Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto: An Alternative To Rosenkranz’s Approach To Facial, As-Applied, And Overbreadth Adjudication

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Abstract

Nicholas Rosenkranz has recently proposed a model of judicial review for dealing with facial and as-applied challenges. This model argues that “facial” challenges necessarily apply to suits against legislative actions and, where successful, lead to total invalidation of the statutory provision at issue; whereas “as-applied” challenges are as-executed challenges to executive conduct and can only lead to vindication of the litigant’s rights in the case at issue. This Article explains that there is a fundamental flaw in Rosenkranz’s approach—a flaw often repeated by other scholars and that has caused serious confusion among judges: the failure to differentiate 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). In addressing this flaw, this Article analyzes the complex relationship between constitutional decision rules and invalidation rules. Understanding this relationship provides answers to questions that have long puzzled courts and commentators, including why there are both as-applied and facial commerce clause challenges and the significance of these doctrines to the pending litigation regarding the Affordable Care Act’s individual mandate.

The Article also uses the relationship between decision rules and invalidation rules to provide a novel explanation for the Court’s adoption of overbreadth doctrine under the First Amendment’s Free Speech Clause. The Article explains that overbreadth is merely a different invalidation rule that became necessary because the Court’s First Amendment decision rules proved insufficient. Understanding that insufficiency of decision rules is what drove the Court to adopt overbreadth provides an extremely useful template for determining whether overbreadth should be made available in controversial and high-stakes areas of law such as abortion and the Second Amendment.

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The views expressed in this article are our own, and are not the views of Justice Kennedy, any other Supreme Court Justice, the law firms of Yetter Coleman LLP or Gibson, Dunn & Crutcher LLP, or any other attorneys at the law firms of Yetter Coleman LLP or Gibson, Dunn & Crutcher LLP. We would like to thank Mitch Berman, Jonathan Bond, Josh Deahl, Chris Fonzone, Steven Horowitz, Allon Kedem, Sarah Kohrs, Nicholas Rosenkranz and Eugene Volokh for extremely helpful comments on earlier drafts.
Nicholas Rosenkranz’s groundbreaking articles, *The Subjects of the Constitution*[^3] and *The Objects of the Constitution,*[^4] propose a new model of judicial review, in which courts considering constitutional challenges should first determine who has violated the Constitution.[^5] While Rosenkranz’s insightful framework could influence many doctrines of constitutional law, such as ripeness,[^6] standing,[^7] severability,[^8] incorporation,[^9] and possibly even substantive decision rules,[^10] his approach may have its most profound impact on the way courts and commentators view facial and as-applied challenges.[^11] Indeed, the U.S. Court of Appeals for the Seventh Circuit has already quoted Rosenkranz’s discussion of facial challenges.[^12]

According to Rosenkranz’s theory, “a ‘facial challenge’ is nothing more nor less than a claim that Congress (or a state legislature) has violated the Constitution,”[^13] and “[i]t makes no sense to speak of ‘as-applied’ challenges to legislative actions.”[^14] 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,”[^15] and “the merits of the constitutional claim cannot turn at all on the facts of enforcement.”[^16] In contrast,


[^5]: *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?”).


[^7]: *Id.* at 1246-48.

[^8]: *Id.* at 1248-50.


[^10]: See, e.g., Rosenkranz, *Subjects, supra* note 3, at 1279 (“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.”).

[^11]: See, e.g., *id.* at 1230-35.


[^14]: *Id.* at 1236 (emphasis omitted).

[^15]: *Id.* at 1238.

[^16]: *Id.* at 1236.
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.”

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 differentiate 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 this distinction is critical, we focus upon the overlooked fact that modern constitutional adjudication proceeds in two distinct steps. 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 the 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 decision 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 (1) 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 (2) the remedy (that is, invalidation of a statute in toto, also known as invalidation of a statute “on its face”). Rosenkranz assumes that if the statute’s text is the object of the inquiry under, 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 or precedent.

In practice, the Supreme Court has created some decision rules that examine the statutory text passed by Congress and can only result in in toto invalidation; some decision rules that look only to the statute’s text but only result in in toto invalidation in some circumstances; and some decision rules that consider how the executive enforced the statute and only rarely result in toto invalidation. In addition, the Court has also created a remedial doctrine known as overbreadth, which requires in toto invalidation in more circumstances than the Court’s default invalidation rule. This Article aims to show that it is the complex interaction between constitutional decision rules and invalidation rules that leads to confusion about facial, as-applied and overbreadth challenges.

Part I begins by reviewing the Supreme Court’s often inconsistent and incomplete treatment of facial, as-applied and overbreadth challenges and demonstrates how these mechanisms continue to cause confusion among lower courts and commentators. This

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17 Id. at 1239.
Part closes with a discussion of Rosenkranz’s attempt to clear up this confusion by arguing 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, which track 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.

Section 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 Section 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’s text is unconstitutional, and in those instances, the proper remedy is only partial invalidation; at the same time, these rules also allow a finding that satisfies Salerno in some circumstances. The prevalence of such hybrid decision rules—especially the well-known tiers-of-scrutiny decision rules—calls into serious question the explanatory value of Rosenkranz’s theory. Section II.B.3 explores the interaction between Salerno and enforcement decision rules. This Section 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 III.C applies the principles developed in the Article to the contested area of Commerce Clause jurisprudence. This Part 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 on-going litigation regarding the individual mandate in the Affordable Care Act, and hypothesizes some decision rules the Court may ultimately use to decide that challenge.

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 the stricture of 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 Court believes that its free speech decision rules underenforce the Free Speech Clause because they make it very difficult to satisfy the Salerno invalidation rule. More specifically, many statutes that restrict speech will cover some wholly unprotected speech, so it is often not possible to apply the strict scrutiny (and intermediate scrutiny) decision rule to the entire statute.

This, in turn, makes it virtually impossible for many litigants to satisfy the *Salerno* invalidation rule. It is because the Supreme Court has determined that the practical inability to invalidate statutes *in toto* is a serious problem for First Amendment values that it has decided to turn to overbreadth invalidation.

Finally, Section III.C explains how this novel understanding of overbreadth applies to the controversial areas of abortion and Second Amendment challenges. The analysis in this Section abstracts away from the controversial questions of what decision rules should apply and 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, without doing much to clarify this morass. This is quite astounding considering that many of the Court’s high-profile cases have turned on disputes over the intricacies of these doctrines.\(^{19}\) Although the stakes over the interaction between these doctrines are high, the Court has provided little guidance. 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.\(^{20}\) But it took the Supreme Court a long time to start

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\(^{20}\) 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) (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
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.\(^{21}\) The phrase “facial challenge” did not appear in the U.S. Reports until 1971, in a separate opinion by Justice White.\(^{22}\) Justice White appeared to use the phrase “facial challenge” interchangeably with an inquiry into whether a statute was constitutional “on its face.”\(^{23}\) 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.\(^{24}\)

During the following decade, the Court used the phrase “facial challenge” sparingly and without controversy.\(^{25}\) The imprecise use of the phrase “challenge,” though, was the precursor to the current confusion over facial, as-applied, and overbreadth challenges.\(^{26}\) 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.”\(^{27}\)

The Court first attempted to define the standard for a successful facial challenge in 1982, in *Village of Hoffman Estates v. Flipside*.\(^{28}\) *Hoffman Estates* distinguished between facial challenges and First Amendment overbreadth challenges.\(^{29}\) Under the

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22 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 3, at 1232 & n.69.

23 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.”).


29 See id. at 494 (“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.”).
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. 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 applications.” 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, in the watershed case of 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.” Salerno contrasted this facial challenge standard with the free speech overbreadth challenge standard.

Shortly after Salerno, the Court adjudicated a series of high-profile abortion cases starting with Planned Parenthood of Southeastern Pennsylvania v. Casey. As this article will explain later, Casey changed the Court’s abortion constitutional decision rule in such a way that made challenges to abortion restrictions unlikely to satisfy Salerno’s standard for in toto invalidation, which 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


31 Hoffman Estates, 455 U.S. at 494. 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”).

32 One year after Hoffman Estates, there was a minor dispute about facial challenges in Kolender v. Lawson. 461 U.S. 352 (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 Id.

35 Planned Parenthood of Se. Pa. v. Casey, 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 majority for failing to apply Salerno).

36 See infra Section III.B.I.
facial challenges—in all cases, not just abortion cases. Justice Stevens even argued that the standard for facial challenges should be replaced with the standard for overbreadth challenges. 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. 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.

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. 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.” 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. This articulation, though, seems to raise more questions than answers. After all, a “facial” challenge has also referred to applying a constitutional decision rule that looks at the face of a statute, but a court can 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 challenge. As one Fifth Circuit judge recently noted, “[c]ontroversy among Supreme Court Justices and doubt among lower courts regarding the ‘no set of circumstances’ language has persisted since that phrase first appeared in *United States v. Salerno*.44 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 standard for whether a statute can be invalidated in toto,45 while the deciding vote on the Sixth Circuit relied heavily on *Salerno* to uphold the law.46

A canvassing of the circuit opinions since just 2010 confirms that courts remain hopelessly befuddled in this area. Some have confidently applied the *Salerno* standard for in toto invalidation,47 while others have held that this standard remains open.48 One court suggested that facial challenges are “discouraged,”49 while another explained that “[a]lthough there is judicial disfavor of facial challenges, there is no proscription on such challenges.”50 One court said that “[i]n recent years, the Supreme Court has sharply

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43 Doe v. Reed, 130 S. Ct. 2811, 2817 (2010).

44 Sonnier v. Crain, 613 F.3d 436, 463 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part).

45 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*.”).

46 Thomas More Law Ctr. v. Obama, ___ F.3d ___, 2011 WL 2556039, at *30 (6th Cir. 2011) (Sutton, J., concurring in the judgment); see also infra Section II.C.2.

47 Sonnier v. Crain, ___ F.3d ___, 2011 WL 452085, at *1-2 (5th Cir. 2011) (per curiam) (order denying petition for panel rehearing); Faculty Senate of Fla. Int’l Univ. v. Winn, 616 F.3d 1206, 1208 n.4 (11th Cir. 2010) (per curiam).

48 United States v. Comstock, 627 F.3d 513, 518-19 (4th Cir. 2010); Lozano v. City of Hazelton, 620 F.3d 170, 202 n.25 (3d Cir. 2010); Int’l Women’s Day March Planning Committee v. City of San Antonio, 619 F.3d 346, 355-56 (5th Cir. 2010); GE Co. v. Jackson, 610 F.3d 110, 117 (D.C. Cir. 2010).

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

50 Educational Media Co. v. Swecker, 602 F.3d 583, 588 n.3 (4th Cir. 2010).
distinguished between facial and as-applied challenges, stringently limiting the availability of the former,"\textsuperscript{51} whereas multiple Fifth Circuit opinions have cited the Supreme Court’s recent \textit{Citizens United v. FEC} opinion as evidence that there is no sharp line between facial and as-applied challenges.\textsuperscript{52} The Second Circuit wondered whether “the identified test” for prevailing on “a facial challenge” is “only a variation on as-applied analysis.”\textsuperscript{53} A split panel of the Ninth Circuit tried to reconcile overbreadth challenges, \textit{Salerno}, and strict scrutiny, but with little success.\textsuperscript{54} And a split panel of the Fifth Circuit disputed the interaction between \textit{Salerno}, its alternatives, and intermediate scrutiny—\textit{three times} in the same case (once in the panel opinion,\textsuperscript{55} then in an opinion denying panel rehearing,\textsuperscript{56} and again in an opinion granting panel hearing in part\textsuperscript{57}). The dissenting judge also argued that Justice Stevens’ “plainly legitimate sweep” test for facial invalidity is different from overbreadth and \textit{Salerno}.\textsuperscript{58}

Scholars have attempted to sort out this confusion with only limited success. The foundational work for virtually all of these commentaries is Henry Monaghan’s “valid rule requirement” theory. Under this theory, all individuals have the right to be free from being subject to unconstitutional laws and can argue against application of unconstitutional laws to their conduct, even if their conduct could be banned by a different, perfectly constitutional law.\textsuperscript{59} Monaghan expounded this theory in his explanation of 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.\textsuperscript{60} On this reading, overbreadth is part of the First

\textsuperscript{51} IMS Health Inc. v. Mills, 616 F.3d 7, 24 n.19 (1st Cir. 2010).

\textsuperscript{52} In re Cao, 619 F.3d 410, 439 (5th Cir. 2010) (en banc) (Jones, C.J., concurring in part and dissenting in part) (“the line between facial and as-applied challenges is not well defined”); 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 \textit{Citizens United v. FEC} has contradicted the erroneous idea that there is one single test for all facial challenges.”).

\textsuperscript{53} United States v. Farhane, ___ F.3d ____, 2011 WL 338054, at *7 (2d Cir. 2011).

\textsuperscript{54} United States v. Alvarez, 617 F.3d 1198, 1215-18 (9th Cir. 2010); \textit{id.} at 1235 (Bybee, J., dissenting).

\textsuperscript{55} Sonnier v. Crain, 613 F.3d 436, 443-49 (5th Cir. 2010); \textit{id.} at 449-70 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part).

\textsuperscript{56} Sonnier v. Crain, ___ F.3d ____, 2011 WL 452085, at *1-2 (5th Cir. 2011) (per curiam); \textit{id.} at *2-6 (Dennis, J., dissenting from the denial of panel rehearing).

\textsuperscript{57} Sonnier v. Crain, ___ F.3d ____, 2011 WL 635873 (5th Cir. Feb. 23, 2011) (per curiam); \textit{id.} (Dennis, J., concurring in part and dissenting in part).

\textsuperscript{58} \textit{Sonnier}, 2011 WL 452085, at *3-6 (Dennis, J., dissenting from the denial of panel rehearing).


\textsuperscript{60} \textit{Id.} at 24
Amendment’s substantive requirements—that is, part of its “valid rule” rule that requires a certain degree of perception in statutory drafting. 61

Perhaps the most complete synthesis of facial and as-applied challenges—derived from Monaghan’s “valid rule” theory—comes from Richard Fallon. 62 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 applied in as-applied litigation. Under this view, “the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge,” but the consequence of that as-applied challenge can be in toto invalidation. 63 Indeed, Fallon argues that the nature of the underlying test—as applied to a particular litigant—will always determine whether “the statute is found unconstitutional solely as applied, in part, or in whole.” 64 For Fallon, these decision rules are a rich tapestry that reflects different constitutional values and defies any one-size-fits-all characterization. 65

Fallon’s thesis benefited greatly from the groundbreaking work of Mark Isserles, who diagnosed that some decision rules measure statutes on their faces and thus always lead to “facial” invalidation of statutes. 66 Isserles argued that there are two kinds of “facial” challenges: (1) overbreadth challenges that proceed by accumulating a certain number of unconstitutional applications and (2) “valid rule facial rule 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. 67

Fallon’s thesis was, in many ways, a response to the work of Matthew Adler. 68 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 thing as constitutional rights, per se, but rather only “rights against rules”—such that, much as under Monaghan’s theory, every litigant has the right not to have an unconstitutional law

61 Ibid.


63 Id. at 1321.

64 Id. at 1339.

65 Ibid.


67 Id. at 363-64, 386.

68 Fallon, supra note 62, at 1366-68.
applied against him even if he could have been sanctioned under some other law for the same conduct. 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 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.” Adler then posited that the choice between in toto and partial invalidation is a moral one, which weighs the costs and benefits of invalidating the law versus “revising” it while leaving the remainder intact.

The latest contributor to this dialogue about facial, as-applied, and overbreadth challenges is Nicholas Rosenkranz. Rosenkranz urges the adoption of a model where the availability of facial or as-applied challenges turns on the governmental actor that can violate the constitutional provision raised by the litigant. 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. For example, because the First Amendment is a prohibition against Congress making a particular time of law (“Congress shall make no law . . .”), any inquiry under the First Amendment is “facial.” On the other hand, 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. Thus, because the Fourth Amendment’s prohibition against unreasonable searches and seizures only limits execution action, any challenge under that amendment is “as-applied” challenge—or, more accurately, an “as-executed challenge.” As to overbreadth, Rosenkranz argument followed closely on Monaghan’s, noting that overbreadth invalidation was appropriate under the First Amendment because any law that violated the First Amendment had to be struck down on its face.

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70 Id. at 125.

71 Id. at 126-27.

72 Rosenkranz, Subjects, supra note 3, at 1221.

73 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.”).

74 Id. at 1239.

75 Id. at 1240-42, 1249-50

76 Id. at 1252-55.
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 Issereles properly identified as the decision rules the Court uses to determine whether the Constitution had 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 courts decide constitutional questions relating to facial, as-applied, and overbreadth doctrines. The goal of this article is to put forward just such an 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. In addressing the former inquiry, the U.S. Supreme Court sometimes has discussed whether a defect can be found simply by examining the “face”—that is, the plain text—of a statute. 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.

77 Cf. Beeman & Pharm. Servs., Inc. v. Anthem Prescription Mgmt., LLC, ___ F.3d ___, 2011 WL 2803561, at *7 (9th Cir. 2011) (noting that defendant had to satisfy Salerno’s no-set-of-circumstances test for in toto invalidation applied 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.”).

78 See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (examining “face of the statute” to determine its purpose); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (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 rules 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, 585 (1931) (“The statute on its face makes no distinction between common carriers and a private carrier such as the appellant.”).
The identification of constitutional defects is guided by what Lawrence Gene Sager and Mitchell N. Berman identified as “constitutional decision rules.” 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 and facial challenges. 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 therefore was correct to recognize that 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. 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 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. 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 properly distinguish the object of the relevant constitutional decision rule from the remedial question of whether to invalidate a statute in toto. According to Rosenkranz: (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. Not so. As this Part will show, the Supreme Court has created decision rules under which a court can find that the face of the statute constitutionally covers some conduct but unconstitutionally 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

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81 See Rosenkranz, *supra* note 3, 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.”).


83 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.”); id. at 1249 (“Matters are 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.”).
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 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 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. The more precise question is whether a particular actor violated the Constitution—in the active voice. 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. 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 Court’s interpretation of the Constitution and constrain lower courts as they adjudicate constitutional disputes. The Equal Protection Clause provides an apt illustration. The text of this Clause provides: “nor shall any State... deny to any person

84 Rosenkranz, supra note 3, at 1230.
85 Id.
86 See, e.g., Richard H. Fallon, Jr., The Supreme Court, 1996 Term—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.”).
87 There are a few rules explicitly in the Constitution, such as the age requirements for being a member of the U.S. House of Representatives (25 years old), a member of the U.S. Senate (30), or President (35). U.S. Const. art. I, §2, c.2; id. art. I, §3, cl. 3; id. art. II, §1, cl. 4. But even those rules sometimes can require judicial interpretation to formulate a complete decision rule—for instance, on what date should one’s age be calculated for these requirements (the date of the election, the date of taking office, etc.)?
88 See Sager, supra at 79, at 1213; Berman, supra at 79, at 4-18. In creating these decision rules, the Court may be explicitly or implicitly underenforcing or overenforcing the textual constitutional guarantees. Sager, supra, at 1218; Scott A. Keller, How Courts Can Protect State Autonomy from Federal Administrative Encroachment, 82 S. Cal. L. Rev. 45, 53-59 (2008).
within its jurisdiction the equal protection of the laws.” In crafting its decision rule for enforcing this Clause, the Supreme Court has created rules based upon tiers of scrutiny, such as “strict scrutiny,” “intermediate scrutiny” and “rational basis” review. 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 the due process of law”—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 \textit{Mathews v. Eldridge} balancing test, 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.

As Rosenkranz properly 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). One might be tempted to call the latter “as-applied decision rules” as a quick way of distinguishing between facial and as-applied challenges.

\textbf{Textual Decision Rules.} The 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. 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.

\ \footnote{89 U.S. CONST. amend. XIV, §1.} \footnote{90 See generally City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Scott A. Keller, \textit{Depoliticizing Judicial Review of Agency Rulemaking}, 84 WASH. L. REV. 419, 459–462 (2009).} \footnote{91 U.S. CONST. amend. XIV, §1.} \footnote{92 See \textit{Mathews v. Eldridge}, 424 U.S. 319, 335 (1976) (“\textit{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”).} \footnote{93 Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (plurality opinion)).} \footnote{94 See Rosenkranz, \textit{Subjects}, supra note 3, at 1238.} \footnote{95 Monaghan, \textit{supra} at 59, at 9.
Scholars like Fallon\(^{96}\) and Isserles\(^{97}\) 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:\(^{98}\)

- **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,” and (3) “those activities that substantially affect interstate commerce.”\(^{99}\)

- **Executive discretion to punish speech**: Under the First Amendment, the legislature may not enact a statute that gives executive branch officials too much discretion to punish or penalize speech.\(^{100}\)

- **Impermissible purpose to promote religion**: Under the First Amendment, a legislature may not enact a statute with the actual purpose to advance religion.\(^{101}\)

- **Intrusion on constitutional authority**: Under the Constitution’s separation-of-powers requirements, Congress may enact a statute that eliminates a constitutionally-protected power or responsibility possessed by a branch of government.\(^{102}\)

- **Racial classifications**: Under the Equal Protection Clause, a legislature may not enact a statute that classifies by race, unless the classification survives strict scrutiny—\textit{i.e.}, it is aimed at achieving a compelling government interest and is narrowly tailored to that end.\(^{103}\)

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 will choose to enforce these laws—or even how the law is enforced in the present case—is irrelevant. For instance, assume the President brings a

\(^{96}\) Fallon, \textit{supra} note 62, at 1344-46.

\(^{97}\) Isserles, \textit{supra} note 66, at 361.

\(^{98}\) 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.


\(^{100}\) Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Police Dep’t v. Mosley, 408 U.S. 92, 102 (1972).


prosecution against a pastor for engaging in animal sacrifices under a statute that Congress enacted with the goal of suppressing a particular religion. Even if the President’s subjective motivation was not to restrict that particular religion, and even if the conduct at issue could be prohibited under a statute that was not motivated by religious animus, 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 ban the conduct at issue, but rather with whether the relevant actor violated the Constitution in acting the way it did. It is thus modeled after Monaghan’s valid rule requirement and Adler’s rights-against-rules.\footnote{Monaghan, \textit{supra} at 59, at 8-9; Adler, \textit{supra} note 69, at 37-38; Rosenkranz, \textit{supra} note 21, at 1235-38.}

\textit{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.\footnote{See Rosenkranz, \textit{Subjects, supra} note 3, 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, \textit{Objects, supra} note 4, at 1034 (“Searches and seizures are paradigmatic executive actions.”).} The Court has held that whether a government actor violates the Fourth Amendment by conducting a “\textit{Terry} stop” turns on whether police had “reasonable suspicion” to conduct the stop.\footnote{\textit{Terry v. Ohio}, 392 U.S. 1, 27 (1968).} 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 Process Clause.\footnote{\textit{BMW of N. Am., Inc. v. Gore}, 517 U.S. 559, 574-75 (1996).} 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.\footnote{See Rosenkranz, \textit{Subjects, supra} note 3, at 1241.}

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”).\footnote{Fallon, \textit{supra} note 62, at 1366-68.} Contrary to Alder, some rules really do look to how the executive or judicial branches apply their discretion to 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.  

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

More often, when courts speak of “facial challenges,” they are 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. However, as Adler recognized, to determine whether a successful challenge under a constitutional decision rule always requires the entire statute to be invalidated one must move beyond examining the merits of the constitutional challenge, and to consider the remedy that the court will order after finding that the relevant constitutional actor has violated the constitution.  

In this Section, we explain the Court’s default invalidation rule under United States v. Salerno and then analyze how that invalidation rule interacts with the decision rules discussed in the prior section.

1. Salerno: The Default Invalidation Rule

United States v. Salerno provides the most often cited articulation of the standard for determining whether a court should invalidate a statute in toto—or “on its face.” 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.” Salerno’s articulation of when a court should strike down a statute in toto can be a bit misleading, as courts generally will not analyze every possible discrete as-applied challenge to 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. 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.”


11 Adler, supra note 69, at 125-28.


13 481 U.S. at 745.

14 Id. (emphasis added).

15 Isserles, supra note 66, at 364.

16 Salerno, 481 U.S. at 745.
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, but stands in stark contrast to Rosenkranz’s conception of a facial challenge. At its core, Salerno’s test for in toto invalidation is grounded in judicial restraint or minimalism. Salerno allows courts to leave a statute in effect while declaring 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.”

Critically, Salerno’s standard for in toto invalidation is not a substantive constitutional decision rule—it provides no guidance into whether the relevant governmental actor violated the Constitution. Instead, it is a prudent and cautious remedial rule that informs courts when they should invalidate statues. 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

117 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.”).

118 See generally Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 6 (1996) (introducing the concept of “judicial minimalism”—“the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided”).

119 Commentators have suggested that when a court finds a statute unconstitutional in part, it implicitly uses severability doctrine. See, e.g., David H. Gans, Severability as Judicial Lawmaking, 76 Geo. Wash. L. Rev. 639, 655 (2008). Fallon would say that the Court severs a subrule—a portion of the statutory rule—that encompasses all the unconstitutional applications. See, e.g., Fallon, supra note 62, at 1334-35. Regardless of what one calls what the Court has done, it reaches the same result as the analysis put forth in this Article. We are unsure, however, whether severance can apply as a logical matter when a court holds a statute’s undifferentiated text unconstitutional in part. The Court’s typical severance doctrine has referred to whether additional textual portions of statues should also be excised in light of the Court’s holding that a related textual provision is facially unconstitutional. See, e.g., Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138, 3161-62 (2010); Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 328–329 (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”). Where the Court finds a statute’s undifferentiated text unconstitutional in part, is likely enjoining its application to a portion of the statute’s coverage without severing anything. After all, there would be no statutory text to “sever.”

applications of that statute, courts—in discharging their 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 a bit oversimplified.\(^\text{121}\) The constitutional decision rule is obviously 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 struck down is a function of the invalidation rule the Court chooses to adopt, which is just as much a function of the Court’s proper view of constitutional adjudication 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.”\(^\text{122}\) Indeed, in a later section 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.\(^\text{123}\) 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 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 must 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 statute’s coverage and the nature of the decision rule’s inquiry. Such hybrid rules present an insuperable obstacle to Rosenkranz’s theory.

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’ model—when combined with the Salerno decision rule—provides an adequate account of constitutional adjudication.

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

\(^{121}\) Fallon, supra note 62, at 1339.

\(^{122}\) Adler, supra note 69, at 128.

\(^{123}\) See infra Part. III.
motivations that pervade all possible subrules through which the statute might be specified.”  

124 Fallon, supra note 62, at 1345.

For instance, if the legislature enacted a statute for the express purpose of advancing a religion, 125 this facial defect will be present in any possible circumstance this statute covers under the so-called Lemon test. Or if a statute violates the Court’s decision rule regarding giving the executive too much discretion to punish speech, 126 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; or, put another way, “no set of circumstances exists under which the Act would be valid.” 127

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 always requires a ruling that “no set of circumstances exists under which the Act[s] would be valid.” 128 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. 129

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

Hybrid Decision Rules. Rosenkranz argues that when a court finds a constitutional defect by examining a statute’s text—and thus finds that Congress violated the Constitution by enacting the statute—the court is then required to invalidate the statute in whole. 130 However, as Fallon has noted, 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

124 Fallon, supra note 62, at 1345.

125 See supra note 101 and accompanying text.

126 See supra note 100 and accompanying text.


129 See, e.g., Aptheker v. Secretary 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.”).

130 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.”); see id. at 1248 n.139 (“This suggest that ordinary severability doctrine should not apply when Congress (or a state legislature) is the subject of the constitutional claim.”).
coverage invalid. These decision rules are a staple in Supreme Court jurisprudence and thus must be part of any comprehensive account of the Court’s approach to constitutional adjudication.

Hybrid decision rules have two distinctive features: (1) they are still textual decision rules, so—like pure facial decision rules—they direct courts to examine the statute’s text; but (2) unlike pure facial decision rules, they can lead to either in toto or partial invalidation (sometimes referred to as as-applied invalidation). The most common 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 the methods that the legislature used and the purpose it aimed to achieve. 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 to a particularly problematic portion of the statute’s coverage. The portion of the statute that the decision rule is applied to depends on the arguments the parties make and the relevant sub-categories under the statutory text that the parties and the court identify.

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 a compelling governmental interest. Under this

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131 See Fallon, supra note 62, at 1344.

132 The difference between pure facial and hybrid decision rules also explains the confusion over Congress’ 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, which could only function if it measured the statute’s entire coverage and scope against the constitutional violation Congress identified. Indeed, the Court’s initial cases applying the congruence-and-proportionality test examined a statute’s entire coverage. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

However, in Tennessee v. Lane, 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 (2004). In Lane, Title II of the Americans with Disabilities Act prohibited all discrimination 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. 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 its 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.

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.\textsuperscript{134} If the statute’s entire coverage fails this decision rule, the \textit{entire statute} fails that decision rule and would thus be invalid in all of its applications under \textit{Salerno}. The Court has applied the strict scrutiny decision rule in this way in numerous cases, most recently in \textit{Arizona Free Enterprise Club’s Freedom Club PAC v. Bennet},\textsuperscript{135} where the Court struck down, \textit{in toto}, a statute that gave additional funds to publicly-funded candidates whose opponents spent additional funds against them in an election campaign.

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\textsuperscript{136}:

- \textit{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.\textsuperscript{137} \textit{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.\textsuperscript{138} \textit{MCFL}, however, left the rest of the statute on the books, and the Court later ruled that the government had a sufficient interest that justified the rest of the statute.\textsuperscript{139}

- \textit{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 issue ads because the government lacked a compelling interest in prohibiting issue advocacy.\textsuperscript{140}

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\textsuperscript{134} See, e.g., \textit{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).

\textsuperscript{135} ___ S.C. ___ (2011).


\textsuperscript{138} \textit{Id.} at 260–61.


\textsuperscript{140} 551 U.S. 449, 457 (2007) (plurality opinion).
• 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.¹⁴¹

Rosenkranz’s framework cannot account for these types of cases that apply a tiers-of-scrutiny analysis to only a portion of a statute’s coverage. In such cases, he would leave courts with only two choices: (1) strike down the entire statute in toto, even though the magnitude of Congress 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.¹⁴² Put another way, because Rosenkranz does not disaggregate the notions of textual evaluation and 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.¹⁴³

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 look to fact-specific and case-specific issues. In this way, these rules generally lead to what Courts and commentators call as-applied challenges and this view of enforcement decision rules fits squarely within Rosenkranz’s theory.


¹⁴² Rosenkranz, supra note 3, 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.”); id. (“ordinary severability doctrine should not apply when Congress (or a state legislature) is the subject of the constitutional claim”).

¹⁴³ 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 plaintiffs’ particular case, but challenges application of the law more broadly to all referendum petitions.”).
Rosenkranz’s theory as to these sorts of 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 those 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 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. This is not necessarily because the Court rejects (or has even contemplated) Rosenkranz’s notion 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 enforced under those rules, that statute should be struck down in whole.  

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. More accurately stated, *Salerno* represents a wise and prudent invalidation rule, in which the Court determined that any statute that cannot 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 President authority to conduct *Terry* stops without reasonable suspicion in Washington D.C. Such stops are 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. 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. However, when the legislature 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

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145 Isserles, supra note Error! Bookmark not defined., at 364.

146 See supra notes 105-106 and accompanying text.
since no “unreasonable search” has yet taken place, a statute can still be invalid in toto under the Fourth Amendment due to Salerno.\footnote{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, 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, \textit{Objects}, supra note 4, at 1028-33. Even accepting Rosenkranz’s view as to this Amendment’s object is the Executive, if Congress passed a law authorizing that the Executive could 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 to declare the statute was invalid in toto under Salerno because the statute authorize the Executive to engage in only unconstitutional conduct.}{147}

This explains why the Supreme Court in \textit{Marshall v. Barlow’s, Inc.} held that a statute was invalid in toto under the Fourth Amendment.\footnote{436 U.S. 307 (1978).}{148} In \textit{Marshall}, Congress passed a statute authorizing the Secretary of Labor to search certain employment facilities without a warrant.\footnote{Id. at 309.}{149} The Court held that “the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent.”\footnote{Id. at 325.}{150} 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.\footnote{Id. at 315-17.}{151} 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 \textit{Marshall}.\footnote{Rosenkranz, \textit{Subjects}, supra note 3, at 1240.}{152} It appears Rosenkranz would assert that \textit{Marshall} should have ruled only that the Secretary of Labor violated the Fourth Amendment by searching the plaintiff’s workplace without a warrant. Such a holding, 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.\footnote{The distinction between decision rules and invalidation rules also demonstrates that the Court is oversimplifying matters when it declares that “facial challenges to legislation are generally disfavored.” FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (plurality opinion), quoted in Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998); see Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008) (“Facial challenges are disfavored . . . .”), quoted in Citizens United v. FEC, 130 S. Ct. 876, 932 (Stevens, J., concurring in part and dissenting in part); City of Chicago 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”); \textit{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 creates the least basis for a broad invalidation remedy. \textit{See Grange}, 552 U.S. at 450 (internal quotation marks omitted) (quoting}{153}
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. Perhaps the most important context in which this distinction matters is the Commerce Clause, which has perplexed courts and commentators. Rosenkranz, agreeing with some commentators,\(^{154}\) has argued that any successful challenge based on Congress’s enumerated powers must result in invalidating a statute in toto.\(^{155}\) However, disaggregating the object of the decision rule from the invalidation rule 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 reinvigorated the Commerce Clause in *United States v. Lopez*, it established the following hybrid decision rule: In order for Congress to invoke its power under the Commerce Clause, it can only regulate either (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce,” and (3) “those activities that substantially affect interstate commerce.”\(^{156}\) This is a hybrid

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Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), in turn quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (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 clear that the statute should be invalidated in toto under a pure facial decision rule—even if the challenger also has a decent 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 want to encourage in toto invalidation in certain areas. See David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1337 (2005) (“strategic 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 probably will conduct a cost-benefit analysis to determine which claim it should address first. A court may would 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 (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.”).


\(^{155}\) Rosenkranz, *Subjects*, *supra* note 3, at 1273-1281.

decision rule because a statute’s entire undifferentiated text may fall outside these three categories (and therefore be invalid in toto under Salerno), or only part of a statute’s text may fall outside these categories, in which case the statute would only be invalid in part.

In Lopez itself and in the follow-on case of 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, because Lopez and Morrison concluded that those laws did not regulate activities that substantially affect interstate commerce because the regulated activities were not economic. That is, Lopez and Morrison held that where the entire class of activities regulated by a statute is both intrastate and non-economic, that statute had no constitutional applications under the hybrid decision rule. This means that, under the Salerno invalidation rule, the statute must be struck down in toto. Alternatively, as in Wickard v. Filburn, where the activities Congress regulates are economic and Congress rationally concluded that those activities, in the aggregate, “affect” interstate commerce, then the statute would survive the Lopez decision rule. In these cases, the litigants’ arguments and the courts’ inquiry focused on the entire statutory coverage, because the crux of the argument was that the entire class of activities regulated in Lopez and Morrison was either economic or it was not. Thus, given the statute’s coverage, the result was either a loss for the challenger or in toto invalidation under Salerno.

But what happens when the litigant admits that at least some of the activities covered by the statute are “economic” and would, in the aggregate, affect interstate commerce but nevertheless successfully argues that some of the activities covered are either non-economic or insubstantial 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. But hybrid decision rules do not operate in this manner.

Thus, in Gonzales v. Raich, the Court considered an argument that the Controlled Substances Act was unconstitutional in part—that is, the Court considered only the portion of the Act prohibiting the cultivation, possession, and use of medical marijuana.

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157 Lopez, 514 U.S. at 561 (“Section 922(g) 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(g) 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 619 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”).
which was legal under state law. The Court began by noting that the petitioner 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 substantially affected interstate commerce. Then, critically, the Court considered and rejected the petitioner’s 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 “substantially affect interstate commerce.”

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, which was lawful under state law, would “substantially affect interstate commerce”? Or, what if the Court had accepted the petitioner’s argument that her growth 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, they would have only invalidated the Act as applied to the cultivation, possession, and use of medical marijuana. In this way, *Lopez*’s hybrid decision rule would have allowed the Court to conclude that the CSA was only unconstitutional in some narrow circumstance and to provide a disposition 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, it nonsensical because the President cannot possibly violate the prohibition against Congress overstepping its authority under Constitution. But even if one accepts Rosenkranz’s almost certainly correct thesis that only Congress can violate the limitations on its own enumerated

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158 *See Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (“The [Controlled Substances Act] is a valid exercise of federal power, even as applied to the troubling facts of this case.”); *id.* at 33 (Scalia, J., concurring in the judgment) (“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.”).

159 *Id.* at 15.

160 *Id.* at 19.

161 *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.”).

162 Rosenkranz, *Subjects*, *supra* note 3, at 1277 (“If pressed to give an answer, Ms. *Raich would presumably want to say the President [violated here constitutional rights].”).
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. However, while Congress violated the Constitution, the proper court-ordered remedy for this relatively minor violation is commensurate with the scope of the error—partial invalidation. 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, the Court can still entertain those claims.

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

Understanding the interaction between Commerce Clause decision rules and the Salerno Invalidation Rule is more than an academic exercise, as illustrated in the Sixth Circuit’s decision that upheld the requirement that all citizens buy health insurance in the Affordable Care Act (“ACA”)—also known as the “individual mandate.” Invoking Salerno, Judge Sutton’s controlling opinion held that ACA’s requirement survived the plaintiffs’ “facial” constitutional challenge because 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. But recall that Salerno is merely an invalidation rule; it does not address or answer the predicate question of whether the Constitution has been violated, which requires carefully examination of the relevant constitutional decision rule. Indeed, Salerno itself should never settle the outcome of any case—only the remedy the Court proscribes after applying a decision rule.

The real debate over ACA is not about Salerno but is rather about the Commerce Clause decision rule. The plaintiffs’ main argument before the Sixth Circuit was that Congress lacks authority to compel them to enter into (and/or remain in) the market for health insurance under Lopez’s hybrid decision rule. As Rosenkranz would explain, their argument turns 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

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163 In Raich itself, the President had not even instituted any prosecution—Ms. Raich brought a declaratory judgment motion 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 individual such as her. See id. at 8-9.

164 Thomas More Law Ctr. v. Obama, ___ F.3d ___, 2011 WL 2556039, at *30 (6th Cir. 2011) (Sutton, J., concurring in the judgment)

165 Brief for Petitioner, Thomas More Law Ctr. v. Obama, ___ F.3d ___, 2011 WL 2556039.
defendant in *Lopez* bought his gun in interstate commerce or that the actual defendant in *Lopez* was a drug courier engaged in economic activity.\footnote{United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993)}

So why did Judge Sutton believe that the plaintiffs’ facial challenge had to fail? The only answer is that he must have rejected the plaintiffs’ argument, under the *Lopez* hybrid decision rule, that Congress has the power under the Commerce Clause to compel an individual to enter into or remain in a particular market. This is an answer that has nothing whatsoever to do with *Salerno* or the notion of facial versus as-applied challenges. Indeed, Sutton’s reasoning—under the *Lopez* hybrid decision rule—would doom any litigant raising that same argument, 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—under his reading of the *Lopez* decision rule—appears to foreclose those arguments in every case. Thus, Judge Sutton’s invocation of *Salerno* obscured his actual analysis.

At the same time, Judge Graham’s dissenting opinion also misunderstood the function of *Salerno* and repeated Rosenkranz’s error. Graham argued that ACA’s individual mandate was invalid in toto and quoted a district court opinion for the proposition that a statute is “‘legally stillborn’” if Congress enacts an unlawful statute.\footnote{Id. at 34 (quoting *Virginia v. Sebelius*, 728 F.Supp.2d 768, 774 (E.D. Va. 2010)).} However, under *Salerno*, a statute is only “legally stillborn” in its entirety only if it fails the relevant decision rule in all of its applications. But 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, in fact, be “legally stillborn” in whole. But that is not always the case, under the Commerce Clause or otherwise. As shown above,\footnote{See supra Section II.B.} the Court has decided that a statute may only be “legally stillborn” in part.

So, the reader may ask, how is a judge supposed to approach a case like the constitutional challenge to ACA’s individual mandate? The answer is based upon the decision rules the litigant invokes and the court chooses to consider. For example, a challenge to ACA’s individual mandate could require application of the Commerce Clause’s *Lopez* hybrid decision rule. This may apply to the entire statutory coverage, as in *Lopez* and *Morrison*—in which case the mandate may well be invalid in toto under *Salerno* depending on how a court articulates and applies the rule distilled from those cases. Indeed, the plaintiffs in the Sixth Circuit challenge to the individual mandate appear to have raised this type of argument by arguing that Congress lacks authority to
compel individuals to enter into or remain in a particular market—which would call into question all applications of the individual mandate. 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 individual mandate, arguing that she would never receive medical under any circumstances and thus it is irrational to include her 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.

Alternatively, litigants always have room to argue that a court should create 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 *United States v. New York*, where the Court held that the Tenth Amendment and the Commerce Clause categorically prohibited Congress from commandeering the states. 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 commander 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, apply, or even create the relevant constitutional decision rule before reaching the remedial questions inherent in the *Salerno* invalidation rule.

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 could not 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 altered the requirements for invalidation: 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.\footnote{New York v. United States, 505 U.S. 144 (1992).} \footnote{Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).}
Overbreadth, consequently, is an invalidation rule that is easier to satisfy than Salerno. The overbreadth invalidation rule therefore 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 80% of the statute’s reach, that statute may be struck down under the overbreadth invalidation rule (whereas it would not be struck down under Salerno). Similarly, if the Court’s reasoning establishes that 80% of a statute’s applications by the executive would violate the relevant enforcement decision rule, that statute would be invalidated in toto under overbreadth.

The natural question thus becomes: when should a different invalidation rule (such as overbreadth or perhaps some other rule) 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, fails to advance the ball because that does not explain when this “requirement” does not apply outside the free speech context. Put another way, Monaghan’s theory of overbreadth boils down to an ipse dixit that assumes that the 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 inaccurate for the reasons explained in the prior paragraphs, but offers no explanation for when this invalidation rule should apply beyond the Free Speech Clause. And Rosenkranz’s argument, that overbreadth challenges should be permitted for all constitutional provisions directed at legislative action,\textsuperscript{171} does not account for why the Court has only applied the doctrine definitively to one aspect of the First Amendment. It also fails for the same reason that his argument that all text-based inquiries must result in in toto invalidation is incomplete: it does not explain why overbreadth invalidation (any more than Salerno invalidation) cannot be appropriate for other constitutional provisions, including those with enforcement decision rules.

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 apply overbreadth (or not) to other constitutional provisions. 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 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 strange feature that leads to the potential “chill” on First Amendment rights that the Court, in adopting the overbreadth doctrine, was attempting to remedy.

\textsuperscript{171} Rosenkranz, Subjects, supra note 3, at 1252-55.
A. Free Speech Overbreadth as 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.”172 The Court has subsequently used the overbreadth doctrine to invalidate statutes banning virtual child pornography,173 prohibiting the selling of depictions of killing or wounding animals,174 and prohibiting “First Amendment activities” at airports.175

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, “[b]ecause 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.”176 A second and related policy rationale for free speech overbreadth is an excessive-discretion rationale: a statute that sweeps too broadly by infringing on protected speech may allow too much opportunity for discriminatory enforcement.177

But these explanations are inadequate because the Court considers the values that constitutional provisions are supposed to protect when creating constitutional decision rules in the first place. Thus, if the First Amendment decision rules created by the Court already adequately protected free speech values—including the interest against chilling speech—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 to protect the values inherent in the First Amendment because the court has the flexibility—if it so

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177 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.”).
chooses—to apply this rule to the entire coverage of a statute. For example, in *United States v. Playboy Entertainment Group, Inc.*, 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 non-protected obscene speech. The Court struck down the statute *in toto* by finding that the statute was not narrowly tailored—without resorting to overbreadth analysis. 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 about chilling speech—the concern that motivates the overbreadth doctrine—the Court was fully able to address that concern under the *Salerno* framework.

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 statutes 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 unnecessary because if the court feels that *in toto* invalidation is needed to protect the constitutional provision’s values, 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.” It is not that overbreadth and strict scrutiny are analogous inquiries in all cases, 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 is largely irrelevant.

So why 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. A hypothetical example illustrates this point. Suppose Congress enacted the Speech Suppression Act, which provides that “no person may speak.” What decision rule would apply in addressing the validity of this provision? A whole slew of free speech decision rules could apply: content-based restrictions on political speech are

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179 *Id.*

180 Isserles, *supra* note Error! Bookmark not defined., at 421.
subject to strict scrutiny, restrictions on commercial speech are subject to intermediate scrutiny, and restrictions on wholly unprotected speech like obscenity are per se valid because they are subject to no scrutiny at all. All of these forms of speech are prohibited by the Speech Suppression Act. So does strict scrutiny, intermediate scrutiny, or some other Hybrid 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 to either 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 balance the interests of enforcing the constitution and not 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. Indeed, the 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.

The inability to invalidate a statute in toto may not itself be a problem. The Constitution nowhere requires that the Court, in doing its job of enforcing the Constitution in cases or controversies that come before it, be able to strike down statutes in whole under every (or, indeed, any) constitutional provision. But this is where the

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185 Justice Scalia has questioned whether a court should ever be allowed to invalidate a statute under overbreadth. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 73, 77 (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 nonadvisory opinions.”); Janklow v. Planned Parenthood, 517 U.S. 1174, 1178 n.3 (1996) (Scalia, J., dissenting from denial of certiorari) (referring to the contrary view as “an overbreadth approach”); Luke Meier, A Broad Attack on Overbreadth, 40 VAL. U. L REV. 113 (2005). 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 v. FEC, 130 S. Ct. 816 (2010); Granholm v. Heald, 544 U.S. 460.
Court’s concern about chilling speech comes in. The potential that a statute may chill speech unless invalidated in toto could motivate the Court to either develop a new robust decision rule to deal with the Grace problem or allow for invalidation of statutes on a different basis, such as overbreadth. 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 free speech values to the extent the Court deems proper.

The Supreme Court’s recent decision in United States v. Stevens 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 harming or killing animals.\(^ {186}\) This statute was a content-based restriction on both protected speech—like hunting videos—and arguably unprotected speech like gruesome “crush videos.”\(^ {187}\) 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.’”\(^ {188}\) 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 an illustration of the failure to understand 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 rather than strict scrutiny, 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.”\(^ {189}\) 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. 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


\(^ {187}\) 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.

\(^ {188}\) 533 F.3d 218, 232, 235 n.16 (3rd Cir. 2008) (quoting Broadrick v. Oklahoma, 413 U. S. 601, 613 (1973)).

\(^ {189}\) Stevens, 130 S. Ct. at 1587.
overbreadth invalidation rule, and struck down the statute in toto because the portion of the statute that it had just 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 to the Free Speech Clause realm 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—and thus invalidating the statute under Salerno—was impractical unless the Court decided that strict scrutiny could apply even where some of the speech at issue was unprotected. At the same time, the Court did not want to confront the government’s argument that crush videos were unprotected speech and thus could lawfully be banned. Of course, had the situation had been materially different—for example, if both parties agreed that the statute only covered protected speech, as was the case in United States v. Playboy Entertainment Group, Inc.,190 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 statute191—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. However, lacking that option, the Court resorted to the overbreadth invalidation rule and reached the same result, without having to tackle the thorny crush video issue.

In sum, the Court 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 the Free Speech Clause’s values. While the confluence of these two particular factors is not strictly required for the application of overbreadth to other constitutional provisions, what is required is the conclusion by the Court that the Salerno invalidation rule is insufficient to the constitutional adjudication process for that particular constitutional provision.192

192 Another possible basis for extending to 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 88, 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. Where there’s smoke, there’s fire. Consequently, even
B. Overbreadth Beyond Free Speech Claims

After identifying the reason that the overbreadth invalidation rule applies to Free Speech Clause claims, one can begin to analyze whether overbreadth should also apply to other contexts. Indeed, the Court has already hypothesized that overbreadth has been applied to other areas, although sub silentio.\(^{193}\) Going further, Justice Stevens has urged that something like an overbreadth invalidation rule should apply to all constitutional provisions, arguing that if a statute lacks a “plainly legitimate sweep,” it should be struck down in toto.\(^{194}\) The Court has recently left open the question of whether Justice

If only part of a statute would be unconstitutional under an enumerated powers decision rule, the Court could 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, 610 (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).”).

\(^{193}\) *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 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).


Some have disputed whether Justice Stevens’s “plainly legitimate sweep” standard is different from the overbreadth standard. *See, e.g.*, Sonnier v. Crain, ___ F.3d ___, 2011 WL 452085, at *3-6 (5th Cir. 2011) (Dennis, J., dissenting from the denial of panel rehearing). 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) (“we 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. But in the very least, Justice Stevens’ “plainly legitimate sweep” test is simply another more lax Invalidation Rule, more similar to overbreadth than *Salerno*. 39
Stevens’ view that the Court should abandon Salerno’s invalidation rule should prevail for all constitutional provisions.\footnote{United States v. Stevens, 130 S. Ct. 1577, 1587 (2010).}

We believe that the Court is unlikely to adopt such categorical approaches to embracing or abandoning Salerno—especially given the uniformly recognized aversion to overbreadth challenges. Instead, the Court is likely to take a cautious, constitutional provision-by-provision approach. This inquiry will take into account the values the Court believes the provision is aimed at achieving 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 gotten 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).

1. Abortion Overbreadth

When the Court first established that the Due Process Clause protects the right to an abortion in \textit{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.\footnote{See \textit{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.”).} \textit{Roe} then proceeded with a strict-scrutiny analysis, and this 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.\footnote{Id. at 164-65; see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) (“\textit{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.””).} Under this trimester framework, if the strict scrutiny hybrid decision rule were applied to the entire statute, the statute could be invalidated \textit{in toto} under Salerno’s no-set-of-circumstances test.\footnote{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).} But then the Court altered its substantive due process abortion decision rule in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}.\footnote{505 U.S. 833, 872 (1992)} \textit{Casey} either scrapped the first-order strict-scrutiny decision rule or most of the second-order trimester framework—or perhaps both.\footnote{See \textit{Casey}, 505 U.S. at 876 (“The trimester framework, however, does not fulfill \textit{Roe}’s own promise that the State has an interest in protecting fetal life or potential life. \textit{Roe} began the contradiction by using the

\textit{Roe} framework in an area of no interest to the State.”).} Whatever the
basis for Casey’s switch, it replaced Roe’s trimester framework with a different hybrid decision rule that was much harder to apply to an entire statute: the “undue burden” test.\(^\text{201}\) 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.\(^\text{202}\)

In addition to altering the abortion decision rule—or, quite possibly, because the Court altered this decision rule—Casey applied overbreadth invalidation to strike down the statute at issue. Since Casey replaced Roe’s decision rule with the undue burden hybrid decision rule, this 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.\(^\text{203}\) 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.”\(^\text{204}\) This “large fraction” approach is the equivalent to an overbreadth invalidation rule.\(^\text{205}\)

Although Casey applied overbreadth, the Court did not say that it was doing so—until a decade later in Sabri, in passing dicta. This, of course, caused much confusion. Some courts, looking to the substance of the Casey decision, believed the “[Supreme] Court effectively overruled Salerno for facial challenges to abortion statutes,”\(^\text{206}\)—which the reader of this article will understand as adopting the overbreadth invalidation rule for abortion statutes. Other courts, however, correctly noted that “[d]espite the Supreme Court’s clear application of the [abortion] undue burden standard in Casey . . . it has

\(^{201}\) Id. at 876.
\(^{202}\) 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.”).

\(^{203}\) Dorf, supra note 37, at 275-76.
\(^{204}\) Casey, 505 U.S. at 895.

\(^{205}\) Isserles, supra note 66, 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.”).
\(^{206}\) Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995).
never explicitly addressed the standard’s tension with Salerno.” 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.

More recent Supreme Court cases have not clarified 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 that required 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.” 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. 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. The majority explained that an “as-applied challenge” is “the proper manner to protect the health of the woman,” but it also cited Casey and recognized that “respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases.”

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 is almost impossible under Casey’s undue burden hybrid decision rule. That said, 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.” This indicates that the Court views the values associated with 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 rights, without the need to resort to overbreadth invalidation. Put

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207 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)).

208 See supra notes 37-39 and accompanying text.


210 Id. at 328-32.


212 Id. at 167.

213 Id. (citing Casey, 505 U.S. at 895).

214 550 U.S. at 167.
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 their infancy, but a few circuits have already stated that overbreadth challenges should not be available for Second Amendment claims. The problem with this view is that it conflates the decision rule with the invalidation rule—in order to know whether the 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 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) because the Court is concerned that without in toto invalidation of laws that restrict too much protected speech, First Amendment rights will be chilled. But will these two rationales congeal to justify applying the overbreadth invalidation rule to the Second Amendment?

In District of Columbia v. Heller, the Supreme Court recognized that the Second Amendment protects an individual’s right to bear arms. The Court, however, did not sketch out in any detail what sort of decision rules or invalidation rules will apply to Second Amendment claims. The Court has provided a few clues. Heller suggested that heightened scrutiny will apply to statutes that burden Second Amendment rights. Then, McDonald v. Chicago held that an individual’s right to bear arms is a fundamental right, which typically triggers heightened scrutiny. 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 will

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

216 See supra Part III.A.


218 Id. at 2817 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”)

219 See McDonald v. City of Chicago, 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.”).
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). These circuits have acknowledged the parallel between these Second Amendment decision rules and free speech decision rules. A split panel in the Ninth Circuit also adopted a two-step inquiry that applies some form of heightened scrutiny at the second step. 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. Yet a third possible Second Amendment decision rule is similar to Casey’s undue-burden test.

While all of these approaches have their merits, one thing appears to be clear: courts appear unlikely to adopt any pure facial decision rule or hybrid decision rule that could readily apply to the entire statutory scope. For example, assume the Court adopts the approach accepted by most circuits: a two-prong inquiry that first asks 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), and then if the right to bear arms does protect the conduct at issue, then the Court would then ask 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 different 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 implicate 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

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221 See Ezell, 2011 WL 2623511, at *12 (“The Supreme Court’s free-speech jurisprudence contains a parallel for this kind of threshold ‘scope’ inquiry.”); Chester, 628 F.3d at 682-83.

222 Nordyke v. King, No. 07-15763, 2011 WL 1632063, at *4-6 (9th Cir. May 2, 2011).

223 Id.


225 Heller, 128 S. Ct. at 2817 (“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”).
implicate multiple decision rules and thus a litigant would almost never satisfy *Salerno*. 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 Second Amendment values will remain underenforced if overbreadth does apply in this context. This is a question for the Court, and this Article has little to say about how much courts should value particular constitutional norms. This question, however, becomes much clearer when one understands the relationship between constitutional decision rules from the invalidation rules, which is precisely what this article counsels.

V. Conclusion

The Supreme Court has a difficult job. It must maintain fidelity to the Constitution’s text, while adequately enforcing constitutional guarantees. To grapple with these often conflicting goals, the Court has designed various decision rules to determine whether the Constitution has been violated, as well as invalidation rules that decide 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 confusing the decision rule with the invalidation rule. In contrast, our analysis of these concepts—as well as the related notions 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.