

AS-APPLIED COMMERCE CLAUSE CHALLENGES

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Article I, Section 8 of the Constitution provides that “[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.”¹ For sixty years following the New Deal, the Supreme Court took a hands-off approach in assessing Congress’s assertions of Commerce Clause authority, going so far as to treat the boundaries of that authority as a political question.² In the last twenty years, however, the Court showed a renewed interest in enforcing limitations on Congress’s assertions of authority under this provision, from its landmark decisions invalidating congressional enactments in *United States v. Lopez*³ and *United States v. Morrison*⁴ to its underrated decisions limiting the reach of statutes on Commerce Clause grounds in *Jones v. United States*⁵ and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*,⁶ to the Commerce Clause ruling in *National Federation of Independent Business v. Sebelius (NFIB)*.⁷ At the same time, the Court’s engagement in this area has been marked by caution. *Lopez* and *Morrison* involved narrow, single-issue statutes or provisions.⁸ *Jones* and *SWANCC* relied upon the Commerce Clause and the doctrine of constitutional avoidance merely to narrow broad statutes.⁹ And, *NFIB* combined the Commerce Clause determination with the same avoidance doctrine to justify upholding the Affordable Care Act as a tax.¹⁰

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1 U.S. CONST. art. I, § 8.

2 *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

3 514 U.S. 549 (1995).

4 529 U.S. 598 (2000).

5 529 U.S. 848 (2000).

6 531 U.S. 159 (2001).

7 132 S. Ct. 2566 (2012).

8 *Morrison*, 529 U.S. at 601–02; *Lopez*, 514 U.S. at 551.

9 *SWANCC*, 531 U.S. at 162; *Jones*, 529 U.S. at 850–51.

10 132 S. Ct. at 2578–80.

Just as the Court has taken the most careful, preliminary steps toward enforcing limitations on the outer boundaries of Congress's authority under the Commerce Clause, some commentators and judges—many of whom are sympathetic to the merits of some judicial limitations on congressional authority—have argued that the Court must act broadly, or not at all.¹¹ The most prominent and cogent articulation of this viewpoint comes from Professor Nicholas Quinn Rosenkranz, whose seminal, brilliant work in *The Subjects of the Constitution*¹² and *The Objects of the Constitution*¹³ inspired this Symposium. Rosenkranz argues that because the Commerce Clause is directed at Congress (“Congress shall have the power to . . .”¹⁴) any challenge to congressional action under that Clause must be “facial.”¹⁵ Specifically, he claims that because the subject of the Commerce Clause is *Congress*, a decision as to whether Congress exceeded its Commerce Clause authority in enacting a statute—and thus, violated the Tenth Amendment’s prohibition against usurping authority “reserved to the States respectively, or to the people”¹⁶—must be adjudicated as an all-or-nothing proposition.¹⁷ Professor Rosenkranz’s theory is unquestionably creative constitutional interpretation of the highest caliber. At the same time, if accepted, it would mean that a court facing an argument that Congress has exceeded its Commerce Clause authority must either invalidate the entire statute or uphold the entire statute.

This Article seeks to refute Rosenkranz’s argument that courts should limit their adjudication of challenges to Congress’s assertions of Commerce Clause authority to those attacking the entire statutory provision. Part I provides a primer on as-applied and facial challenges, explaining that the claim that a challenge under a constitutional provision must be “facial” is—in practical reality—an argument that a statute is always constitutional in all of its possible applications or unconstitutional in all of its applications, with no middle ground possible. Part II explains the Supreme Court’s modern Commerce Clause jurisprudence. Part III argues that—contrary to Rosenkranz’s view—

11 See, e.g., Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge “On Its Face”: Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 164 (2004) (discussing the choice faced by the judiciary to adopt either the as-applied test or the facial test when analyzing laws challenged under the Commerce Clause (citing *United States v. McCoy*, 323 F.3d 1114, 1133 (9th Cir. 2003) (Trott, J., dissenting))).

12 Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

13 Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011).

14 U.S. CONST. art. I, § 8, cl. 3.

15 Rosenkranz, *supra* note 12, at 1236.

16 U.S. CONST. amend. X.

17 Rosenkranz, *supra* note 12, at 1248.

the Constitution's structure does not require that all Commerce Clause challenges must be facial; indeed, that structure suggests the opposite. This Part also argues that Rosenkranz's facial-only approach would lead to outcomes inconsistent with the meaning of the Commerce Clause and would undermine the Supreme Court's nascent project to enforce the limitations on that Clause. Finally, Part IV suggests two as-applied decision rules under modern Supreme Court doctrine, which can serve as a starting point to reinvigorate as-applied adjudication in this area.

I. PRIMER ON FACIAL AND AS-APPLIED CHALLENGES

To evaluate Professor Rosenkranz's argument that all Commerce Clause challenges must be "facial," as opposed to "as-applied," it is essential to understand with some precision what these terms mean. In a recent article in the *Virginia Law Review*, Scott A. Keller and I endeavored to define those terms by reference to the practice of courts.¹⁸

First, some basics. Courts do not simply look at a constitutional phrase like "[t]he Congress shall have power . . . [t]o regulate Commerce . . . among the several States,"¹⁹ compare it to the statute that Congress enacted, and thus decide the question of whether the statute exceeds Congress's authority under the Commerce Clause. Judicial review is often a complicated task, which requires the court to consider factors such as mandates of the text, how those mandates compare to the statute Congress enacted, how courts in the future should determine whether Congress has exceeded its constitutional authority, and the institutional limitations of the judicial branch. Put another way, to determine whether Congress has exceeded its authority under the Commerce Clause, courts need judicially enforceable tools to translate the Constitution's phrases into doctrines that can be enforced across a broad range of complicated statutes and situations.²⁰ These judicial tools are known as "decision rules."²¹ To take

18 Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto*, 98 VA. L. REV. 301 (2012).

19 U.S. CONST. art. I, § 8, cl. 3.

20 See Keller & Tseytlin, *supra* note 18, at 320–21 (contending that the court has created a variety of constitutional decisional rules to "enforce the Constitution's provisions and constrain lower courts as they adjudicate constitutional disputes").

21 See Mitchell N. Berman, *Constitutional Decisional Rules*, 90 VA. L. REV. 1, 9 (2004) ("[D]octrines that direct courts how to decide whether a constitutional operative proposition is satisfied [are] constitutional decisional rules." (internal quotations omitted)); Keller & Tseytlin, *supra* note 18, at 318 ("The identification of constitutional defects is guided by what many scholars have identified as 'constitutional decision rules.'"); Lawrence

the most relevant example for present purposes, the Supreme Court has created a series of decision rules in the Commerce Clause context, including that a court will not invalidate a congressional action where it determines that there is a “rational basis” for concluding that the statute regulates “activities, taken in the aggregate, [that] substantially affect interstate commerce.”²² Even this complex articulation of the Commerce Clause decision rule is an oversimplification, as Part II will discuss.

Court-created decision rules rarely attempt to enforce the Constitution’s requirements completely. Instead, they incorporate the comparative institutional (in)competence of the judiciary vis-à-vis the politically accountable branches. For example, deferential standards of review such as “rational basis,” by definition, acknowledge that the courts will not fully enforce a constitutional provision, out of due respect for a co-equal branch.²³ Acknowledging that many decision rules are not designed to fully enforce the Constitution does not mean that the courts can legitimately change the Constitution’s meaning; to the contrary, well-designed decision rules should derive from the Constitution’s actual meaning, while at the same time acknowledging that the courts are just one of three co-equal federal actors charged with enforcing the Constitution.

Some decision rules train the courts’ focus broadly on a statute as a whole, while others permit (or require) courts to look only at a small sliver of a statute’s application. To take the simplest example, in the rare circumstances where the Supreme Court has adopted decision rules that require courts to look to the motivation underlying a statute, these rules necessarily require evaluating the statute as a whole.²⁴ One such decision rule is the so-called *Lemon* test, which asks whether the enactment was motivated by a desire to suppress religion.²⁵ That decision rule necessarily applies to the statute at its root,

Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214–15 (1978) (“In applying provisions of the Constitution to the challenged behavior of state or federal officials, the federal courts have modeled analytical structures . . .”).

²² See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

²³ See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1653 (2005) (observing that the Court, when applying rational-basis review, defers to Congress’s constitutionality determinations in Commerce Clause legislation even if the determination is imperfect).

²⁴ See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1345 (2000) (“[S]ome constitutional tests identify defects in a statute’s historical origins or motivations that pervade all possible subrules through which the statute might be specified.”).

²⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

as the congressional motivation to harm a particular religion is not amenable to a narrowed focus on a particular subclass of persons the statute covers.²⁶ On the other end of the spectrum, a decision rule that requires a court to focus on the burden the statute places on any individual litigant—such as the undue-burden test in the Due Process Clause/abortion context²⁷—is unlikely to train a court’s eye on the statute’s entire reach, as the amount of burden each person (or class of persons) will experience under the statute will almost necessarily vary.²⁸

So what of as-applied and facial challenges? The Supreme Court has explained that “[a]s-applied challenges are the basic building blocks of constitutional adjudication.”²⁹ Put another way, in the run-of-the-mill constitutional challenge, a litigant brings a lawsuit (or is subject to a lawsuit or a criminal prosecution by the government) and then, invokes a constitutional provision to vindicate his or her rights. As the court adjudicates the case, the decision rule applicable to the constitutional provision will inform how broadly the court reasons. The breadth of that reasoning may, as a matter of precedent or persuasive authority, impact a significant number of other cases. In this way, every case is an as-applied challenge.

But that is three-quarters of the story. The Supreme Court has held that, under some circumstances, a court should go beyond merely adjudicating a case as-applied to the particular facts of the case and declaring the rights of the parties before it, and should hold that the entire statute is unenforceable in toto. To implement this remedial doctrine, the Court has designed what Scott Keller and I have labeled “invalidation rules.”³⁰ By far, the most straightforward and commonly used invalidation rule is the *Salerno* doctrine, which derives its name from the Supreme Court’s decision in *United States v. Salerno*.³¹ Under this doctrine, a court should only invalidate a statute in toto if “the challenger [can] establish that no set of circumstances exists under which the Act would be valid.”³² That is, a court should invalidate a statute in whole where the court’s application of the rele-

26 Keller & Tseytlin, *supra* note 18, at 328–29.

27 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).

28 See Keller & Tseytlin, *supra* note 18, at 360 (explaining that the “undue burden” test established in *Casey* limited courts’ ability to invalidate abortion regulations in toto).

29 Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (quoting Fallon, *supra* note 24, at 1328).

30 See Keller & Tseytlin, *supra* note 18, at 325 (defining the term “invalidation rule” as a judicially created rule for determining a remedy after a constitutional violation has been found).

31 481 U.S. 739 (1987).

32 *Id.* at 745.

vant decision rules makes clear that *any* challenge to the statute would succeed, in *every* application.³³ The *Salerno* invalidation rule rests on a commonsense proposition: if the court applying the relevant decision rule can readily determine that the statute has no constitutional application, then it should so hold, informing citizens and public officials that the statute, as a whole, is unenforceable. The *Salerno* invalidation rule, while it may seem exceedingly difficult to satisfy due to its categorical nature, is actually used fairly commonly, as courts' reasoning under decision rules often covers the reach of the entire statute.³⁴

Given that as-applied challenges are the basic building blocks of constitutional adjudication and that "facial" challenges are the product of invalidation rules superimposed upon such as-applied challenges, it is fair to ask whether the argument that a particular constitutional provision permits only facial adjudication is coherent at all. There is, however, a way to reframe the question to be fair to Professor Rosenkranz's argument that Commerce Clause challenges must be adjudicated facially. The *Salerno* doctrine provides that where a particular decision rule adheres in all of a statute's possible applications, the statute must be invalidated in toto; accordingly, if successful adjudication under a particular decision rule will always satisfy *Salerno*, one can confidently conclude that adjudication under that decision rule is exclusively "facial." For example, if the *Lemon* test was the only decision rule in the Establishment Clause context, then all adjudication under the Clause would be "facial." When Professor Rosenkranz claims that all challenges under the Commerce Clause must be "facial," what he is saying, as a practical, real-world matter, is that court adjudication of congressional enactment of statutes under that Clause must always either lead to wholesale affirmance of the enactment or in toto invalidation; it must be an all-or-nothing proposition. The court is not allowed to say: "Congress violated the Constitution by attempting to prohibit the relevant conduct at issue in this particular case under its Commerce Clause power, and we need not make any further comment."³⁵

³³ Keller & Tseytlin, *supra* note 18, at 326.

³⁴ See generally Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011) (finding that use of facial challenges like the *Salerno* invalidation rule to challenge the validity of statutes is much more common than the conventional wisdom assumes); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998) (arguing that the *Salerno* invalidation rule is not as stringent as it is perceived).

³⁵ Notably, the *Salerno* invalidation rule is not the only invalidation rule that the Court has adopted. In the Free Speech Clause context, the Court has created the "overbreadth"

II. THE MODERN COMMERCE CLAUSE CASE LAW

After sixty years of a hands-off approach to the Commerce Clause, the Supreme Court began to re-engage in *United States v. Lopez* and *United States v. Morrison*, by invalidating in toto a provision prohibiting anyone from possessing a firearm in a school zone and a federal cause of action for gender-motivated violence. In those cases, the Court went beyond as-applied adjudication—which would have involved merely holding that the defendant in *Lopez* could not be prosecuted and the defendant in *Morrison* could not be subject to a civil action—and discussed its justification for “invalidat[ing]” both statutes.³⁶

Lopez and *Morrison* announced a series of Commerce Clause decision rules, which courts could use to determine whether Congress exceeded its authority under the Commerce Clause in future cases. Under these rules, in order to decide whether the Commerce Clause authorized Congress’s actions, a court has to determine whether the statute regulates (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “those activities that substantially affect interstate commerce.”³⁷ *Lopez* and *Morrison* dealt with this last, most controversial category by announcing a further-refined decision rule which required a court to decide whether Congress had a “rational basis” for concluding that the regulated activity, taken in aggregate, substantially affects interstate commerce.³⁸ And, in determining whether Congress satisfied this “substantive affects” test, the Court emphasized the importance of the activity being “economic,”³⁹

doctrine, which permits a court to declare a statute void in toto based upon a finding that a statute is unconstitutional in a substantial number of its applications, compared to the statute’s constitutional reach. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Keller & Tseytlin*, *supra* note 18, at 348. The possibility of an alternative invalidation rule does not seem, however, to have any relevance to a claim that adjudication under a particular decision rule must always be facial. This is because the very concept of overbreadth invalidation presupposes that there can be a number of successful as-applied challenges to a statute but not a sufficient number to satisfy the overbreadth standard. Put another way, the relevance of the overbreadth invalidation rule is directly tied to the existence of as-applied decision rules.

³⁶ *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 580 (1995). This Article will later address whether the Court acted properly and coherently in invoking the *Salerno* invalidation rule for these statutes. See *infra* pp. 490, 493.

³⁷ *Morrison*, 529 U.S. at 608–09 (internal citations omitted); *Lopez*, 514 U.S. at 558–59 (internal citations omitted).

³⁸ *Morrison*, 529 U.S. at 612–13; *Lopez*, 514 U.S. at 556–58.

³⁹ See *Morrison*, 529 U.S. at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”); *Lopez*, 514 U.S. at 561 (“Section 922(q) is a criminal

adding that “[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . . thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature.”⁴⁰

The Court has also invoked the limitations of the Commerce Clause to narrow congressional enactments under the cannon of constitutional avoidance. In *Jones v. United States*,⁴¹ a unanimous Supreme Court creatively constricted the federal arson statute—which made it a crime to destroy “by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce”—to apply only to the burning of commercial buildings.⁴² The Court justified this interpretation by reliance on *Lopez*’s limitations on the Commerce Clause authority, combined with the doctrine of constitutional avoidance.⁴³ And, in *SWANCC*,⁴⁴ the Court made clear that the doctrines announced in *Lopez* and *Morrison* went beyond federalizing local criminal law. In *SWANCC*, the Court held that the Clean Water Act (“CWA”) coverage of “waters of the United States” did not encompass land containing permanent and seasonal ponds. In explaining its narrow reading of the CWA, which was contrary to the interpretation of the CWA adopted by the Army Corps of Engineers, the Court noted that a broader reading of the statute would “push the limit of congressional authority” by forcing the Court to determine whether the regulation fell within “Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce.”⁴⁵ Addressing this question would force the Court “to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.”⁴⁶

The Supreme Court’s next adjudication under Commerce Clause decision rules came in *Gonzales v. Raich*.⁴⁷ There, the Court considered whether Congress exceeded its authority under the Controlled Substances Act (“CSA”), as applied to “the intrastate manufacture and possession of marijuana for medical purposes pursuant to Cali-

statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”).

40 *Morrison*, 529 U.S. at 613 (emphasis added).

41 529 U.S. 848 (2000).

42 18 U.S.C. § 844(i) (2006); *Jones*, 529 U.S. at 859.

43 *Jones*, 529 U.S. at 857–58.

44 531 U.S. 159 (2001).

45 *Id.* at 173.

46 *Id.*

47 545 U.S. 1 (2005).

ifornia law.”⁴⁸ The Court explained that the petitioners had conceded that the entire category of activities that the CSA covered had, in the aggregate, “substantially affect[ed] interstate commerce.”⁴⁹ Addressing the plaintiffs’ narrower argument that their activities could not constitutionally be swept into this “concededly valid” regime,⁵⁰ the Court quoted its earlier pronouncement—repeated in *Lopez*—that when “a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence,”⁵¹ adding that “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”⁵² The Court explained that it was “appropriate to include marijuana grown for home consumption in the CSA [because of] the likelihood that the high demand in the interstate market will draw such marijuana into that market,” adding that Congress had a “rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”⁵³ And, in responding to the argument that the plaintiffs’ activities could not be regulated under the Commerce Clause because they are non-economic, the Court explained that “[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. ‘Economics’ refers to ‘the production, distribution, and consumption of commodities.’”⁵⁴

The Supreme Court’s latest pronouncement on the scope of congressional authority under the Commerce Clause came in *NFIB*,⁵⁵ where five Justices wrote or joined opinions concluding that requiring people to buy health insurance exceeded Congress’s authority under *Lopez*’s “substantially affects interstate commerce” decision rule. These opinions explained that a person’s decision not to engage in an activity, such as purchasing insurance, was not the sort of “economic activity” that could be aggregated under the third *Lopez* prong.⁵⁶ Then, the Chief Justice, using a variant of the approach in

48 *Id.* at 15.

49 *Id.* at 22.

50 *Id.* at 23.

51 *Id.* at 17 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)) (internal quotation marks omitted).

52 *Raich*, 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

53 *Id.* at 19, 22.

54 *Id.* at 25–26 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 720 (Philip Babcock Gove ed., 3d ed. 1966)).

55 132 S. Ct. 2566 (2012).

56 *Id.* at 2587, 2647–48.

SWANCC, read the statute to avoid this constitutional problem by concluding that the individual mandate could be recast as a tax, even though he concluded that this was not the most “natural[]” reading of the provision.⁵⁷

III. IN DEFENSE OF AS-APPLIED COMMERCE CLAUSE CHALLENGES

The Court’s recent decision in *NFIB* illustrates that post-*Raich* reports of the death of the *Lopez/Morrison* Commerce Clause revival⁵⁸ were greatly exaggerated. Instead, the Supreme Court doctrine in this area remains in a state of flux. The Court is seeking—indeed, grasping—to create decision rules that provide meaningful limitations on Congress’s authority under the Commerce Clause, while at the same time showing understandable trepidation about invalidating broad laws such as the Affordable Care Act, the CWA, and the CSA. In the face of this uncertainty, Rosenkranz has provided a powerful voice in favor of the Court deciding Commerce Clause cases broadly or not at all. This Part aims to show that limiting Commerce Clause adjudication in the manner that Rosenkranz urges is not required by the constitutional text (indeed, arguably it is contrary to that text in most cases), would lead to results inconsistent with the Commerce Clause’s mandates, and would stunt the Supreme Court’s fragile project to enforce some limitations on Congress’s Commerce Clause authority.

Rosenkranz’s primary argument is that the structure of the Commerce Clause requires only facial challenges.⁵⁹ Under Rosenkranz’s logic, because the subject of the Commerce Clause is *Congress*, any challenge to Congress’s authority under that Clause must be facial, since Congress must be the constitutional culprit in any assertion that Congress exceeded its Commerce Clause authority. As Rosenkranz explains, “[i]f 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.”⁶⁰

57 *Id.* at 2594–601.

58 *See, e.g.*, Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005) (arguing for the death of *Morrison* and evolution towards broader reaching federal laws). *But see* Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879 (2005) (arguing that declarations of *Morrison*’s death are exaggerated).

59 Rosenkranz, *supra* note 12, at 1275.

60 *Id.* at 1248.

Rosenkranz's linguistic analysis correctly identifies that only Congress can exceed Congress's Commerce Clause authority. But, this insight does not suggest that in toto invalidation is a mandatory remedy for such an overreach. Recall, for example, the Supreme Court's decision in *SWANCC*.⁶¹ If Congress had specifically defined "waters of the United States" in the CWA as including seasonal ponds—and, assuming, *arguendo*, that reaching some such ponds is beyond Congress's Commerce Clause authority—it would have been wholly consistent with the Commerce Clause's structure for the Court to invalidate the CWA only to the extent that it applied to those ponds. Put in Rosenkranz's terms, while the "constitutional culprit"⁶² would be *Congress*, its "crime" would be enacting a statute that—in some small measure—exceeded its Commerce Clause authority. Or, as Professor Gillian E. Metzger put it, "no logical reason exists why a litigant could not . . . allege that part of a statutory provision is unconstitutional or that a statute is unconstitutional in a particular range of applications, even if not unconstitutional in all or most."⁶³

A deeper look at Rosenkranz's linguistic analysis of the Constitution actually supports the conclusion that in toto is rarely appropriate in the Commerce Clause context. As Rosenkranz points out, Congress cannot actually *violate* the Commerce Clause; rather, it can only violate the Tenth Amendment when it makes a law that exceeds its authority under the enumerated powers.⁶⁴ But, consider what could justify a court in invoking the *Salerno* invalidation rule to begin with. In the case of an external limitation on congressional authority—such, for example, as the Establishment Clause—the justification for in toto invalidation is straightforward: if, under the relevant decision rule, the statute violates the Establishment Clause in all of its applications, *Salerno* invalidation of the statute must follow. Or, put more simply, if Congress has enacted a statute that establishes a religion, Congress's actions are wholly invalid. But, since Congress cannot actually violate the Commerce Clause, the only basis upon which *Salerno* invalidation would be appropriate is if the court looked at the statute, *under every potentially relevant enumerated power*, and then determined that the statute was categorically authorized by none of those powers in every instance. That inquiry would seem to be an incredibly time-consuming task and one which would force the court to violate the "the fundamental principle of judicial restraint that courts should

61 531 U.S. 159 (2001).

62 Rosenkranz, *supra* note 12, at 1277.

63 Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 881 (2005).

64 Rosenkranz, *supra* note 12, at 1287.

[not] anticipate a question of constitutional law in advance of the necessity of deciding it.”⁶⁵

Take a concrete example: in the earliest successful Commerce Clause challenge, *United States v. Dewitt*,⁶⁶ the Supreme Court held that the Commerce Clause did not authorize Congress to prohibit the selling of combustible illuminating oils, but did not invalidate the statute in toto. Instead, the Court observed that the prohibition would continue to have effect where Congress had plenary legislative authority, “as for example, in the District of Columbia.”⁶⁷ *Dewitt*’s refusal to invalidate the statute in toto is wholly consistent with Rosenkranz’s linguistic analysis that Congress cannot actually violate the Commerce Clause but merely violates the Tenth Amendment. In a particular case, a court can conclude that Congress exceeded its Commerce Clause authority in enacting the statute and that, if the Commerce Clause was the only font of authority that the government invoked, the government should lose the case. However, the Court need not definitively decide whether the same statute may be authorized by a different enumerated power in other instances not before the Court, such as within the District of Columbia, where the Constitution authorizes Congress “[t]o exercise exclusive Legislation in all Cases whatsoever.”⁶⁸

This account calls into question whether the Court was correct in its in toto invalidation of the statutes in *Lopez* and *Morrison*. After all, it is not clear that Congress exceeded its constitutional authority to the extent that it was prohibiting gun possession in the District of Columbia. Perhaps the result more consistent with the Constitution’s text would have been for the Court to declare that the statute could not constitutionally be applied to Mr. Lopez (and, by logical implication, all others similarly situated), leaving for another day the question of whether that statute was invalid in all of its applications.

Rosenkranz’s remaining argument against as-applied Commerce Clause challenges is that “[i]f 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,” meaning that “it must be that the violation is visible on the ‘face’ of the statute.”⁶⁹ There are at least two flaws in

65 *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted).

66 76 U.S. (9 Wall.) 41 (1869).

67 *Id.* at 45.

68 U.S. CONST. art. I, § 8.

69 Rosenkranz, *supra* note 12, at 1278–79.

this argument. First, it is possible—indeed, far from difficult—to design decision rules that could be applied by a “conscientious congressman” at the time of enactment, which nevertheless would not require the entire statute be invalidated in toto. In Part IV, for example, this Article argues that Supreme Court doctrine suggests an as-applied decision rule that would permit a court to invalidate a portion of a statute that applied to intrastate noneconomic conduct—or non-conduct—even if the rest of the statute applies to economic conduct that, taken in the aggregate, has a substantial effect on interstate commerce.⁷⁰ A congressman deciding whether to vote in favor of a statute could make this inquiry in the same manner as a court would and vote against a law that regulates—even in small part—some intrastate noneconomic activity. Second, there is no textual basis for Rosenkranz’s intuition that legislators would be more offended by broader adjudication, which invalidates their entire handiwork. To the contrary, one could plausibly argue that a healthy respect for a co-equal branch would suggest that the Court should not, at a very minimum, create decision rules that require it to decide each Commerce Clause case as broadly as possible. Rather, it should design rules that permit courts to narrow congressional enactments to avoid constitutional problems, where possible, and to invalidate narrow slivers of statutes, where avoidance is not possible. That mode is consistent with the principle that a court should seek to avoid “formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”⁷¹

Rosenkranz’s approach to the Commerce Clause is also potentially harmful to the project of enforcing the limitations in the Commerce Clause. If the Court were to adopt the principle that all adjudication under the Commerce Clause must be facial, this would narrow the Court’s ability to design decision rules that enforce the limitations on Commerce Clause authority consistent with text, precedent, and the comparative competence of courts. To allow for facial-only adjudication of Commerce Clause cases, the Court would have to design decision rules that apply to every application of a statute and can never apply to less than the entire statute.⁷²

Designing a facial-only decision rule that would lead to adjudication that dutifully enforces the Commerce Clause’s limitations would be difficult; indeed, probably impossible. Take, for example,

⁷⁰ See *infra* pp. 495–96.

⁷¹ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted).

⁷² See *supra* pp. 482–83; see generally Keller & Tseytlin, *supra* note 18, at 328–29.

Rosenkranz's suggested decision rule: any statute that invokes Congress's authority under the Commerce Clause must have an "affects interstate commerce" hook in the text of the statute.⁷³ This proposed rule is likely both overinclusive and underinclusive. On one hand, no provision in the Constitution requires Congress to specifically state the invocation of that power on the face of legislation. Thus, if courts were to apply Rosenkranz's suggested decision rule with fidelity, then they would invalidate numerous statutes based not upon an analysis of the Commerce Clause's text and history, but upon Congress's failure to follow a court-created rule. On the other hand, Rosenkranz's proposed rule may overlook actions that exceed Congress's Commerce Clause authority. For instance, the anticommandeering doctrine is based upon the understanding that the Commerce Clause does not authorize Congress to force state officials to enforce federal law.⁷⁴ It is at least arguable that Congress could not force state officials to do Congress's bidding, even if the Government could prove that failure to abide by such a mandate would "affect interstate commerce."

Of course, one could imagine any number of Commerce Clause decision rules that apply to the entire statute as a whole; or, one could add the anticommandeering decision rule as an additional rule to Rosenkranz's proposed rule. But, the point is that whatever facial-only decision rule—or series of rules—scholars and courts envision, those rules will likely suffer one of two problems and sometimes both. The rules will either be overbroad, such that it will require the courts to invalidate wholesale broad congressional enactments, where Congress's transgression is relatively minor compared to the scope of the law. Or they would permit Congress to exceed its authority under the Commerce Clause by hiding otherwise unconstitutional assertions of authority in broad statutes. These problems are acute because the art of modern legislation is a complex endeavor, especially in the field of the flow of goods among the states. It is difficult to envision that anyone could design facial-only decision rules that would apply across every application of every possible statute that implicates the Commerce Clause and which would yield results consistent with the Constitution, under any interpretative theory.

In sharp contrast to the facial-only approach, permitting the Court to design narrower decision rules, which would encourage as-

⁷³ Rosenkranz, *supra* note 12, at 1281.

⁷⁴ *See* *New York v. United States*, 505 U.S. 144, 174–77 (1992) (invalidating the take title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on these grounds).

applied adjudication, would give courts the flexibility to tailor the cure to the constitutional malady. A court confined to a facial-only approach to the Commerce Clause has, in effect, only two options: either uphold the statute in its entirety or declare that Congress has violated the Constitution and then, strike down the statute in toto by applying the *Salerno* invalidation rule. Such a limitation could be disastrous to the development of the law in this area. The impetus for *Lopez*, *Morrison*, and the general modern thrust of the Supreme Court's Commerce Clause doctrine is to find some limitations to Congress's authority consistent with the "non-infinity principle."⁷⁵ Put another way, the Constitution created a government of limited, enumerated powers, which presupposes a quantum of authority *not* delegated to Congress. At the same time, as Michael E. Rosman—a proponent of Rosenkranz's facial-only approach—admits, the Court is "unlikely to declare a . . . broad and all-encompassing [statute]. . . unconstitutional."⁷⁶ The Chief Justice's struggle to find a way to uphold the Affordable Care Act in *NFIB* is a testament to that fact.

In light of this reality, scholars and litigants should encourage the Court to strive to create narrower decision rules in the Commerce Clause, which would not call for in toto invalidation. This would allow the Court to avoid the daunting all-or-nothing choice when facing a dubious assertion of congressional authority. It would encourage the courts to use the common law method, working one case at a time, without needing to apply decision rules that measure whether Congress violated the Constitution in every instance where the statute operates.⁷⁷ At the same time, the development of a robust as-applied Commerce Clause doctrine would discourage Congress from, as Justice Sandra Day O'Connor warned in her *Raich* dissent, "nestling questionable assertions of its authority into comprehensive regulatory schemes."⁷⁸ At the very minimum, recognition of the possibility of meritorious as-applied challenges will permit courts to use the doctrine of constitutional avoidance to trim the constitutionally questionable boundaries of broad statutes such as the CWA, instead of

75 Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 376.

76 Michael E. Rosman, *Facial Challenges and the Commerce Clause: Rethinking Lopez and Morrison*, 4 FAULKNER L. REV. 1, 29 (2012).

77 See Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1753 (2006).

78 *Gonzales v. Raich*, 545 U.S. 1, 43 (2004) (O'Connor, J., dissenting).

concluding—with the dissenters in *SWANCC*—that because the CWA is not invalid in whole, no such trimming should take place.⁷⁹

IV. TWO MODEST AS-APPLIED COMMERCE CLAUSE DECISION RULES

A final objection to the argument in defense of as-applied Commerce Clause adjudication is precedential: after the Supreme Court decided *Raich*, most commentators concluded that as-applied Commerce Clause challenges were now foreclosed.⁸⁰ Courts of appeals generally agree; as Professor David L. Franklin has explained, “lower courts have reacted to *Raich* by declining to entertain as-applied challenges under the Commerce Clause.”⁸¹ Even the few courts of appeals that had ruled in favor of challengers in as-applied Commerce Clause cases in the wake of *Lopez* and *Morrison* held that those prior cases were no longer good law after *Raich*.⁸²

This reaction rests on an overreading of *Raich*. After all, *Raich* did not rebuff the as-applied Commerce Clause challenge categorically, as Rosenkranz believes it should have.⁸³ Instead, the Court rejected the challenge only after reaching two conclusions necessary to its holding: (1) the CSA regulated *economic activity*, including Ms. Raich’s cultivation and subsequent possession of marijuana⁸⁴ and (2) it was rational for Congress to include homegrown marijuana, for private use, within the CSA’s prohibition because such marijuana is fungible with marijuana that is traded in the interstate drug market.⁸⁵ Accordingly, if the Supreme Court accepted the argument that as-applied Commerce Clause challenges should become an important

⁷⁹ *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 192–97 (2001) (Stevens, J., dissenting).

⁸⁰ See Fallon, *supra* note 34, at 936 (arguing that *Raich* “can be read as rejecting the possibility of successful as-applied challenges to assertions of legislative power under the Commerce Clause”); Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705, 706 (2006) (“After *Raich* . . . facial challenges appear to be the only type of Commerce Clause challenge that remains viable.”). But see Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 745 (2005) (arguing that as-applied challenges remain viable after *Raich*).

⁸¹ David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 52 n.46 (2006).

⁸² See e.g., *United States v. Bowers*, 594 F.3d 522, 529 (6th Cir. 2010) (“*Raich* makes clear . . . that *Lopez* and *Morrison* are no longer the controlling authorities in this type of as-applied challenge.”); *United States v. McCalla*, 545 F.3d 750, 754–55 (9th Cir. 2008) (following *Raich* rather than *Lopez* and *Morrison*); *United States v. Stewart*, 451 F.3d 1071, 1073–77 (9th Cir. 2006) (reconsidering its prior holding after *Raich*); *United States v. Maxwell*, 446 F.3d 1210, 1213–16 (11th Cir. 2000) (same).

⁸³ Rosenkranz, *supra* note 12, at 1279.

⁸⁴ *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005).

⁸⁵ *Id.* at 19, 22.

tool in trimming overreach by Congress, then *Raich* provides it with two ready-made decision rules to apply when dealing with assertions of authority under *Lopez*'s "substantially effects" prong.

A. *The statute regulates both economic and non-economic activity, and the challengers' action falls within the non-economic sphere.*

In *Lopez* and *Morrison*, the Supreme Court held that intrastate activities at issue there could not be aggregated under *Lopez*'s "substantially effects" prong. Put another way, no matter the combined economic impact of crimes outlawed by the statutes in *Lopez* and *Morrison*, the impact of those non-economic activities could not be aggregated to justify a statute under the Commerce Clause. As the Court explained in *Morrison*, "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."⁸⁶ From this principle, one can—at least arguably—derive the rule that if a statute regulates both economic and non-economic activities, then the statute's constitutionality can only turn on the aggregation of the economic activities; at the same time, the non-economic activities, which could not be regulated under the Commerce Clause and, thus, could not possibly provide the constitutional justification, would remain outside of Congress's reach. Thus, if Congress passed a law that banned the possession of guns in school zones as part of a broader prohibition that encompassed economic activity, then Mr. Lopez would seem to have a strong argument that his mere possession of the gun in the school zone did not subject him to federal authority under the Commerce Clause. In this way, *Lopez* and *Morrison* are not—as Justice O'Connor feared—"nothing more than a drafting guide."⁸⁷ As properly understood, Congress can draft no law, no matter how narrow or broad, which would go beyond regulating economic activity, at least under *Lopez*'s "substantial effects" prong.

Nor does the Court's holding in *Raich* extend Congress's Commerce Clause authority beyond the regulation of intrastate economic activity which, taken in the aggregate, has a substantial effect on interstate commerce. The Court in *Raich* did not hold that the nature of Ms. Raich's activity was immaterial. Instead, the Court adopted a broad definition of "[e]conomics" as meaning "the production, dis-

⁸⁶ United States v. Morrison, 529 U.S. 598, 613 (2000).

⁸⁷ *Raich*, 545 U.S. at 46 (O'Connor, J., dissenting).

tribution, and consumption of commodities” and then, held that Ms. Raich’s conduct fell within that definition.⁸⁸ While this definition is broad, it is consistent with *Lopez*’s recitation of the Court’s prior holding as applying only to “economic activities,” including “intrastate coal mining,” “restaurants utilizing substantial interstate supplies,” “hotels catering to interstate guests,” and—most on point—“consumption of homegrown wheat.”⁸⁹ At the same time, this definition of “economic activity” is not unlimited. Under *Lopez*, the mere possession of a gun in a school zone is not an economic activity; under *Morrison*, the commission of a violent crime that involves no element of an economic motive is not an economic activity; and, under *NFIB*, refusing to enter into a market is not an economic activity. Other cases may well provide additional categories of non-economic activities, which Congress cannot regulate in order to forestall effects on interstate commerce. Or, the Court may choose to narrow the range of what is an “economic activity,” especially when dealing in an area of historical state concern. And, if a litigant can identify its activity as fitting within a subclass that is a noneconomic activity or no activity at all, then that litigant should be able to prevail on an as-applied Commerce Clause challenge, even if the rest of the statute’s regulation of economic activity remains undisturbed.

B. The statute sweeps in a substantial class of conduct that is too attenuated from the class of conduct that gives rise to substantial effects on interstate commerce.

In *Raich*’s misunderstood passage, the Court explained that because the Commerce Clause authorizes Congress “to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce,” where “a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”⁹⁰ This statement, if properly understood, merely stands for the proposition that if a congressionally defined “class of activities” has a substantial effect on interstate commerce, then the fact that *each individual instance of that activity* does not itself have an

88 *Id.* at 25–26 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 54 at 720).

89 *United States v. Lopez*, 514 U.S. 549, 559–60 (1995) (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981), *Katzenbach v. McClung*, 379 U.S. 294 (1964), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Wickard v. Filburn*, 317 U.S. 111 (1942)).

90 *Raich*, 545 U.S. at 17 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

effect on interstate commerce is of no moment. At the same time, as Judge Higginbotham, explained even before *Raich*,

[I]ndividual acts cannot be aggregated if their effects on commerce are causally independent of one another. That is, if the effect on interstate commerce directly attributable to one instance of an activity does not depend in substantial part on how many other instances of the activity occur, there is an insufficient connection—in other words, an interactive effect—and the effect of different instances cannot be added. If, on the other hand, the occurrence of one instance of the activity makes it substantially more or less likely that other instances will occur, then there is an interactive effect and the effects of different instances can be added.⁹¹

Under this understanding, Congress could rationally determine that legal permission for some citizens to grow and consume home-grown marijuana would impact “demand” for other marijuana in the interstate market, rendering irrelevant that any particular instance of home-grown marijuana did not have a substantial effect on interstate commerce.⁹²

Following from this understanding, *Raich* left open a decision rule permitting a party to argue that its activities—or subclass of activities—are not causally related to the economic activities that the statute regulates under *Lopez*’s substantial effects prong. For example, if a statute regulated a class of economic activities that, taken in aggregate, substantially affect interstate commerce, but also sweeps in another class of activities with no causal relationship to the core class being regulated, then there would be no reason in logic or precedent to permit Congress to sweep in that second, unrelated class.

Finally, even if the Court balks at either of the above described as-applied decision rules in isolation, then at very minimum, they can be combined into one rule, which would prohibit Congress from using its Commerce Clause authority to regulate noneconomic activity that is too tangentially related to the core economic activity that the statute regulates. Consider, for example, Section 1532 of the Endangered Species Act (“ESA”). The ESA prohibits anyone from “taking” endangered species, with “take” being defined as “pursue, hunt, shoot, wound, kill, trap, [and] capture.”⁹³ It is at least arguable that the “taking” prohibition applies to economic activity—for example, “hunting” endangered species—whereas other taking activity—such

91 United States v. Hickman, 179 F.3d 230, 233 (5th Cir. 1999) (Higginbotham, J., dissenting).

92 *Raich*, 545 U.S. at 19, 22.

93 16 U.S.C. § 1532(19) (1973).

as a “lone hiker”⁹⁴ “killing” an endangered local gnat—would not be “economic.” In addition, it is far from clear whether protection of particularly isolated species, which do not travel across state lines, have any interactive effect with the ESA’s broader regime. And, while lower courts have thus far uniformly rejected as-applied challenges to the ESA, those courts have often disagreed within the same panel, and among themselves, as to the rationale for these decisions.⁹⁵ This suggests an opportunity for a properly articulated as-applied Commerce Clause challenge to Section 9 of the ESA to—at minimum—trim the application of the statute to clearly non-economic activities, similar to the Court’s decision in *SWANCC*.⁹⁶

CONCLUSION

The two proposed as-applied decision rules above are modest in character and are unlikely—standing on their own—to achieve the Court’s goal of finding meaningful limitations on Congress’s Commerce Clause authority, while proceeding in a measured manner that does not disturb decades of settled expectations. The important point is that as the Court continues in the task of crafting Commerce Clause decision rules, there is no basis to remove wholesale from its judicial toolbox the ability to create rules that permit litigation with a scalpel, not a meat cleaver. There are cases where broader adjudication is appropriate, where such adjudication can more fully and dutifully enforce the Constitution. But, that is not always the case.

⁹⁴ *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, J., concurring).

⁹⁵ *See, e.g., GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 291 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc) (rejecting the panel’s justification of a similar regulation under the Commerce Clause for similar reasons); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (concluding that the panel opinion misapplied the Commerce Clause in upholding an application of the ESA by “ask[ing] whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so”); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997) (upholding the constitutionality of an application of the ESA protecting a small, local habitat of an endangered species of fly from construction of a hospital wing under the Commerce Clause on channels of commerce and substantial effects grounds); *id.* at 1057–59 (Henderson, J., concurring) (upholding the constitutionality of the application under the Commerce Clause, but only on substantial effects grounds); *id.* at 1061 (Sentelle, J., dissenting) (concluding that the application is not protected by the Commerce Clause at all).

⁹⁶ Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 2032 (2008) (“[E]nvironmental regulations should be upheld as valid only when applied to actors such as businesses and real estate developers, who are engaged in economic activity.”).

While this Article has ostensibly been about as-applied decision rules, there is a deeper issue of constitutional adjudication at stake. The variety and complexity of laws, at both the federal and state levels, has grown. Those laws interact with the powers and limitations in the Constitution in complicated—often surprising—ways, especially when one takes into account the gloss added by two centuries of Court doctrine. In such a complex world, it is highly unlikely that any judge or scholar would be able to design doctrines that always and only measure constitutional provisions in all of their applications, which also accurately reflect the meaning of constitutional provisions, under any theory of the Constitution.

The deeper point is that the search for facial-only doctrines is not worth the candle, under any provision. Nothing in Article III, the judicial power, or any constitutional provision requires courts to only measure the constitutionality of congressional actions in all of their applications, as opposed to taking a more flexible approach and deciding that some actions, by some actors, violate the Constitution in the part relevant to the challenge being brought, leaving for another day—and, for the application of the venerable common law method—a wholesale challenge to Congress's actions. That is not to say that facial challenges should never be permissible, or should always be disfavored. Far from it. The point is that a *per se* rule under any constitutional provision requiring only facial invalidation or facial affirmance is unlikely to lead to real-world decisions by courts that comport with the Constitution.

Does this mean that we should discard Professor Rosenkranz's entire project? Not at all. His critical insight that the subjects of the Constitution often explain which actor the constitutional provision is targeted at restraining or empowering provides powerful tools for understanding the substantive scope of those provisions. Thus, for example, his understanding would seem to rule out any decision rule that measured the constitutionality of a statutory enactment under the Commerce Clause based upon how the President would choose, in his own discretion, to enforce that enactment. That is because, as a textual matter, the President's actions cannot inform the scope of congressional power. Just because that insight does not also track directly upon disagreements that courts and scholars have had about when "facial" and "as-applied" challenges should be permissible does not make Professor Rosenkranz's work any less valuable or any less worthy of study or understanding.