that law regulates: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce," or (3) "those activities that substantially affect interstate commerce."[100]

- Executive discretion to punish speech: Under the First Amendment, Congress may not enact a statute that gives executive branch officials too much discretion to punish or penalize speech.[101]

- Impermissible purpose to promote religion: Under the First Amendment, Congress may not enact a statute with the actual purpose to advance a particular religion.[102]

- Intrusion on constitutional authority: Under the Constitution's separation-of-powers requirements, Congress may not enact a statute that eliminates a constitutionally protected power or responsibility possessed by either itself or another branch of government.[103]

- Racial classifications: Under the Equal Protection Clause, a legislature may not enact a statute that classifies by race, unless the classification survives strict scrutiny—that is, it is aimed at achieving a compelling government interest and is narrowly tailored to that end.[104]

All of these decision rules require a court to examine only the statutory text passed by the legislature, including (sometimes) the circumstances surrounding that text's passage. How the executive

[100] United States v. Lopez, 514 U.S. 549, 558–59 (1995); see United States v. Morrison, 529 U.S. 598, 608–09 (2000); see also infra Subsection II.C.1.
[101] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 102 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).
[102] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
[103] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010); INS v. Chadha, 462 U.S. 919, 951 (1983).
[104] Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003).

will choose to enforce these laws—or even how the law is enforced in the present case—is irrelevant.[105] For instance, assume the executive branch brings a prosecution against a priest for conducting Mass in prison under a statute that bans only Catholic prison ceremonies. Even if the executive's subjective motivation was not to restrict that particular religion, and even if the conduct at issue somehow could be prohibited under a different statute (perhaps a statute that reasonably restricts religious ceremonies in prison), a court will still find that Congress violated the Constitution simply by applying the relevant textual decision rule to the statute's text. Put another way, judicial review under textual decision rules is not concerned with whether hypothetical statutes could constitutionally restrict the conduct at issue, but rather with whether the relevant actor violated the Constitution in acting the way it did. Textual decision rules are thus modeled after Monaghan's valid rule requirement and Adler's "rights against rules."[106]

Enforcement Decision Rules. In contrast, some decision rules direct courts to examine the particular facts surrounding the executive's or the judiciary's enforcement of a statute instead of the statutory text itself. Consider the Court's decision rule under the Fourth Amendment's restriction against unreasonable searches and seizures.[107] For instance, the Court has held that whether a government actor violates the Fourth Amendment by conducting a "*Terry* stop" turns on whether police had "reasonable suspicion" to conduct the stop.[108] Analogously, some decision rules under the Due Process Clause direct courts to consider judicial enforcement of the law. For example, in the punitive damages context, the Court has adopted a fact-specific, three-factor decision rule to determine whether a punitive damages award violates the Due Proc-

[105] See Rosenkranz, Subjects, supra note 1, at 1235 & n.84.

[106] Adler, supra note 70, at 37–38; Monaghan, supra note 60, at 8–9; Rosenkranz, Subjects, supra note 1, at 1235–38.

[107] See Rosenkranz, Subjects, supra note 1, at 1241 ("But in the Fourth Amendment context, the reverse is true: the statute matters little if at all, while the enforcement facts are crucial. The statute does not matter because the search would have been a Fourth Amendment violation with or without it."); Rosenkranz, Objects, supra note 2, at 1034 ("Searches and seizures are paradigmatic executive actions.").

[108] Terry v. Ohio, 392 U.S. 1, 27 (1968).

ess Clause.[109] As Rosenkranz explains, these enforcement decision rules direct a court to examine the totality of the circumstances of the executive's or the judiciary's particular enforcement of the law.[110]

Notably, the existence of enforcement decision rules should be sufficient to refute Adler's notion that all constitutional decision rules are "facial" or "rights against rules." These decision rules protect individuals against certain actions, by certain governmental actors, regardless of whether those actions are taken pursuant to any unlawful "rule." In this way, Fallon's critique of Adler is exactly correct—the diversity of constitutional decision rules refutes any simple, one-size-fits-all characterization (such as facial "rights against rules").[111] Contrary to Adler, some rules really do look to how the executive or judicial branches apply their discretion in the particular facts at issue. Indeed, in his later writing, Adler seemed to acknowledge that "rights against rules" are not the only sorts of constitutional rights courts have enforced.[112]

B. The Remedial Question of Whether to Invalidate a Statute In Toto

When courts speak of "facial challenges," they are usually not referring to whether the challenge focuses on the statute's text or facts of enforcement. Rather, they are discussing a lawsuit that asks the Court to strike down the challenged law *in toto*. As Adler recognized, however, to determine whether a successful challenge under a constitutional decision rule requires the entire statute to be invalidated, one must move beyond examining the merits of the constitutional challenge and consider the *remedy* that the court will order after finding a constitutional violation.[113] This separate remedial question, we argue, implicates another set of judicially-created rules, which we will call "invalidation rules." Invalidation rules, unlike decision rules, do not apply to the question of whether a

[109] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).
[110] See Rosenkranz, Subjects, supra note 1, at 1241.
[111] Fallon, supra note 63, at 1366–68.
[112] Matthew D. Adler & Michael C. Dorf, Constitutional Existence Conditions and Judicial Review, 89 Va. L. Rev. 1105, 1166 (2003).
[113] Adler, supra note 70, at 125–28.

constitutional violation exists. The interaction between invalidation and decision rules, however, has a significant effect on the remedial decision of whether to invalidate a statute *in toto*. In this Section, we explain the Court's default invalidation rule under *Salerno*[114] and then analyze how that invalidation rule interacts with the decision rules discussed in the prior Section.

1. Salerno*: The Default Invalidation Rule*

Salerno provides the most-cited articulation of the standard for determining whether a court should invalidate a statute *in toto*—or "on its face."[115] The Supreme Court in *Salerno* explained 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*."[116] *Salerno*'s articulation of when a court should strike down a statute *in toto* is a bit misleading, as courts generally will not analyze every possible discrete enforcement of a particular statute in order to address whether the statute should be invalidated in whole. Rather, in many cases, the *Salerno* test will be satisfied because application of the relevant decision rule makes clear that every litigant with standing would necessarily succeed in challenging the statute based upon that same reasoning.[117] Stated another way, the "cause" is the court's reasoning under the constitutional decision rule, and the "effect" of that reasoning is that "no set of circumstances exists under which the Act would be valid."[118]

Salerno's explanation of when a statute should be invalidated *in toto* is in accord with the standard the Court had been using for years,[119] but stands in stark contrast to Rosenkranz's conception of a facial challenge. At its core, *Salerno*'s test for *in toto* invalidation

[114] 481 U.S. 739, 745 (1987).
[115] Id.
[116] Id. (emphasis added).
[117] Isserles, supra note 67, at 364.
[118] *Salerno*, 481 U.S. at 745.
[119] See, e.g., Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921) ("That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another.").

is grounded in judicial restraint or minimalism.[120] *Salerno* allows courts to leave part of a statute in effect while invalidating a portion of the statute's coverage. This, in turn, can allow a court to avoid a constitutional question, as the court may only need to pass on the constitutionality of a small portion of the statute instead of the statute as a whole. That is precisely why the Court has recognized that *in toto* invalidation generally is not the proper remedy when a more limited remedy would suffice, given "the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[121]

Critically, *Salerno*'s standard for *in toto* invalidation is not a substantive constitutional decision rule—it provides no guidance on whether the relevant governmental actor violated the Constitution. Instead, it is a prudent and cautious remedial rule that informs courts when they should invalidate entire statutes. Thus, *Salerno* is an *invalidation rule*. The Court, through *Salerno*, has decided that if a statute is so defective under the Court's decision rules that there are absolutely no constitutional applications of that statute, a court—in discharging its duty to enforce the Constitution and to provide precedential guidance to future litigants (and citizens at large)—should strike down that statute in whole.

This insight demonstrates that Fallon's view (that the nature of the decision rule will always determine the decision's effect) is oversimplified.[122] The constitutional decision rule is highly relevant to the remedy, but an additional remedial rule is necessary to determine the effect of finding a constitutional violation under a decision rule. Whether a statute is invalidated *in toto* is a function of the invalidation rule the Court chooses to adopt, which is just as much a function of the Court's view of constitutional adjudication

[120] See generally Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 6–7 (1996) (introducing the concept of "decisional minimalism"—"the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided").

[121] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) (internal quotation marks omitted) (quoting Ashwander v. TVA, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)).

[122] Fallon, supra note 63, at 1339.

as the decision rule. Thus Adler, although he remained purposefully noncommittal, was correct when he argued that the proper remedy for a constitutional violation may depend on many different considerations, including "the constitutional clause or rule-validity schema at stake."[123] Indeed, in a Section III.A of this Article, we will discuss an alternative invalidation rule for *in toto* invalidation—the overbreadth doctrine—which the Court has so far only definitively applied to Free Speech Clause claims.[124] For purposes of the discussion in this Part, however, we will assume that *Salerno* always provides the definitive invalidation rule.

2. Salerno *Invalidation and Two Types of Textual Decision Rules*

The application of constitutional decision rules and of *Salerno*'s invalidation rule may be two separate questions, but there is a significant relationship between them. Some textual decision rules present an all-or-nothing proposition: if a constitutional violation exists under that rule, *Salerno*'s test will always be satisfied and the statute will be invalidated *in toto*. We call these pure facial decision rules. But not all decision rules that examine a statute's text (that is, not all decision rules whose object is the statute) operate this way. Hybrid decision rules can result in either partial or *in toto* invalidation, depending on both the breadth of the statute's coverage and the nature of the decision rule's inquiry. Such hybrid decision rules, when combined with the *Salerno* invalidation rule, present an insuperable obstacle to Rosenkranz's theory as a matter of Supreme Court practice.

Pure Facial Decision Rules. Under some textual decision rules, whenever a statute is found to be unconstitutional, the statute will have absolutely no lawful applications and thus will necessarily be invalid *in toto* under *Salerno*. If Rosenkranz's model were correct, all textual decision rules would be pure facial decision rules. Indeed, for these sorts of decision rules, Fallon's and Isserles' models—when combined with the *Salerno* decision rule—provide an adequate account of constitutional adjudication.

[123] Adler, supra note 70, at 127.
[124] See infra Part III.

Fallon recognized the existence of these pure facial decision rules by explaining that "some constitutional tests identify defects in a statute's historical origins or motivations that pervade all possible sub-rules through which the statute might be specified."[125] For instance, if the legislature enacted a statute for the express purpose of advancing a particular religion,[126] this facial defect will be present in any possible circumstance this statute covers under the *Lemon* test.[127] Or if a statute violates the Court's decision rule against giving the executive too much discretion to punish speech,[128] this facial defect also will be present in any possible circumstance this statute covers. Other pure facial decision rules arise in the separation-of-powers context. For example, if Congress passes a law usurping the President's authority, every suit brought against the law by a challenger with standing would succeed.[129]

Pure facial decision rules provide the easiest application of *Salerno* invalidation, as Isserles described: by the inherent way in which these decision rules operate, a finding of unconstitutionality in one case always requires a ruling that "no set of circumstances exists under which the Act[s] would be valid."[130] This also means that every application of the statute would be invalid *even if* the legislature could pass a different statute that could be applied validly to some of the situations covered by the invalid statute.[131]

In sum, the defining feature of pure facial decision rules is that they *both* require courts to examine the statute passed by the legislature instead of enforcement facts *and* will always require a statute to be invalidated *in toto* when a litigant prevails.

Hybrid Decision Rules. Rosenkranz suggests that when a court finds a constitutional defect by examining a statute's text and thus

[125] Fallon, supra note 63, at 1345.
[126] See supra note 102 and accompanying text.
[127] See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
[128] See supra note 101 and accompanying text.
[129] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 1338, 1361 (2010); INS v. Chadha, 462 U.S. 919, 951 (1983).
[130] 481 U.S. at 745.
[131] See, e.g., Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964) ("[T]his Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.").

finds that Congress violated the Constitution by enacting the statute—the court is then *required* to invalidate the statute in whole.[132] As Fallon has noted, however, the Court has developed many textual decision rules that can result in mere *partial* invalidation of a statute, because the relevant inquiry under the decision rule will not always render every application of the statute's coverage invalid, as the *Salerno* invalidation rule requires.[133] These decision rules are staples in Supreme Court jurisprudence and thus must be part of any descriptive account of the Court's approach to constitutional adjudication.

Hybrid decision rules have two critical features: (1) they are still textual decision rules, so—like pure facial decision rules—they direct courts to examine the statute's text and not enforcement facts; but (2) unlike pure facial decision rules, they can lead to either *in toto* or partial invalidation (sometimes referred to as as-applied invalidation) under the *Salerno* decision rule.[134] The most common

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[132] See Rosenkranz, Subjects, supra note 1, at 1248 ("If Congress violated the Constitution by making a law, basic remedial principles suggest that the Court should accord the violation no legal effect and should instead restore the law to the previolation status quo."); id. at 1248 n.139 ("This suggests that ordinary severability doctrine should not apply when Congress (or a state legislature) is the subject of the constitutional claim.").

[133] See Fallon, supra note 63, at 1344.

[134] The difference between pure facial and hybrid decision rules also explains the confusion over Congress's authority under the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments). In *City of Boerne v. Flores*, the Court adopted a congruence-and-proportionality decision rule for determining whether Congress acted within its Reconstruction Amendment powers: when considering a statute that regulates more conduct than what would be banned by a Reconstruction Amendment, Congress can regulate additional conduct if it is congruent and proportional to what the Amendment prohibits. 521 U.S. 507, 520 (1997). *City of Boerne* applied the congruence-and-proportionality rule to the entire statutory coverage, which might have suggested that the statute was a pure facial decision rule that could only function if it measured the statute's entire coverage and scope against the constitutional violation Congress identified. Id. at 533. Indeed, the Court's initial cases applying the congruence-and-proportionality test examined a statute's entire coverage. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); Kimel v. Fl. Bd. of Regents, 528 U.S. 62, 82–91 (2000); Fl. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999).

In *Tennessee v. Lane*, however, the Court treated the congruence-and-proportionality rule as a hybrid decision rule, which could be applied to just a portion of a statute's coverage rather than the statute's entire scope. 541 U.S. 509, 533–34 (2004). In *Lane*, Title II of the Americans with Disabilities Act prohibited all dis-

types of hybrid decision rules are those that apply a tiers-of-scrutiny approach, such as strict scrutiny, intermediate scrutiny, or rational basis. These rules require a court to consider both the statute's purpose and the fit between that purpose and the methods that the legislature used. The reason that such decision rules are "hybrid" is because the Supreme Court has authorized applying this sort of scrutiny to either the statute's entire statutory coverage or a particularly problematic portion of the statute's coverage. That is not to say that the Court *could not* articulate tiers-of-scrutiny decision rules as pure facial decision rules—requiring an examination of whether the entire statute survives heightened scrutiny or rational-basis review. Rather, we argue that the Court *has not* treated tiers-of-scrutiny decision rules—or other hybrid decision rules—in this manner.

Consider the Supreme Court's decision rule that subjects statutes burdening political speech to strict scrutiny, which requires courts to decide whether the statutory restriction is narrowly tailored to further a compelling governmental interest.[135] Under this decision rule, a court is permitted to examine the statute's entire coverage and determine that the statute was not supported by a compelling interest or was insufficiently tailored to achieve that interest.[136] If the statute's entire coverage fails this decision rule, the *entire statute* fails that decision rule and would thus be invalid in all of its applications, thus requiring invalidation under *Salerno*. The Court has applied the strict scrutiny decision rule in this way in numerous cases, most recently in *Arizona Free Enterprise Club's*

crimination based on disability. Id. at 513. Justice Stevens' majority opinion held that the statute was within Congress's Section 5 power, in part, "as [the statute] applies to the class of cases implicating the fundamental right of access to the courts." Id. at 533–34. Chief Justice Rehnquist, in dissent, criticized the majority for "importing an 'as applied' approach into the § 5 context." Id. at 551 (Rehnquist, C.J., dissenting). As he argued, the congruence-and-proportionality inquiry "can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy." Id. This boils down to an argument that the congruence-and-proportionality rule is, by design, a pure facial decision rule, as opposed to a hybrid decision rule.

[135] See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).

[136] See, e.g., id. at 913 (invalidating the Bipartisan Campaign Finance Reform Act § 203's extension of 2 U.S.C. § 441b's restrictions on corporate independent expenditures).

Freedom Club PAC v. Bennett,[137] where the Court struck down, *in toto*, a statute that gave additional funds to publicly funded candidates whose opponents spent additional funds against them in an election campaign. This use of hybrid decision rules is wholly consistent with Rosenkranz's approach.

But, in other cases, the Supreme Court has applied this same strict scrutiny decision rule to only portions of a statute's coverage and has found that Congress's rationale for banning the speech covered by that particular portion was not justified by a compelling interest or was not sufficiently tailored to achieving that interest. In this way, the Court has been able to invalidate a particularly suspect portion of the statute's coverage, while not ruling on other portions of the statute. Three U.S. Supreme Court cases show this quite well, as David Gans has explained.[138]

- *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*") held that Congress violated the First Amendment by banning election-related spending by corporations, but only insofar as the ban covered certain nonprofit corporations.[139] *MCFL* reasoned that under the political-speech decision rule, the government lacked a compelling interest to ban the speech of some nonprofit corporations, such as the plaintiff corporation.[140] *MCFL*, however, did not comment on the constitutionality of the rest of the statute, and the Court later ruled that the government had a sufficient interest that justified the rest of the statute (although it thereafter overturned this decision).[141]

- *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*") held that a ban on election-related spending by corporations was unconstitutional, but only insofar as the ban covered is-

[137] 131 S. Ct. 2806, 2829 (2011).
[138] David H. Gans, Severability as Judicial Lawmaking, 76 Geo. Wash. L. Rev. 639, 648 (2008).
[139] 479 U.S. 238, 241, 264 (1986) (citing 2 U.S.C. § 441b).
[140] Id. at 260–61.
[141] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 662 (1990), overruled by Citizens United v. FEC, 130 S. Ct. 876, 912–13 (2010).

sue ads, because the government lacked a compelling interest in prohibiting issue advocacy.[142]

- *United States v. Grace* found that a ban on expressive activities in the Supreme Court building and grounds was unconstitutional, but only insofar as the ban covered speech on the sidewalks surrounding the Court, because the government's interest in maintaining order and decorum in the Court did not extend to the surrounding sidewalks.[143]

Rosenkranz's framework cannot account for these types of cases, which apply a tiers-of-scrutiny analysis to only a portion of a statute's coverage. In such cases, he appears to leave courts with only two choices: (1) strike down the entire statute *in toto*, even though the magnitude of Congress's constitutional violation may be rather limited; or (2) allow the unconstitutional restrictions on speech to stand. This approach would either wholly disarm courts from enforcing the Constitution against statutes whose text is only problematic in part, or require courts to invalidate statutes *in toto* even if only a small portion of the statute's coverage is unconstitutional.[144] Put another way, because Rosenkranz does not sufficiently differentiate the concept of textual evaluation on the merits from the remedy of *in toto* invalidation, his approach would have a drastic effect on constitutional law: many more statutes will have to be invalidated *in toto* or many more challengers will lose their meritorious constitutional claims. While there is no a priori argument against such a regime, it is telling that the Supreme Court has emphatically rejected it by repeatedly adopting and applying hybrid decision rules.[145]

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[142] 551 U.S. 449, 457 (2007) (plurality opinion).

[143] 461 U.S. 171, 183–84 (1983).

[144] Rosenkranz, Subjects, supra note 1, at 1232; see id. at 1248 ("If Congress violated the Constitution by making a law, basic remedial principles suggest that the Court should accord the violation no legal effect and should instead restore the law to the pre-violation status quo.").

[145] See, e.g., Doe v. Reed, 130 S. Ct. 2811, 2817 (2010) ("The claim is 'as applied' in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is 'facial' in that it is not limited to

3. Salerno *Invalidation and Enforcement Decision Rules*

Recall that enforcement decision rules are those that require courts to examine how the statute was enforced by the executive or the judiciary. Rosenkranz would argue that these rules derive from the notion that only the executive can violate some constitutional provisions. For example, these decision rules require a court to determine whether a particular search was "reasonable" or whether a particular punitive damages award was "excessive." The application of these enforcement-based decision rules will almost never satisfy *Salerno*'s standard because the rules generally require courts to look to fact- and case-specific issues. In this way, these rules typically lead to what courts and commentators call as-applied challenges, and this view of enforcement decision rules fits squarely within Rosenkranz's theory.

Rosenkranz's theory as to enforcement decision rules glosses over the complexities of constitutional adjudication, as it did with regard to hybrid decision rules. There are rare examples where statutes may be invalidated *in toto* under enforcement decision rules pursuant to the *Salerno* invalidation rule, because these statutes only authorize the executive to engage in wholly unconstitutional conduct. This is because the standard for invalidating a statute *in toto* or in part is not *necessarily* linked to whether the decision rule is searching for a defect in the text of the statute (textual decision rules) or in the executive's enforcement of the statute (enforcement decision rules). Rather, under *Salerno*, a statute is invalid *in toto* when "no set of circumstances exists under which the Act would be valid" and a statute that authorizes the executive to engage in only unconstitutional conduct could not be validly applied by the executive.[146] This is not because the Court rejects (or has even contemplated) Rosenkranz's insight that Congress cannot possibly violate some constitutional provisions. Rather, the Court has created certain decision rules to enforce the Constitution, and the Court has decided that where a statute can never be lawfully

plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.").

[146] *Salerno*, 481 U.S. at 745.

enforced under those rules, that statute should be struck down in whole.[147]

Put another way, Isserles was only half correct when he said that *Salerno*'s rule simply states the effect of, or the consequences that follow from, a court's reasoning in applying a particular constitutional decision rule.[148] More accurately stated, *Salerno* represents a wise and prudent default invalidation rule: the Court has determined that any statute that can never be lawfully enforced—either because of the broad reasoning under a pure facial or a hybrid decision rule, or because of obvious implications under an enforcement decision rule—should be invalidated so that citizens have no reason to believe that the statute would apply to them.

Consider the following example: Congress passes a statute that gives the executive authority to conduct *Terry* stops in Washington, D.C. only where police lack reasonable suspicion. Such stops are clearly prohibited by the Court's Fourth Amendment decision rule. Consistent with Rosenkranz's view, the relevant Fourth Amendment decision rule is an enforcement decision rule because it examines whether the executive's enforcement of a law—not the statute itself—violates the Constitution.[149] In other words, in order to know whether the Fourth Amendment has been violated, courts will have to consider the totality of the circumstances surrounding the executive's action, under the relevant constitutional decision rule. When the legislature, however, passes a statute that authorizes only executive action that would be unconstitutional under the relevant decision rule, the executive would be acting unconstitutionally each time he invokes that statutory authority. Consequently, "no set of circumstances exists under which the Act would be valid," so it would be invalid *in toto* under *Salerno*. Thus, even if Rosenkranz is correct that Congress cannot violate the Fourth Amendment by passing a particular law because no "unreasonable search" has yet taken place, a statute can still be invalid *in toto* under the Fourth Amendment due to *Salerno*.[150]

[147] Id.

[148] Isserles, supra note 67, at 364.

[149] See supra notes 107–108 and accompanying text.

[150] Or take, for example, Rosenkranz's argument that the Third Amendment—which provides that "[n]o Soldier shall, in time of peace be quartered in any house,

This explains why the Supreme Court in *Marshall v. Barlow's, Inc.* held that a statute was invalid *in toto* under the Fourth Amendment.[151] In *Marshall*, Congress passed a statute authorizing the Secretary of Labor to search certain employment facilities without a warrant.[152] The Court held that "the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent."[153] Under the Court's reasoning, the executive would have violated the Fourth Amendment each time he invoked his statutory authority to search an employment facility without a warrant.[154] Thus, even if only the President—and not Congress—can violate the Fourth Amendment, the statute would be invalid *in toto* because there would be no circumstance in which the President could constitutionally invoke this statutory authorization. Rosenkranz's view of facial challenges, however, cannot accommodate *Marshall*.[155] It appears Rosenkranz would assert that *Marshall* should have ruled only that the Secretary of Labor violated the Fourth Amendment by searching that particular plaintiff's workplace without a warrant. The reasoning underlying that ruling, though, would obviously apply whenever the Secretary invoked this statutory authority to search without a warrant. Thus, the application of the relevant decision rule led to the conclusion that the statute would be invalid in every one of its applications.[156]

without the consent of the Owner"—restricts only the President because of its grammatical and structural nature and thus is only appropriate for an as-applied constitutional challenge. Rosenkranz, Objects, supra note 2, at 1028–33 (quoting U.S. Const. amend. III as part of the argument). Even accepting Rosenkranz's view, if Congress passed a law authorizing the executive to disregard any citizen's refusal to allow a soldier in his house during peacetime, it seems rather clear that there would be no lawful way the executive could enforce this law consistent with any reasonable decision rule. Thus, a court would be well within its power, under Supreme Court practice, to declare the statute invalid *in toto* under *Salerno* because the statute authorizes the Executive to engage in only unconstitutional conduct.

[151] 436 U.S. 307, 325 (1978).

[152] Id. at 309.

[153] Id. at 325.

[154] Id. at 315–17.

[155] See Rosenkranz, Subjects, supra note 1, at 1240.

[156] The distinction between decision rules and invalidation rules also demonstrates that the Court may be oversimplifying matters when it declares that "facial challenges to legislation are generally disfavored." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (quoting FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 223 (1990)

C. Applying This Framework: The Commerce Clause Decision Rules and the Salerno *Invalidation Rule*

The difference between constitutional decision rules and the remedial *Salerno* invalidation rule can clarify many facets of constitutional adjudication. An important context in which this distinction matters is the Commerce Clause, which has perplexed courts and commentators. Rosenkranz, agreeing with some commentators,[157]

(plurality opinion)); see Citizens United v. FEC, 130 S. Ct. 876, 932 (2010) (Stevens, J., concurring in part and dissenting in part) ("Facial challenges are disfavored . . . ." (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008))); City of Chi. v. Morales, 527 U.S. 41, 111 (1999) (Thomas, J., dissenting) (discrimination claims "are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of facial challenge on vagueness grounds"); *Finley*, 524 U.S. at 617 (Souter, J., dissenting). More precisely stated, the Court is asserting that in cases presenting multiple grounds for decision—either multiple decision rules or multiple ways to apply a hybrid decision rule—a court should first address the claim that would result in the narrowest invalidation remedy. See *Grange*, 552 U.S. at 450 (quoting Ashwander v. TVA, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)) (recognizing "the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied").

It is unclear, however, whether a court must *always* first consider the claim that would result in a more narrow remedy. In some cases, it could be crystal clear that the statute should be invalidated *in toto* under a pure facial decision rule—even if the challenger also has a claim that the statute should be invalidated in part under a hybrid decision rule or that the executive enforced the statute unconstitutionally in the challenger's particular case. And the Court may even believe that it should encourage *in toto* invalidation in certain areas. See David H. Gans, Strategic Facial Challenges, 85 B.U. L. Rev. 1333, 1337 (2005) ("[S]trategic facial challenges aim to better enforce constitutional rights by preempting case-by-case review because of fear that such review will not adequately protect constitutional norms.").

Ultimately, a court may conduct a cost-benefit analysis to determine which claim it should address first. A court might look at the breadth of the various rules, the difficulty of the questions under each rule, the benefit of *in toto* invalidation, the harm and risk of an erroneous decision, and the perils of judicial intrusion into the democratic process. See *Grange*, 552 U.S. at 450 (noting that facial claims "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records'" (quoting Sabri v. United States, 541 U.S. 600, 609 (2004))); id. at 451 ("[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.").

[157] Rosenkranz, Subjects, supra note 1, at 1269–73; Nathaniel Stewart, Note, Turning the Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges, 55 Case W. Res. L. Rev. 161, 164 (2004).

has argued that any successful challenge based on Congress's enumerated powers must result in invalidating a statute *in toto*.[158] Disaggregating the object of the decision rule from the invalidation rule, however, shows that this is not the case, and it answers many debates that have arisen under the Commerce Clause.

1. Lopez*,* Morrison*, and* Raich

When the Supreme Court in *United States v. Lopez* reinvigorated the limits on congressional power imposed by the Commerce Clause, it established the following decision rule: under the Commerce Clause, Congress may only regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce," and (3) "those activities that substantially affect interstate commerce."[159]

In *Lopez*, and the follow-on case *United States v. Morrison*, Congress had attempted to invoke the third category—"those activities that substantially affect interstate commerce." In *Lopez* and *Morrison*, the Court invalidated *in toto* the Gun Free School Zones Act and the Violence Against Women Act's tort remedy, respectively, concluding that those laws did not regulate activities that substantially affect interstate commerce because the regulated activities that Congress was attempting to aggregate to show a "substantial[] [e]ffect" were not economic.[160] That is, *Lopez* and *Morrison* elaborated on the Commerce Clause decision rule to hold that

[158] Rosenkranz, Subjects, supra note 1, at 1273–81.

[159] 514 U.S. 549, 558–59 (1995); see United States v. Morrison, 529 U.S. 598, 608–09 (2000).

[160] *Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."); see *Morrison*, 529 U.S. at 610 ("[T]he noneconomic, criminal nature of the conduct at issue [in *Lopez*] was central to our decision in that case."); id. at 613 ("Gender-motivated crimes of violence are not, in any sense of that phrase, economic activity."); id. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

Congress may not invoke its "substantially affects" authority by aggregating intrastate and non-economic activities. Put another way, where Congress can only justify a statute's entire coverage by aggregating the effects of *intrastate and non-economic* activities, that statute has no constitutional applications under the *Lopez* hybrid decision rule. Such a holding requires, under the *Salerno* invalidation rule, that the statute be invalidated *in toto*. In these cases, the litigants' arguments and the courts' inquiries focused on the entire statutory coverage, because the crux of the argument was that the *entire* class of activities that would show a "substantial[] [e]ffect" on interstate commerce was either economic or it was not. Thus, given the statute's coverage and the related justification, the result was either a loss for the challenger or *in toto* invalidation under *Salerno*.

But what happens when a court concludes (or a litigant admits) that at least some of the activities covered by the statute are "economic" and would, in the aggregate, affect interstate commerce, but then finds *some* of the activities covered are non-economic (or wholly unrelated to the regulation in their own right)? If one were to apply Rosenkranz's approach to the *Lopez* decision rule, the Court would have exactly two choices—either strike down the entire statute because some portions of the undifferentiated text are unconstitutional or uphold the entire statute and ignore Congress's overreach. If the Court only adopted a pure facial decision rule for the Commerce Clause, then that would indeed be the result. Unsurprisingly, the Court has rejected this all-or-nothing proposition and has articulated the Commerce Clause decision rule as a hybrid decision rule.

Thus, in *Gonzales v. Raich*, the Court considered an argument that the Controlled Substances Act ("CSA") was unconstitutional in part—that is, the Court considered only the portion of the Act prohibiting the cultivation, possession, and use of medical marijuana, which were legal under state law.[161] The Court began by not-

[161] See Gonzales v. Raich, 545 U.S. 1, 8–9 (2005) ("The [CSA] is a valid exercise of federal power, even as applied to the troubling facts of this case."); id. at 33 (Scalia, J., concurring) ("I agree with the Court's holding that the [CSA] may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use.").

ing that the respondents conceded that a large portion of the CSA would have survived the *Lopez* decision rule—that is, the CSA regulated a substantial amount of economic activity that, taken together, substantially affected interstate commerce.[162] Then, critically, the Court considered and rejected the respondents' Commerce Clause argument on its merits, which focused on one subset of the CSA's broad coverage. The Court did so by explaining that the growth of marijuana was an "economic" activity, and that Congress could have rationally concluded that the aggregation of this activity had a substantial effect on interstate commerce.[163]

But suppose the analysis had come out the other way: What if the Court had decided that it was irrational for Congress to conclude that banning marijuana for personal consumption would substantially affect interstate commerce (and that banning her conduct was not essential, or relevant, to Congress's otherwise constitutional broader regulatory scheme)? Or what if the Court had accepted respondent Monson's argument that her growing of marijuana was non-economic under the economic/non-economic distinction that *Lopez* drew? In that circumstance, the Court's application of the *Lopez* hybrid decision rule would have only applied to some of the CSA's coverage and this would have been insufficient to satisfy the *Salerno* invalidation rule. Indeed, had the *Raich* dissenters carried the day on the merits of Ms. Raich's claims that her activities were non-economic, the Court would have only invalidated the Act as applied to the cultivation, possession, and use of medical marijuana.[164] In this way, *Lopez*'s hybrid decision rule—when combined with the *Salerno* invalidation rule—would have allowed the Court to conclude that the CSA was only unconstitutional in some narrow circumstances and to provide a disposi-

[162] Id. at 15 (majority opinion).

[163] Id. at 19.

[164] See id. at 48 (O'Connor, J., dissenting) ("To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes."); id. at 59 (Thomas, J., dissenting) ("Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial."); id. at 60 ("The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause.").

tion of the case consistent with the magnitude of Congress's constitutional error.

Rosenkranz argues that the above analysis of *Raich* is mistaken because Ms. Raich's as-applied argument is really that the President violated her constitutional rights when he enforced the CSA against her. This, Rosenkranz says, is nonsensical because the President cannot possibly violate the prohibition against Congress overstepping its authority under the Constitution.[165] But even if only Congress can violate the limitations on its own enumerated powers, this does not mean that as-applied claims such as Ms. Raich's are inappropriate. If Ms. Raich's challenge succeeded, the constitutional culprit would still be *Congress*, which passed a law that—in some small part—exceeded its constitutional authority.[166] However, while Congress violated the Constitution, the proper court-ordered remedy for this relatively minor violation—partial invalidation—is commensurate with the scope of the error. In this way, the *Lopez* hybrid decision rule and the *Salerno* invalidation rule allow courts to avoid Rosenkranz's all-or-nothing proposition. In some cases, such as *Lopez* and *Morrison*, applying the hybrid decision rule to the entire statutory coverage makes sense and leads to *in toto* invalidation under *Salerno*. But when litigants such as Ms. Raich raise narrower arguments, courts can still entertain those claims.

Finally, note a powerful feature of this Article's taxonomy. Suppose the Court is convinced by arguments of Rosenkranz, Nathaniel Stewart, and Luke Meier,[167] and determines that the Commerce Clause's text does not permit as-applied adjudication. This would merely mean that the Court has decided that whatever decision rule it has adopted, that decision rule is a pure facial decision, such that it can be applied only to the entire statute's reach. While we think it is unlikely that the Court would create such an all-or-

[165] Rosenkranz, Subjects, supra note 1, at 1277 ("If pressed to give an answer, Ms. Raich would presumably want to say the President [violated the Constitution].").

[166] In *Raich* itself, the President had not even instituted any prosecution—Ms. Raich sued for a declaratory judgment to protect herself from any prosecution under a law that Congress had passed, which Ms. Raich argued exceeded its authority to the extent it covered an individual such as her. See *Raich*, 545 U.S. at 8–9.

[167] Luke Meier, Facial Challenges and Separation of Powers, 85 Ind. L.J. 1557, 1559 (2010).

nothing rule for the Commerce Clause, this Article's framework can easily accommodate such judicial innovations and provide an easy-to-understand vocabulary for articulating them.

2. Commerce Clause Challenges to the Affordable Care Act's Individual Mandate

This Article's framework can be put to full use when courts have to step into an arena where litigants raise novel arguments to address novel issues. Consider the Sixth Circuit's recent decision upholding the requirement of the Affordable Care Act ("ACA") that all citizens buy health insurance—also known as the "individual mandate." Invoking *Salerno*, Judge Sutton's controlling opinion held that the ACA's requirement survived the plaintiffs' "facial" constitutional challenge because the ACA did not unconstitutionally compel "activity" from several categories of individuals—for example, those that had already purchased health insurance voluntarily or had been forced to purchase health insurance by state laws.[168]

This Article's framework allows us to peel back the complexity and evaluate Judge Sutton's argument. Recall that *Salerno* is merely an invalidation rule; it does not address or answer the antecedent question whether the Constitution has been violated, which requires careful examination of the relevant constitutional decision rule. Indeed, *Salerno* cannot possibly provide any guidance on whether the Constitution has been violated; instead, it only deals with the remedy the Court prescribes after applying a decision rule.

The real debate in the ACA individual mandate litigation is not about the proper invalidation rule, but is rather about the correct Commerce Clause decision rule that should apply. The plaintiffs' main argument before the Sixth Circuit was that Congress categorically lacks authority to compel them to enter into (and/or remain in) the market for health insurance, under *Lopez*'s hybrid decision rule.[169] As Rosenkranz would explain, their argument turns

[168] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 565–66 (6th Cir. 2011) (Sutton, J., concurring).

[169] Brief for Appellants at 8, 23, 31, Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388).

on the statutory text—not the facts of enforcement. Thus, for purposes of evaluating their argument, it should not have mattered whether some hypothetical individuals might already be complying with this requirement or undertaking some conduct that would otherwise place them within the federal government's reach. After all, this is the reason that it did not matter whether the defendant in *Lopez* bought his gun in interstate commerce or that the actual defendant in *Lopez* was a drug courier engaged in economic activity.[170]

Judge Sutton therefore must have rejected the plaintiffs' argument, under the *Lopez* hybrid decision rule, that Congress categorically lacks the power under the Commerce Clause to compel an individual to enter into or remain in a particular market. He held that at least in some cases, Congress has the power to compel an individual to enter into or remain in a particular market. Such a ruling, of course, does not depend on the *Salerno* invalidation rule—and thus the distinction between facial and as-applied challenges that Judge Sutton invoked. Indeed, Judge Sutton's reasoning—under the *Lopez* hybrid decision rule—would appear to doom any litigant raising a Commerce Clause challenge to the individual mandate, regardless of whether that litigant styled his challenge as an "as-applied" or "facial" challenge. By invoking and relying heavily upon *Salerno*, Judge Sutton's opinion purports to leave open the possibility that individuals outside the categories he identified could bring as-applied challenges to ACA, presumably raising the same argument that Congress lacks the authority to compel individuals to enter into or remain in a particular market. But Judge Sutton's reasoning that upheld the individual mandate in at least some cases—*under his reading of the* Lopez *decision rule*, and not the *Salerno* invalidation rule—appears to foreclose challenges to the individual mandate in every case.

This Article's framework also sheds light on Judge Graham's dissenting opinion in the same case. Judge Graham said that the ACA's individual mandate was invalid *in toto* because a statute is

[170] United States v. Lopez, 2 F.3d 1342, 1345, 1368 (5th Cir. 1993).

"'legally stillborn'" if Congress enacts an unlawful statute.[171] However, as this Article has made clear, under the *Salerno* invalidation rule, a statute is only "legally stillborn" *in its entirety* if it fails the relevant decision rule in all of its applications. In order to determine whether the statute's defect is, in fact, this pervasive, the court must first identify and apply the relevant decision rule. If that decision rule is a pure facial decision rule or is a hybrid decision rule applied to the statute's entire coverage, the statute may be "legally stillborn" in whole. But that is not always the case, under the Commerce Clause or otherwise. As shown above,[172] the Court has decided that a statute may only be "legally stillborn" *in part*.

So how is a court supposed to approach a case like the constitutional challenge to ACA's individual mandate, given this Article's framework? A court must begin by identifying and then applying the relevant decision rule. For example, a challenge to the ACA's individual mandate could require application of the Commerce Clause's *Lopez* hybrid decision rule—and, more particularly, its substantial effect prong. This may apply to the entire statutory coverage, as in *Lopez* and *Morrison*. If a court applies a hybrid decision rule to a statute's entire coverage, the statute will be invalid *in toto* under *Salerno* if the court finds a constitutional violation. The plaintiffs who challenged the individual mandate in the Sixth Circuit appear to have raised this type of argument by asserting that Congress may not invoke its "substantial[] [e]ffects" authority by compelling individuals to enter into or remain in a particular market. Such an argument, if accepted, would call into question all applications of the individual mandate for the same reason as in *Lopez*: the entire statutory coverage would not provide Congress with the required "substantial[] [e]ffects." Alternatively, a plaintiff raising a Commerce Clause challenge could also present a narrow challenge under the same decision rule, as in *Raich*, in which case the challenger would prevail on what is commonly referred to as an as-applied challenge. For example, a person subscribing to a religion that rejected all medical care could raise such a challenge to the

[171] *Thomas More Law Ctr.*, 651 F.3d at 566 (Graham, J., concurring in part and dissenting in part) (quoting Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010)).

[172] See supra Section II.B.

individual mandate, arguing that he would never receive medical care under any circumstances and thus it is irrational to include him within the mandate's reach. Applying these decision rules and determining whether Congress has violated the Constitution necessarily occurs before a court reaches the question of whether *Salerno* requires *in toto* invalidation.

At the same time, litigants always have room to argue that a court, in order to enforce the Constitution, should derive a new constitutional decision rule. For instance, a litigant could ask a court to adopt a pure facial decision rule to adjudicate the ACA constitutional dispute. This rule could be similar to the one the Court adopted in *New York v. United States*, where the Court held that Congress cannot commandeer the states.[173] This was a pure facial decision rule because whether a statute commandeered state officials was an all-or-nothing proposition, which (where satisfied) led to *in toto* invalidation under *Salerno*. Likewise, an enterprising litigant or court could articulate a Commerce Clause decision rule that similarly prohibits Congress from invoking its Commerce Clause power to commandeer individuals as a condition of citizenship. Importantly, whether litigants should prevail under such a decision rule (if it were adopted) cannot be decided by merely invoking the *Salerno* invalidation rule and pointing out that some citizens already have insurance. After all, the government cannot defeat a *New York* anti-commandeering challenge by pointing out that some state officials are already voluntarily acting in accord with what Congress wants to force them to do. To be clear, this is not to say that courts should or should not adopt an individual anti-commandeering pure facial decision rule. This example merely shows that a court must first identify (or even create) and then apply the relevant constitutional decision rule before reaching the remedial questions inherent in the *Salerno* invalidation rule.

D. Partial or As-Applied Invalidation and Severability

Much recent scholarship has treated what this Article calls partial invalidation—or as-applied invalidation—as a matter of "application severability." Put another way, many scholars believe that

[173] 505 U.S. 144, 175–77 (1992).

when the Court says it is invalidating a statute as-applied, the Court actually "severs" the statute's unconstitutional applications from the rest of the statute. Fallon supports this view, arguing that when the Court partially invalidates a statute it severs a sub-rule—a portion of the statutory rule—that encompasses all the unconstitutional applications.[174] Scholars such as Professors Dorf and Gans are largely in accord, arguing that whether a statute is facially unconstitutional "depends on whether the court treats the unconstitutional applications of the statute as severable."[175] Professor Gillian Metzger strongly agrees, arguing that "the debate regarding the availability of facial challenges is, at bottom, fundamentally a debate about severability."[176]

Other scholars have disagreed with this emphasis on severability. Most notably, Professor Luke Meier argues that "[c]ourts do not stumble into the facial-versus-as-applied decision only after making a severability decision. Rather, courts confront the facial-versus-as-applied decision head-on."[177] Meier explains that while severability proponents do not suffer from *analytical* shortcomings, their approach is descriptively defective because the Court rarely, if ever, articulates the facial-versus-as-applied problem as a matter of severability. As Meier puts it, "[i]f a severability analysis is really the dispositive point on the facial-versus-as-applied question, I cannot believe that this analysis would never be made a part of the Court's formal disposition of the case in the written opinions."[178]

There is some truth in both approaches, and both can accommodate the concepts we have discussed in this Article. When scholars such as Dorf, Metzger, Gans, and Fallon discuss how the Court narrows a statute's applications, severs applications, or severs a sub-rule, they are merely restating what the Court has done in creating hybrid decisions rules and then pairing those with the *Salerno* invalidation rule: not every action by Congress that violates the

[174] See, e.g., Fallon, supra note 63, at 1334–35.

[175] Dorf, supra note 38, at 249; Gans, supra note 138, at 655.

[176] Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873, 887 (2005).

[177] Meier, supra note 167, at 1570; see also David L. Franklin, Facial Challenges, Legislative Purpose, and the Commerce Clause, 92 Iowa L. Rev. 41, 59–67 (2006); Kevin C. Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 738 (2010).

[178] Meier, supra note 167, at 1577.

Constitution requires *in toto* invalidation of the statute at issue. Thus, regardless of whether the Court's remedy in a case such as *MCFL* is called as-applied invalidation, partial invalidation, or application severability, the result is the same. And, of course, any of these labels would refute Rosenkranz's suggestion that *in toto* invalidation is the only possible remedy for a legislative violation of a constitutional requirement.

Indeed, to the extent the severability-versus-partial-invalidation debate continues, the most important point may be that these largely identical concepts are analytically distinct from the doctrine of *external severability*. We call this "external" severability because it implicates statutory provisions that are external, or distinct, from the unconstitutional statutory provision at issue. External severability refers to the situation when the Court finds a statute is invalid *in toto*—that is, it violates the *Salerno* invalidation rule—and then asks the further question of whether the Court should also invalidate a related, albeit constitutional, statutory provision.[179] Thus, for example, if only one sentence of a two thousand-page omnibus bill has no constitutional applications, the Court has created an external severability doctrine—based upon legislative intent—to determine whether the Court should take any action with regard to the many other sentences and provisions in that omnibus bill. It is true that questions of external severability and partial invalidation (or as-applied severability) raise similar concerns in terms of judicial restraint and possibly legislative intent, but external severability is not analytically identical to the questions of as-applied, facial, and overbreadth challenges that have caused scholars and courts so much confusion. If only to avoid this potential problem, this Article has used—and will use—the term "partial invalidation" instead of "application severability."

[179] See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161–62 (2010); Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328–29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact . . . .").

III. OVERBREADTH: AN ALTERNATIVE INVALIDATION RULE

So far, this Article has proceeded on the assumption that *Salerno* provides the only invalidation rule—that is, unless a litigant could show that the statute can never be applied validly under a constitutional decision rule, the statute would not be invalidated in whole. As a necessary corollary to this doctrine, if the litigant cannot even show that the statute would be invalid as applied to his particular case, that statute could not possibly satisfy the *Salerno* invalidation rule for that reason alone. But at least in the Free Speech Clause context, the Supreme Court has used a different invalidation rule than *Salerno*: a statute that is unconstitutional under the Free Speech Clause in a "substantial" number of circumstances compared to its "legitimate sweep" can be struck down *in toto*—even if part of the statute's legitimate sweep covers the litigant's own case.[180] The Supreme Court has referred to this alternative invalidation rule as the overbreadth doctrine.

Overbreadth, consequently, is an invalidation rule that is easier to satisfy than *Salerno*. The overbreadth invalidation rule only applies to the *remedial question* of whether to invalidate a statute *in toto*—not to the initial inquiry into whether a constitutional violation exists under the relevant decision rule. For example, if a statute fails a free speech hybrid decision rule that has been applied to, say, ninety percent of the statute's reach, that statute may be struck down under the overbreadth invalidation rule (whereas it could not be struck down under *Salerno*). Similarly, if the court's reasoning establishes that ninety percent of a statute's applications by the executive would violate the relevant enforcement decision rule, that statute could be invalidated *in toto* under overbreadth.

So, when should a different invalidation rule (such as overbreadth or perhaps some other alternative) displace the *Salerno* invalidation rule? Commentators have not offered a satisfactory answer. Arguing that overbreadth is merely an instance of the valid rule requirement under the Free Speech Clause, as Monaghan does, does not explain when this "requirement" should apply outside the free speech context. Put another way, Monaghan's theory of overbreadth boils down to an *ipse dixit* that assumes that the

[180] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

Free Speech Clause's substantive requirements mandate a particular type of invalidation rule. Similarly, describing overbreadth as different in-kind from *Salerno*, as Isserles does, is not only inaccurate for the reasons explained above, but offers no explanation for when overbreadth should apply beyond the Free Speech Clause. We would also disagree with Fallon insofar as he may be asserting that overbreadth is descriptive of any *in toto* invalidation of a statute that covers conduct that could have been prohibited by a different statute[181]—a confusing analysis that would arguably apply to virtually every instance of *in toto* invalidation in the Court's history. And Rosenkranz's suggestion that overbreadth challenges should be permitted for all constitutional provisions directed at legislative action[182] does not account for why the Court has only applied the doctrine definitively to one aspect of the First Amendment.

This Part offers a theory as to why the overbreadth invalidation rule is applied to Free Speech Clause challenges, and explains how this rationale can be exported to determine whether overbreadth should apply to challenges under other constitutional provisions.[183] Courts have justified applying overbreadth to prevent a "chilling" of free speech, but this explanation is inadequate and cannot be readily applied to broader questions about whether to expand the availability of overbreadth invalidation. Using the tools this Article has developed, we offer a more compelling reason for free speech overbreadth: the free speech hybrid decision rules that the Court has created do not enforce the Free Speech Clause to the extent that the Court deems proper because these rules carve out certain

[181] Richard H. Fallon, Jr., Fact and Fiction About Facial Challenges, 99 Calif. L. Rev. 915, 945 (2011).

[182] Rosenkranz, Subjects, supra note 1, at 1252–55.

[183] An initial caveat is in order: some have argued that the overbreadth doctrine should be eliminated and that *Salerno* is the only proper invalidation rule. See, e.g., Luke Meier, A Broad Attack on Overbreadth, 40 Val. U. L. Rev. 113, 114 (2005). Regardless of the merits of these arguments, the Supreme Court continues to invoke the overbreadth invalidation rule, at least in the free speech context. We do not address, as a matter of first principles, whether *Salerno* is the only proper invalidation rule such that overbreadth should have never existed. Instead, we take overbreadth's existence as a given in the free speech context and attempt to discern whether there are principled arguments for applying the overbreadth invalidation rule in challenges under other constitutional provisions.

categories of unprotected speech. This, in turn, undermines the flexibility and design of hybrid decision rules by making it virtually impossible to satisfy *Salerno*'s standard for *in toto* invalidation for statutes that cover both protected and unprotected speech. It is this peculiar feature of free speech decision rules that leads to the potential "chill" on First Amendment rights that the Court, in adopting the overbreadth doctrine, was attempting to remedy.

A. Free Speech Overbreadth as a Solution to the "Grace" Problem

In *Broadrick v. Oklahoma*, the Court explained that overbreadth challenges were allowed in free speech cases because "the First Amendment needs breathing space" and because the existence of a statute that restricts a substantial amount of protected speech by its "very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[184] The Court has subsequently used the overbreadth doctrine to invalidate statutes banning virtual child pornography,[185] prohibiting the selling of depictions of killing or wounding animals,[186] and prohibiting "First Amendment activities" at airports.[187]

Since *Broadrick*, the Court and commentators have justified overbreadth for free speech claims by reference to the values that the Free Speech Clause is aimed at protecting. If a statute has many unconstitutional applications, the protected speech of third parties will be chilled on an ongoing basis if litigants can only rely on a series of as-applied challenges to vindicate their free speech claims. As the Court has noted, "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."[188] A second and related policy rationale for free speech overbreadth is an excessive-discretion rationale: a statute

[184] 413 U.S. at 611–12.
[185] Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).
[186] United States v. Stevens, 130 S. Ct. 1577, 1592 (2010).
[187] Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987).
[188] Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965).

that sweeps too broadly by infringing on protected speech may allow too much opportunity for discriminatory enforcement.[189]

But these explanations are inadequate because the Court considers these same factors when creating constitutional decision rules in the first place. Thus, if the First Amendment decision rules created by the Court already adequately protected the Free Speech Clause, as required by that Clause's text and history, there would be no need for overbreadth in free speech cases. After all, the Court has already developed a hybrid decision rule that applies strict scrutiny to content- and viewpoint-based restrictions on fully protected speech, without reference to any of the particular facts regarding the litigant before the Court. For many statutes that are subject to this constitutional decision rule, overbreadth is unnecessary because a court has the flexibility—if it so chooses—to apply this rule to the entire coverage of a statute. For example, in *United States v. Playboy Entertainment Group*, the government defended a statute that required cable operators to scramble sexually explicit images by arguing that the statute was narrowly tailored to the compelling governmental interest of protecting children, while admitting that the statute did not restrict unprotected obscene speech.[190] The Court struck down the statute *in toto* by finding that the statute was not narrowly tailored—without resorting to overbreadth analysis.[191] That is, because the entire statute was not narrowly tailored to any compelling governmental interest, the statute was invalid under *Salerno*. It is true that, as a theoretical matter, the Court could have chosen to apply this strict scrutiny decision rule to only some portion of the statute at issue, as the Court did in cases such as *MCFL*. But to the extent the Court was concerned that such an approach would underenforce the First Amendment by chilling speech—the concern that motivates the overbreadth doctrine—the Court was fully able to address that concern by ap-

[189] See Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) ("The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.").

[190] 529 U.S. 803, 827 (2000).

[191] Id.

plying the strict-scrutiny decision rule to the statute's entire coverage and then invoking the *Salerno* invalidation rule.

Cases such as *Playboy* teach an important lesson about the interaction between *Salerno* and overbreadth: *For constitutional provisions that involve only pure facial decision rules or hybrid decision rules that, at the court's option, can cover the entire statutory scope, there is absolutely no difference between* Salerno *and overbreadth invalidation rules*. For constitutional provisions that only have pure facial decision rules, the failure of a statute under any such decision rule will inexorably lead to the conclusion that the statute has no constitutional applications—thus satisfying both *Salerno* and overbreadth. Put another way, if the Court only created pure facial decision rules, the overbreadth doctrine would have no independent relevance. And for statutes containing only hybrid decision rules that are flexible enough to cover the entire statutory scope whenever the court deems appropriate, overbreadth is often unnecessary because if the court decides that *in toto* invalidation is needed to enforce the constitutional provision, it will simply apply that decision rule to the entire statutory scope. This is why Isserles was half-right when he wondered whether the "narrow tailoring requirement [may] render[] null the need for an overbreadth doctrine within the First Amendment context."[192] The point is not that overbreadth and strict scrutiny are analogous inquiries—the former is an invalidation rule and the latter is a decision rule; it is that for cases such as *Playboy*, where strict scrutiny applies to the entire statute's coverage, the question of whether the court uses *Salerno* or overbreadth as an invalidation rule is unimportant.

Why, then, did the Court bother to adopt overbreadth for the Free Speech Clause, in light of the strict scrutiny hybrid decision rule? The answer to this puzzle lies in the nature of the Court's Free Speech Clause decision rules and the reality of the statutes to which they apply. An absurd hypothetical illustrates this point. Suppose Congress enacted the Speech Suppression Act, which provides that "no person may speak."[193] What decision rule would

[192] Isserles, supra note 67, at 421.

[193] In a recent article, Larry Alexander used a similar hypothetical statute, although to argue that there is no such concept as First Amendment overbreadth. See Larry Alexander, There is No First Amendment Overbreadth (But There are Vague First

apply in addressing the validity of this provision? A whole slew of free speech decision rules could apply: from strict scrutiny for the political speech aspects of the statute's coverage,[194] to intermediate scrutiny for commercial speech,[195] to no scrutiny for wholly unprotected speech like obscenity,[196] and so on. All of these forms of speech are prohibited by the Speech Suppression Act. So does strict scrutiny, intermediate scrutiny, or some other decision rule apply to a challenge to the Speech Suppression Act?

The problem illustrated by the Speech Suppression Act is common to free speech cases because the Court has carved out certain categories of constitutionally unprotected speech. Many statutes restrict both protected and unprotected speech in the same indivisible statutory text. And if one of these statutes covers even a tiny amount of unprotected speech, *no hybrid decision rule could be applied across the entire statutory text*. Thus, Free Speech Clause hybrid decision rules often lose one of their most important features—the freedom a court has to apply the decision rule either to the entire statutory coverage or to a particularly problematic subset of the statutory prohibition, depending upon the court's judgment as to the most effective way to enforce the Constitution without deciding issues too broadly. The practical import is that no statute that covered both protected and unprotected speech could be analyzed or invalidated *in toto*—at least, under the *Salerno* invalidation rule. This problem of statutes implicating multiple constitutional decision rules has been identified by scholars such as Isserles, who labels this the "*Grace* problem" after *United States v. Grace*.[197]

The inability to invalidate a statute *in toto* may not itself be a problem. The Constitution nowhere requires that the Court, in enforcing the Constitution in cases or controversies that come before

Amendment Doctrines); Prior Restraints Aren't "Prior"; and "As Applied" Challenges Seek Judicial Statutory Amendments, 27 Const. Comment. 439, 439–440 (2011).

[194] Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).

[195] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 569 (1980).

[196] Roth v. United States, 354 U.S. 476, 485 (1957).

[197] 461 U.S. 171 (1983); see Isserles, supra note 67, at 459; see also supra note 143 and accompanying text.

it, be able to strike down statutes in whole under every (or, indeed, *any*) constitutional provision.[198] But this is where the Court's concern about chilling speech comes in. The potential that a statute may chill speech unless invalidated *in toto* could motivate the Court *either* to develop a new robust decision rule *or* to allow for invalidation of statutes on a different basis, such as overbreadth. In other words, the Court must either change the applicable decision rule or develop an alternative invalidation rule besides *Salerno*. By allowing overbreadth invalidation under the Free Speech Clause, the Court has recognized that it cannot craft an adequate decision rule in this area that enforces the Free Speech Clause sufficiently, consistent with that Clause's text and history.

The Supreme Court's recent decision in *United States v. Stevens*[199] provides an apt illustration of the beneficial functions that overbreadth can serve in light of the *Grace* problem. *Stevens* involved a challenge to a federal statute that banned the sale of depictions of

[198] Indeed, Justice Scalia has questioned whether a court should *ever* be allowed to invalidate a statute under overbreadth. See, e.g., City of Chi. v. Morales, 527 U.S. 41, 73, 77 (1999) (Scalia, J., dissenting) ("It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in all applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion—which a federal court should never issue at all . . . and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions . . . .") (citations omitted); Janklow v. Planned Parenthood, 517 U.S. 1174, 1176, 1178 & n.3 (1996) (Scalia, J., dissenting from denial of certiorari) (referring to the contrary view as "an overbreadth approach"); Meier, supra note 183 at 160. Justice Scalia's argument, however, actually appears to be an argument that courts never have authority to issue remedies that benefit third parties and that there should be no invalidation rules, including *Salerno*. In other words, under that view, a court should never invalidate a statute *in toto*—even if it meets *Salerno*'s standard. Instead, Justice Scalia appears to argue that a court should issue a remedy that only enjoins application of the statute to the particular litigant before the court. The Court, however, has not adopted this approach, as it does invalidate statutes *in toto*. See, e.g., *Citizens United*, 130 S. Ct. at 917; Granholm v. Heald, 544 U.S. 460, 493 (2005); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003); United States v. Lopez, 514 U.S. 549, 567–68 (1995); Loving v. Virginia, 388 U.S. 1, 11–12 (1967). In fact, Justice Scalia has gone along with this approach, at least as a matter of stare decisis. See, e.g., *Citizens United*, 130 S. Ct. at 886; *Granholm*, 544 U.S. at 493; *Lopez*, 514 U.S. at 549; see also Jonathan F. Mitchell, supra note 17, at 1, 16 (explaining how textualist and originalist jurists such as Justice Scalia can reconcile stare decisis with their interpretive commitments).

[199] United States v. Stevens, 130 S. Ct. 1577 (2010).

harming or killing animals.[200] This statute was a content-based restriction on both protected speech—like hunting videos—and arguably unprotected speech like gruesome "crush videos."[201] The Third Circuit held the statute invalid *in toto* for failing "strict scrutiny," applying that hybrid decision rule to the entire face of the statute. In a footnote, the Third Circuit declined to invalidate the statute under the overbreadth doctrine, pointing to the Supreme Court's observation that overbreadth is "'strong medicine.'"[202] Given that overbreadth is merely an alternative invalidation rule to *Salerno* and given that overbreadth's "medicine"—*in toto* invalidation—is exactly the same as *Salerno*'s, this rationale was not only puzzling but also an illustration of the confusion surrounding the interaction between decision rules and remedial invalidation rules.

When the case came to the Supreme Court, the Court affirmed the Third Circuit's judgment by invoking the overbreadth invalidation rule. In explaining why it used overbreadth analysis, the Court said the choice was between: (1) a "typical facial attack," and (2) an overbreadth analysis, which the Court described as "a second type of facial challenge."[203] While this statement may be a bit oversimplified, it is essentially correct—overbreadth is a "second type" of invalidation rule that allows for *in toto* invalidation. The Court then proceeded to apply the strict scrutiny hybrid decision rule to only one portion of the statute (like *MCFL*, *WRTL*, and *Grace*)—the portion that covered unarguably protected speech such as hunting videos. The Court then easily concluded that the statute's ban on protected speech was not narrowly tailored to any compelling governmental interest. Moving to the remedial inquiry, the Court applied the overbreadth invalidation rule and struck down the statute *in toto* because the portion of the statute that it had just

[200] Id. at 1583–84.

[201] Crush videos "feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. Crush videos often depict women slowly crushing animals to death 'with their bare feet or while wearing high heeled shoes,' sometimes while 'talking to the animals in a kind of dominatrix pattern' over '[t]he cries and squeals of the animals, obviously in great pain.'" Id. at 1583 (citations omitted).

[202] United States v. Stevens, 533 F.3d 218, 232, 235 n.16 (3d Cir. 2008) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

[203] *Stevens*, 130 S. Ct. at 1587.

held invalid was vast "judged in relation to the statute's" even arguably "legitimate sweep" (the ban on crush videos).

Stevens demonstrates the value of the overbreadth invalidation rule in free speech cases in light of the *Grace* problem. The Court saw that the Third Circuit's approach of applying the strict scrutiny hybrid decision rule to the entire statutory coverage—which could have invalidated the statute *in toto* under *Salerno*—was impractical unless the Court decided that strict scrutiny could apply even where some of the speech at issue was unprotected (or decided that all of the speech the statute covered was, in fact, protected). At the same time, the Court may not have wanted to confront the government's argument that crush videos were unprotected speech that could lawfully be banned. Of course, had the situation been materially different—for example, if both parties agreed that the statute only covered protected speech, as was the case in *Playboy*,[204] or a pure facial decision rule like the one the Court developed in *R.A.V. v. City of St. Paul* clearly applied to the statute[205]—then the case would have been much different. In that circumstance, the Court could have applied the appropriate decision rule to the entire statutory text and invalidated the statute under *Salerno*. Lacking that option, however, the Court resorted to the overbreadth invalidation rule and reached the same result, without having to tackle the thorny constitutional question regarding crush videos.

In sum, the Court may have developed the overbreadth invalidation rule for the Free Speech Clause because (1) the free speech decision rules created by the Court led to the *Grace* problem, which, in turn, largely eliminated the ability of courts to invalidate statutes imposing speech restrictions *in toto* under *Salerno*; and (2) the Court believed that *in toto* invalidation was important to protecting free speech. While the confluence of these two particular factors may not be required for the application of overbreadth to other constitutional provisions, what is required is the conclusion

[204] 529 U.S. at 827.
[205] 505 U.S. 377, 380 (1992).

by the Court that the *Salerno* invalidation rule is insufficient to enforce a particular constitutional provision.[206]

B. Overbreadth Beyond Free Speech Claims

After identifying the justification for applying the overbreadth invalidation rule to Free Speech Clause claims, one can begin to analyze whether overbreadth invalidation should also apply in other contexts. The Court has already hypothesized that overbreadth has been applied to other areas, although *sub silentio*.[207]

[206] Another possible basis for extending overbreadth to other contexts is that overbreadth should be permitted when the Court is already underenforcing constitutional norms. For instance, federalism is an underenforced constitutional norm, as the Supreme Court has applied few limits on Congress's enumerated powers—possibly because the Court cannot fashion a workable test for enforcing limits on Congress's enumerated powers, or because the Court wants to give Congress adequate powers to regulate the modern economy. Keller, supra note 89, at 53–57. Thus, allowing overbreadth challenges to statutes when Congress exceeds its enumerated powers could serve as "a second-best alternative for protecting federalism"—if the Court does not strengthen first-order substantive limits on Congress's enumerated powers. Id. at 56.

Because the Court's constitutional decision rules place few limits on Congress's enumerated powers, the Court will rarely find that Congress has exceeded these powers. But when the Court concludes—even under its lax decision rules—that Congress has exceeded its enumerated powers, it may be fair to presume that Congress has probably also exceeded its enumerated powers under the Court's more robust *meaning* of these constitutional provisions. Under this "where there's smoke, there's fire" approach, even if only part of a statute would be unconstitutional under an enumerated powers decision rule, the Court might presume that other parts of the statute may very well violate the Constitution. Thus, if a substantial portion of the statute is unconstitutional under an enumerated powers decision rule, the Court might invalidate the statute *in toto* using overbreadth as a presumption that other parts of the statute probably also violate the Constitution. This use of the overbreadth doctrine would also deter Congress ex ante from passing statutes that might exceed its enumerated powers.

In fact, *Sabri v. United States* claimed that the Court applied the overbreadth doctrine to challenges arising under Section Five of the Fourteenth Amendment. 541 U.S. 600, 609–10 (2004) (asserting that overbreadth applied in *City of Boerne v. Flores*, 521 U.S. 507, 532–35 (1997), and to challenges to "legislation under § 5 of the Fourteenth Amendment"). And Justice Kennedy's *Sabri* concurrence hinted that different invalidation rules may apply in the Commerce Clause context. Id. at 610 (Kennedy, J., concurring in part) ("The Court in Part III does not specifically question the practice we have followed in cases such as *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).").

[207] *Sabri*, 541 U.S. at 609–10 ("[W]e have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our

Justice Stevens further urged that something like an overbreadth invalidation rule should apply to *all* constitutional provisions, arguing that a statute should be struck down *in toto* if it lacks a "plainly legitimate sweep."[208] The Court has recently left open the question of whether Justice Stevens' view, that the Court should abandon the *Salerno* invalidation rule, should prevail for all constitutional provisions.[209]

If the Court is going to apply the overbreadth invalidation rule beyond the free speech context, it probably will not categorically abandon the *Salerno* invalidation rule. Instead, the Court is likely to take a cautious, constitutional provision-by-provision approach. This inquiry might take into account the text and history of the particular provision as well as the design and operation of the decision rules the Court has created or will create. In this Section, we explore how such an inquiry could proceed in an area that has received a lot of attention for applying overbreadth in high profile cases (abortion) and what the inquiry would look like in an unexplored area (Second Amendment challenges).

well-founded reticence."); id. at 610 (stating that the Court has allowed overbreadth challenges in "free speech," "right to travel," "abortion," and "§ 5 of the Fourteenth Amendment" cases).

[208] Troxel v. Granville, 530 U.S. 57, 85 (2000) (Stevens, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 740 & n.7 (1997) (Stevens, J., concurring) (saying the statute was not facially invalid because it had a "plainly legitimate sweep" under *Broadrick v. Oklahoma*'s overbreadth standard).

Some have disputed whether Justice Stevens' "plainly legitimate sweep" standard is different from the overbreadth standard. See, e.g., Sonnier v. Crain, No. 09-30186, 2011 WL 452085, at *3–6 (5th Cir. 2011) (Dennis, J., dissenting from the denial of panel rehearing) (on file with the Virginia Law Review Association), withdrawn, 634 F.3d 778 (5th Cir. 2011). Justice Stevens took the "plainly legitimate sweep" formulation directly from *Broadrick v. Oklahoma*'s articulation of the standard for overbreadth invalidation. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). It may be theoretically possible for a statute to have a "plainly legitimate sweep" while also having "substantial" overbreadth—such that the statute would survive a facial challenge under Justice Stevens' formulation, while failing an overbreadth challenge under *Broadrick*'s standard—but it seems unlikely that Justice Stevens really meant that the statute's legitimate sweep should be measured without reference to the statute's unconstitutional sweep. At the very least, Justice Stevens' "plainly legitimate sweep" test is simply another lax invalidation rule, more similar to overbreadth than to *Salerno*.

[209] United States v. Stevens, 130 S. Ct. 1577, 1587 (2010).

1. Abortion Overbreadth

When the Court first established that the Due Process Clause protects the right to an abortion in *Roe v. Wade*, it reasoned that because one has a fundamental right to a pre-viability abortion, strict scrutiny was the constitutional decision rule that should be used to adjudicate a substantive due process abortion claim.[210] *Roe* then proceeded with a strict-scrutiny analysis, which resulted in a secondary decision rule: a trimester framework under which states could only ban abortion in the third trimester unless the health of the mother was at stake.[211] Under this trimester framework, if the strict-scrutiny hybrid decision rule were applied to the entire statute, the statute could be invalidated *in toto* under *Salerno*'s no-set-of-circumstances test.[212] But then the Court altered its substantive due process abortion decision rule in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[213] *Casey* either scrapped the first-order strict-scrutiny decision rule or most of the second-order trimester framework—or perhaps both.[214] Whatever the basis for *Casey*'s switch, it replaced *Roe*'s trimester framework with a differ-

[210] See Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

[211] Id. at 164–65; see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) ("*Roe* established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.").

[212] See, e.g., Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 514 (1990) (upholding a law requiring minors to obtain parental consent before having an abortion, after quoting *Salerno*'s "no set of circumstances" test and recognizing that the parental consent provision could be constitutional in at least some applications).

[213] 505 U.S. at 872.

[214] See id. at 876 ("The trimester framework, however, does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.").

ent hybrid decision rule that was much harder to apply to an entire statute: the "undue burden" test.[215] The undue-burden decision rule directs courts to look at how the statute would function in the real world in particular cases, so it is unlikely to be easily applied to an entire statute's coverage and therefore lead to *in toto* invalidation under *Salerno*.[216]

In addition to altering the abortion decision rule—or, quite likely, *because* the Court altered this decision rule—*Casey* applied an overbreadth invalidation rule to strike down entire statutory provisions. By replacing *Roe*'s decision rule with the undue-burden hybrid decision rule, *Casey* limited the ability of courts to invalidate abortion regulations *in toto* because it would be much harder to satisfy *Salerno*. The *Casey* Court, however, essentially sustained an overbreadth challenge by invalidating an abortion regulation *in toto* even though it would have been constitutional in some of its applications under the undue burden inquiry.[217] The Court explained that an abortion restriction would be invalidated *in toto* if, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[218] This "large fraction" approach appears to be the overbreadth invalidation rule.[219]

Although *Casey* applied overbreadth, the Court did not say that it was doing so—until a decade later in the passing dicta of *Sabri v. United States*.[220] This, of course, caused much confusion. Some courts, looking to the substance of the *Casey* decision, believed the

[215] Id.

[216] See id. at 877 ("A finding of an undue burden is a shorthand for the conclusion that 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. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.").

[217] Dorf, supra note 38, at 275–76.

[218] *Casey*, 505 U.S. at 895.

[219] See Isserles, supra note 67, at 458 ("It seems rather hard to quarrel with the conclusion that *Casey* employed some version of the overbreadth doctrine in facially invalidating the spousal notification provision of the challenged statute.").

[220] 541 U.S. 600, 609 (2004).

"[Supreme] Court effectively overruled *Salerno* for facial challenges to abortion statutes,"[221] which the reader of this Article will understand as adopting the overbreadth invalidation rule for abortion substantive due process challenges. Other courts, however, correctly noted that "[d]espite the Supreme Court's clear application of the [abortion] undue burden standard in *Casey* . . . it has never explicitly addressed the standard's tension with *Salerno*."[222] Indeed, the confusion created by *Casey*'s analytical approach spawned a proxy war between Justice Scalia and Justice Stevens regarding the proper invalidation rule for constitutional challenges in general.[223]

More recent Supreme Court cases have not definitively settled whether overbreadth can be invoked in the abortion context. In *Ayotte v. Planned Parenthood of Northern New England*, a unanimous Court determined that a statute requiring written permission before a minor could obtain an abortion was unconstitutional as applied to minors who needed emergency abortions "to avert serious and often irreversible damage to their health."[224] The Court, however, did not invalidate the restriction *in toto* under *Casey*'s overbreadth approach, and the Court did not consider whether to invalidate the statute *in toto*—under *Salerno* or otherwise.[225] And in *Gonzales v. Carhart*, five Justices upheld the federal ban on partial birth abortions without directly answering whether overbreadth invalidation is permitted in the abortion context.[226] The majority explained that an "as-applied challenge" is "the proper manner to protect the health of the woman,"[227] but it also cited *Casey* and rec-

[221] Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995).

[222] Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 57 (1st Cir. 2004); see Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992) ("The *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision of the Pennsylvania Act, not in issue here . . . . Nevertheless, we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." (citations omitted)).

[223] See supra notes 38–40 and accompanying text.

[224] 546 U.S. 320, 328 (2006).

[225] Id. at 328–32.

[226] 550 U.S. 124, 147 (2007).

[227] Id. at 167.

ognized that "respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases."[228]

What considerations might the Court look to in definitively deciding whether to allow overbreadth invalidation in the abortion context? On one hand, *in toto* invalidation under *Salerno* appears to be almost impossible under *Casey*'s undue-burden hybrid decision rule. On the other hand, even though *Gonzales v. Carhart* expressly declined to determine whether *Casey*'s "large fraction" overbreadth test applied in the abortion context, it stated that "[t]he latitude given facial challenges in the First Amendment context is inapplicable here."[229] This indicates that the Court views the right to abortion as less in need of broad protections than those associated with free speech. Consequently, the Court may believe that the existing abortion decision rules sufficiently safeguard abortion due process rights, so there is no need to replace the *Salerno* invalidation rule with the overbreadth invalidation rule in abortion cases. Put another way, the Court may ultimately conclude that the threat of "chilling" abortion rights without overbreadth *in toto* invalidation is not of sufficient magnitude to justify abandoning *Salerno* for these sorts of challenges.

2. *Second Amendment Overbreadth*

Second Amendment decision rules are in their infancy, but a few circuits have already stated that overbreadth challenges should not be available for Second Amendment claims.[230] The problem with this view is that courts have conflated the decision rule with the invalidation rule. And in order to know whether the Supreme Court is likely to adopt an invalidation rule more permissive than *Salerno* for Second Amendment claims, one must necessarily examine what the Second Amendment decision rule will look like. As this Article has explained, the Court has created the overbreadth invalidation

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[228] Id. at 167–68 (citing *Casey*, 505 U.S. at 895).

[229] Id. at 167.

[230] See United States v. Barton, 633 F.3d 168, 172 n.3 (3d Cir. 2011); United States v. Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011); United States v. Chester, 628 F.3d 673, 687–88 (4th Cir. 2010) (Davis, J., concurring in the judgment); United States v. Skoien, 614 F.3d 638, 645 (7th Cir. 2010) (en banc); United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010).

rule in the Free Speech Clause context because (1) a plethora of free speech hybrid decision rules may apply to various parts of the same statute, making *in toto* invalidation under *Salerno* virtually impossible and (2) the Court is concerned that First Amendment rights will be chilled without *in toto* invalidation of laws that restrict too much protected speech.[231] But will these two rationales congeal to justify applying the overbreadth invalidation rule to Second Amendment claims?

In *District of Columbia v. Heller*, the Supreme Court recognized that the Second Amendment protects an individual's right to bear arms.[232] The Court, however, did not sketch out in any detail what sort of decision rules or invalidation rules will apply to Second Amendment claims. But it has provided a few clues. *Heller* suggested that heightened scrutiny will apply to statutes that burden Second Amendment rights.[233] Then, *McDonald v. Chicago* held that an individual's right to bear arms is a fundamental right, which typically triggers heightened scrutiny.[234] And heightened scrutiny generally refers to hybrid decision rules—for example, strict scrutiny or intermediate scrutiny.

In light of this minimal guidance, the federal courts of appeals are currently fashioning different Second Amendment decision rules and presumably the Court could adopt one or more of these rules. Most circuits have opted for a two-step inquiry that first asks whether a restricted activity is protected by the Second Amendment, and if so, whether that restriction survives some form of heightened scrutiny (such as strict scrutiny for core Second Amendment rights and intermediate scrutiny for non-core rights).[235] These circuits have acknowledged the parallel between

[231] See supra Part III.A.

[232] 554 U.S. 570, 634 (2008).

[233] Id. at 629 n.27 (explaining that the "rational basis" test "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms").

[234] See McDonald v. City of Chi., 130 S. Ct. 3020, 3042 (2010) ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

[235] Ezell v. City of Chi., 651 F.3d 684, 703–04 (7th Cir. 2011) (citing United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); *Chester*, 628 F.3d at 680; United States v.

these Second Amendment decision rules and free speech decision rules.[236] A split panel in the Ninth Circuit also adopted a two-step inquiry that applies some form of heightened scrutiny at the second step,[237] but its threshold inquiry appears to be some variant of the *Casey* undue burden decision rule, as opposed to a categorical test that classifies whether certain types of rights are protected by the Second Amendment.[238] A third possible Second Amendment decision rule is similar to *Casey*'s undue-burden test.[239]

While all of these approaches have their merits, one thing seems clear: courts appear unlikely to adopt any pure facial decision rule or hybrid decision rule that could readily apply to many statutes' entire scope. For example, assume the Court adopts the approach accepted by most circuits: a two-prong inquiry that first asks either whether the conduct is even protected by the Second Amendment (for example, a felon's right to bear arms probably would not be protected by the Second Amendment),[240] and if so, whether the requisite level of heightened scrutiny is satisfied. This constitutional decision rule looks a lot like the First Amendment's free speech inquiry, which acknowledges that some speech is categorically unprotected while subjecting various regulations of protected speech to varying levels of heightened scrutiny under different hybrid decision rules. Such a scheme would give rise to challenges that implicate multiple constitutional decision rules (for example, regulation of unprotected conduct is never a violation of the Amendment; regulation of protected conduct that does not impli-

Reese, 627 F.3d 792, 800–01 (10th Cir. 2010)); see also Andrew R. Gould, Comment, The Hidden Second Amendment Framework Within *District of Columbia v. Heller*, 62 Vand. L. Rev. 1535, 1562–75 (2009).

[236] See *Ezell*, 651 F.3d at 702 ("The Supreme Court's free-speech jurisprudence contains a parallel for this kind of threshold 'scope' inquiry."); *Chester*, 628 F.3d at 682–83.

[237] Nordyke v. King, 644 F.3d 776, 782–86 (9th Cir. 2011).

[238] Id. at 785.

[239] See Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1454 & n.39, 1461, 1472–73 (2009) (supporting an undue-burden test for Second Amendment claims).

[240] *Heller*, 554 U.S. at 625–24 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.").

cate a core Second Amendment right is subject to intermediate scrutiny; and regulation of protected conduct that implicates a core Second Amendment right is subject to strict scrutiny). This would result in a *Grace* problem, where a particular statute can implicate multiple decision rules and thus a litigant would almost never satisfy *Salerno*'s invalidation rule. Similarly, if the Court adopts a *Casey*-like undue-burden test, this inquiry would almost never lead to the conclusion that the statute is unconstitutional in *all* of its applications.

Does this mean that the Supreme Court is likely to apply the overbreadth invalidation rule to Second Amendment claims, because it will probably be hard for successful Second Amendment challenges to result in *in toto* invalidation under *Salerno*? Not necessarily. This is a complex judgment that will require the Court to determine whether the Second Amendment will remain underenforced if overbreadth does not apply in this context. This is a question for the Court, and this Article does not attempt to answer. The question about whether overbreadth should exist beyond the free speech context, however, becomes much clearer when one understands the fundamental differences and relationships between constitutional decision rules and invalidation rules.

CONCLUSION

The Supreme Court has a difficult job. It must maintain fidelity to the Constitution's text and adequately enforce the Constitution consistent with institutional limitations of courts. In grappling with these goals, the Court has designed various decision rules that allow courts to determine whether the Constitution has been violated in complex cases, as well as invalidation rules that tell courts when a constitutional violation is serious enough to justify striking down the underlying statute *in toto*. Rosenkranz's recent scholarship furthers the laudable goal of basing constitutional doctrines on the Constitution's text. But his approach to facial and as-applied challenges perpetuates the problem of failing to explain properly the relationship between constitutional decision rules and invalidation rules. In contrast, our analysis of these concepts—as well as the related concepts of pure facial versus hybrid decision rules, and *Salerno* versus overbreadth—synthesizes existing Supreme Court

precedent and allows for a more robust discussion of how those doctrines should develop.