

APPRAISING THE SIGNIFICANCE OF THE SUBJECTS AND OBJECTS  
OF THE CONSTITUTION: A CASE STUDY IN TEXTUAL AND  
HISTORICAL REVISIONISM

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A recurrent challenge in modern constitutional law takes the following form: a scholar produces a novel interpretation of the United States Constitution, based on creative textual analysis or original historical research, and calls for a corresponding revision of constitutional doctrine based on his or her insight. How should other law professors, and especially judges and Supreme Court Justices, respond? Insofar as the novel and arresting thesis depends on claims of historical fact, historically minded scholars will want to look carefully at the supporting evidence and otherwise test it. Sometimes even initial scrutiny will expose the claims as transparently unsupported. Perhaps more frequently, work by others will reveal grounds for uncertainty, but leave the new theory among a set of more or less plausible competitors. None will be decisively proven, but all will retain a claim to be taken seriously. Then, with the ultimate truth of the textual or historical claim in a state of greater or lesser certainty, courts will need to decide how much, if at all, to rely on it.

In his splendidly iconoclastic articles *The Subjects of the Constitution*<sup>1</sup> and *The Objects of the Constitution*,<sup>2</sup> Nicholas Rosenkranz draws attention to a feature of the Constitution's language and structure—involving the juxtaposition of provisions written in the passive voice with others that speak in the active voice and have clear subjects—that nearly everyone else, including constitutional experts, had previously overlooked. Having done so, he advances a spectacularly creative argument that according due significance to the subjects and objects of diverse constitutional provisions would not only have significant substantive implications, but also force an even more profoundly important restructuring of constitutional litigation.<sup>3</sup> For

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

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

3 See Rosenkranz, *supra* note 1, at 1210–11 (promising a “new model of judicial review”).

both scholars and judges, coming to terms with Rosenkranz's theory is now an important agenda item.

In this short Article, I shall express some grounds for respectful skepticism, both about whether Rosenkranz has proven his claims and about whether courts should decide cases on the basis of his arguments, even if judges thought him more likely right than not about the significance that well-informed Americans of the Founding generation would have attached to the "subjects" and "objects" of the Constitution. But, I also hope to train attention on the general methodological challenge—partly for other law professors working in the field and especially for judges and Justices—that work such as Rosenkranz's poses: How should we appraise, and what significance should we attach to, ingenious, provocatively novel theses that would make constitutional outcomes depend wholly on seemingly plausible, but not clearly proven linguistic and historical claims?

#### I. PROFESSOR ROSENKRANZ'S INFERENCES FROM THE CONSTITUTION'S SUBJECTS AND OBJECTS

According to Professor Rosenkranz, the Constitution's text and structure clearly establish that the most fundamental question in any constitutional case is always who has violated—or is capable of violating—the particular provision in question.<sup>4</sup> When "the who question"<sup>5</sup> is framed, it will sometimes have obvious answers, especially in cases involving the powers of and the restrictions applying to the federal government. The answer will be unmistakable when a provision is written in the active voice, as is the First Amendment, which says, "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."<sup>6</sup> The Commerce Clause also has "*Congress*" as its subject,<sup>7</sup> as does Section Five of the Fourteenth Amendment.<sup>8</sup> Similarly, many of the provisions of Article II have "the President" as their subject. A number of clauses in Article III, which confers judicial power, are also written in the active voice.

By contrast, many other constitutional guarantees—especially including the provisions of the Bill of Rights other than the First

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<sup>4</sup> Rosenkranz, *supra* note 2, at 1006; Rosenkranz, *supra* note 1, at 1210.

<sup>5</sup> Rosenkranz, *supra* note 1, at 1210.

<sup>6</sup> U.S. CONST. amend. I (emphasis added).

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

<sup>8</sup> U.S. CONST. amend XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

Amendment—are written in the passive voice. When a provision is written in the passive voice, Rosenkranz maintains that we need to figure out who is its “object.”<sup>9</sup> For example, to whom does the Fourth Amendment apply or whom does it restrain? In nearly every case, he says, the answer to questions about the “objects” of constitutional restraints can be discerned from the Constitution’s structure.<sup>10</sup> For example, because only the Executive can effect a search and seizure, the answer to the Fourth Amendment “who question” involving searches and seizures is “the President.”<sup>11</sup> With regard to a variety of procedural guarantees in Amendments V through VII—such as, rights to trial by jury and the assistance of counsel—Rosenkranz infers that it is the courts who are bound.<sup>12</sup>

When we move from constitutional restrictions on the federal government to constitutional restrictions on the states, Rosenkranz acknowledges that answering “the who question” can be trickier.<sup>13</sup> The difficulty largely comes from the partial “incorporation” of the Bill of Rights that he believes occurred through the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>14</sup> It takes careful historical work to determine which provisions are and are not incorporated, and which were redefined in the process. But once these issues are resolved, constitutional grammar again dictates a good deal, he argues. The Privileges or Immunities Clause says, “No state shall *make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>15</sup> Perhaps most often, all three branches of state governments will apparently be bound as either potential

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9 Rosenkranz, *supra* note 2, at 1010.

10 *Id.* at 1027.

11 Rosenkranz, *supra* note 2, at 1034–35; Rosenkranz, *supra* note 1, at 1241.

12 Rosenkranz, *supra* note 2, at 1046–50.

13 *See id.* at 1024 (“It may be tempting to say that all of these clauses apply to all three branches of state government, because they say only ‘No State shall.’ But textual analysis does not end there. Structural logic might demonstrate that some such clauses are limited to only one or two branches of state government.” (footnote omitted)).

14 *See* Rosenkranz, *supra* note 2, at 1054–55 (following Akhil Amar in arguing that the Privileges or Immunities Clause incorporates “the individual-rights aspects of the Bill of Rights” but not its structural aspects). Contrary to what Rosenkranz believes the Constitution’s text and history require, the modern Supreme Court has incorporated the Bill of Rights against the states using the Due Process Clause of the Fourteenth Amendment. Nevertheless, he is not alone in believing that the Privileges or Immunities Clause may be the more historically plausible source of incorporation doctrine. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3063–83 (2010) (Thomas, J., concurring) (presenting exhaustive historical evidence supporting incorporation through the Privileges or Immunities Clause, not the Due Process Clause); AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 118–21, 156–63 (2012) (making a similar argument).

15 U.S. CONST. amend XIV, § 1 (emphasis added).

makers or enforcers of laws that abridge the privileges or immunities of citizens (including, for example, the freedom of speech).<sup>16</sup>

According to Rosenkranz, careful attention to “the who question” would dictate important changes in the substance of constitutional law. For example, because Congress is the subject of the First Amendment, Rosenkranz concludes that action by the President cannot violate the Free Speech, Free Exercise, or Establishment Clauses.<sup>17</sup> And because he believes that nearly all of the Bill of Rights guarantees that are written in the passive voice have the President or the courts, not Congress, as their objects, he argues that no law that Congress might pass could possibly violate most provisions of the Bill of Rights.<sup>18</sup>

As startling as the implications of his thesis would be for substantive constitutional doctrine, Rosenkranz thinks his conclusions have even more revolutionary implications for the structure of constitutional litigation and, in particular, for currently vexed issues about the availability of facial and as-applied challenges. According to Rosenkranz, the answer to “the who question” determines whether a constitutional challenge is facial or as applied.<sup>19</sup> A challenge brought under a constitutional provision that has “Congress” as its subject is inherently facial, Rosenkranz argues, because if Congress oversteps its powers, then it necessarily does so at the moment when it legislates, with the effect that it failed to produce any valid law at all.<sup>20</sup> A court

16 See Rosenkranz, *supra* note 2, at 1057 (“[T]he Framers [of the Fourteenth Amendment] could not be certain precisely *who*, at the state level, would pose each sort of threat to liberty. Therefore, the Constitution never expressly singles out branches of state government when limiting state power; instead, it says either ‘No State shall’ or ‘by any State.’” (footnotes omitted)).

17 See Rosenkranz, *supra* note 1, at 1261 (“[T]he executive branch *cannot* violate the Establishment Clause *on the merits*—for the simple reason that *the executive branch is not the subject of the First Amendment*.”).

18 Rosenkranz, *supra* note 2, at 1050–51.

19 Believing that constitutional challenges are necessarily challenges to *actions* by particular actors, rather than to statutes, Rosenkranz initially mocks the doctrine that attempts to sort challenges to statutes into distinctive categories of “facial” and “as-applied.” See Rosenkranz, *supra* note 1, at 1229–30 (“[T]he terms themselves are misleading malapropisms.”). It swiftly turns out, however, that he believes his theory will give rigorous content to those currently disordered categories by determining which constitutional challenges are necessarily facial—in the sense of framing the question whether Congress successfully enacted any law at all, *id.* at 1238—and which cannot be facial because they arise under constitutional provisions that restrain the President or the courts, not Congress. *Id.* at 1241–42; see Rosenkranz, *supra* note 2, at 1007, 1050–51 (explaining that a challenge to legislative action is a facial challenge, whereas a challenge to an executive action is an as-applied challenge).

20 Rosenkranz, *supra* note 1, at 1238 (“If Congress has violated the Constitution by making an impermissible law, then it has violated the Constitution at the moment of making the

confronted with a proper First Amendment challenge must therefore determine whether a challenged act of Congress either falls or stands in its entirety.

In constitutional litigation under provisions that have the President or the judiciary as their subject or object, the structure of constitutional litigation is necessarily wholly different, Rosenkranz maintains. According to him, the idea of facial challenges under such provisions is nonsensical.<sup>21</sup> If a provision limits the powers of the President or the courts, rather than Congress, then a constitutional challenge under that provision must necessarily address the action of the President or a court. To be sure, the President or a court might sometimes act to enforce a law that a provision of the Bill of Rights forbids the President or a court to enforce. For example, the President or a court might follow a congressional directive to impose cruel or unusual punishments. Even in such a case, however, Rosenkranz argues that a challenge is necessarily to the actual or anticipated presidential or judicial action in applying the statute, which is of course to say that the challenge, to the extent it involves a statute at all, can only be to a statute as-applied.<sup>22</sup> It cannot be a facial one.

Once again, matters are more complicated in the case of challenges to actions by state officials because the crucial language of the Fourteenth Amendment forbids states to “make or enforce any law” that infringes the rights that the Amendment guarantees. If I understand correctly, Rosenkranz thus believes that at least some state legislation can violate incorporated provisions of the Bill of Rights and be vulnerable to challenges on its face, even if substantively identical federal legislation would not.<sup>23</sup> The key distinction is that the Fourteenth Amendment forbids state legislators to “make,” as well as state executives or judiciaries to “enforce,” laws, and it therefore becomes possible for state legislatures to violate the “incorporated” Fourth or Eighth Amendment, for example,<sup>24</sup> even though Congress could not

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law. And so, it must be possible to identify a constitutional flaw on the face of the statute itself. Thus, a ‘facial challenge’ is nothing more nor less than a claim that Congress (or a state legislature) has violated the Constitution.”).

21 *Id.* at 1238–42.

22 *Id.*

23 See Rosenkranz, *supra* note 2, at 1066–67 (“[T]he Privileges or Immunities Clause begins ‘No State shall.’ So the privilege against *state* takings may run against state *legislatures*, as well as state executives, and it may forbid *regulatory* takings as well as physical takings.”). For whatever reason, Rosenkranz’s discussion of incorporation in *Objects* passes over most of the provisions of the Bill of Rights that are written in the passive voice.

24 I do not exclude the possibility that I might be mistaken in my account of the implications of Rosenkranz’s theory for Fourth or Eighth Amendment litigation, as he does not specifically discuss this subject. It seems clear, however, that in his view the language of

violate the original Fourth or Eighth Amendments (because they have the President or the courts as their objects).

## II. METHODOLOGICAL ASSUMPTIONS

Rosenkranz's thesis about the implications of the "subjects" and "objects" of the Constitution is original, ingenious, and bracing. A fair appraisal requires excavating beneath his substantive claims to identify his methodological assumptions. As is evident on the surface, Rosenkranz's methodology is resolutely textualist. Constitutional law is in a state of confusion, he writes, and the confusion, "like most confusion in law, stems from insufficient attention to text. Individual words are important, of course, but equally important is textual structure. . . . [C]areful attention to constitutional grammar can reveal—and will reveal—nothing less than the constitutional structure of judicial review."<sup>25</sup> When the Constitution's text speaks clearly, Rosenkranz generally looks no further in attempting to support his conclusions. If uncertainty would otherwise exist—for example, about who are the objects of constitutional provisions written in the passive voice—he refers to constitutional structure to find resolution.<sup>26</sup>

Appeals to the Constitution's text and structure are by no means unusual or even controversial in constitutional law.<sup>27</sup> But Rosenkranz appears to go further than most in claiming that the Constitution's text and structure almost uniquely determine constitutional outcomes. Albeit with some trepidation, I think it fair to conclude that his argument rests upon three methodological assumptions, each of which will provide a useful point of departure for inquiry into the persuasiveness of his conclusions.

First, Rosenkranz assumes that the appropriate "structure of judicial review"—including the availability of facial challenges—flows directly, nearly as a matter of entailment, from the meaning of constitutional provisions conferring and limiting the powers of Congress, the

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the Fourteenth Amendment requires a different set of rules governing facial challenges to state action than the language of Article I and the Bill of Rights makes appropriate in challenges to action by the federal government.

<sup>25</sup> Rosenkranz, *supra* note 1, at 1210.

<sup>26</sup> *See, e.g.*, Rosenkranz, *supra* note 2, at 1016 ("As Marshall demonstrated, the subjects of the active-voice clauses can help identify the implicit objects of the passive-voice clauses.").

<sup>27</sup> *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 84–85 (1982) (listing such "textual" and "historical" arguments among the recognized modalities of constitutional argument); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195–98, 1200–01 (1987) (discussing arguments from the Constitution's text and structure).

President, the courts, and the states. On an alternative view, constitutional adjudication properly derives its structure, at least partly, from traditions and doctrines that have more to do with constitutional “implementation” than with textual “meaning.”<sup>28</sup> In my view, an apt illustration comes from the “severability” doctrine, under which the courts, when confronting a statute with some unconstitutional parts or applications, will sometimes determine that even if a statute is invalid in part, the valid parts can be separated and remain valid, judicially enforceable law.<sup>29</sup> Another example comes from the “strict scrutiny” test, under which courts will invalidate legislation that infringes on fundamental rights, unless the statutory restriction is “necessary” or “narrowly tailored” to a “compelling governmental interest.”<sup>30</sup> No provision of the Constitution includes any such language. No one has ever traced the strict scrutiny test to the original understanding of any constitutional guarantee. The Supreme Court essentially invented the formula in a series of cases decided during the 1960s.<sup>31</sup> Yet the

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28 RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37–42 (2001); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1276, 1281–85 (2006). Some originalists embrace an analogous distinction between the constitutional meaning that emerges from interpretation, which may sometimes be only vague or abstract, and the “construction” that courts permissibly engage in when they create doctrinal tests to enforce or apply partially indeterminate language. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118 (2004) (“Although both constitutional legitimacy and the commitment to a written constitution necessitate reliance upon the original meaning of the text, originalist interpretation has its limits—limits that inhere in the use of language to guide conduct.”); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 7 (1999) (“When political actors systematically make such arguments with little regard for balancing such textual components, it makes more sense to recognize that they are engaged in a different activity than to accuse them of making ‘bad’ interpretations.”).

29 For discussions of statutory severability, see, for example, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 249–51 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1349–51 (2000); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 231–32 (2004); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 742–43 (2010); *cf.* Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating In Toto*, 98 VA. L. REV. 301, 319 (2012) (arguing that commentators including Professor Rosenkranz have erred by failing to distinguish “constitutional decision rules,” which determine whether statutes are constitutionally valid or invalid, from “invalidation rules,” which determine whether the appropriate remedy for an invalid statute is severance or total nullification”).

30 *E.g.*, *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2738 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010); *Johnson v. California*, 543 U.S. 499, 505 (2005); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

31 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–75 (2007).

strict scrutiny test survives—and I would say appropriately—as a well-designed device for implementing otherwise vague constitutional strictures that could not sensibly be treated as absolute, yet deserve more protection than a balancing test afforded.<sup>32</sup> It will not escape attention that the strict scrutiny test, as currently employed, sometimes measures the constitutionality of legislation under constitutional provisions that do not have “Congress” as their grammatical subjects.<sup>33</sup>

Second, Rosenkranz’s reference point for ascertaining the meaning of the Constitution’s text and structure appears to be what is sometimes described as its “original public meaning.”<sup>34</sup> This is not a necessary assumption for a textualist theorist to make. An avowed textualist might, for example, eschew historical inquiries and focus just on the Constitution’s text and grammar as they would present themselves to twenty-first-century interpreters untutored in constitutional history.<sup>35</sup> Or one might assume that the Constitution’s text reflects aspirations that call for interpretation in light of moral principles.<sup>36</sup> But I take Rosenkranz to want to interpret the Constitution’s words and structure as they would have been understood by intelligent, grammatically adept, and informed members of the generation that adopted relevant constitutional language. Rosenkranz’s linkage of his textualism to a form of originalism emerges most clearly in his discussion of the Fourteenth Amendment. He bases his conclusion that the Privileges or Immunities Clause partially incorporates the Bill of Rights almost entirely on evidence adduced by other scholars concerning the original public understanding of the Fourteenth Amendment.<sup>37</sup>

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<sup>32</sup> *Id.* at 1292.

<sup>33</sup> *E.g.*, *Adarand*, 515 U.S. at 227 (announcing that all racial classifications imposed by the federal government are subject to strict scrutiny under the Fifth Amendment’s Due Process Clause).

<sup>34</sup> *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1144–45 (2003) (“Original meaning . . . asks not what the Framers or Ratifiers meant or understood subjectively, but what their words would have meant objectively—how they would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them.” (footnote omitted)).

<sup>35</sup> *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 208–09 (1980) (discussing the possibility of divergence between the meaning of the Constitution’s text when it was ratified and its meaning today).

<sup>36</sup> *See, e.g.*, JACK M. BALKIN, *LIVING ORIGINALISM* 14–16 (2011); RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–38 (1996).

<sup>37</sup> *See* Rosenkranz, *supra* note 2, at 1052 & n.259 (highlighting the scholarly consensus that the Fourteenth Amendment incorporates aspects of the Bill of Rights against the states through the Privileges or Immunities Clause).



Third, Rosenkranz's constitutional interpretive methodology appears to afford little, if any, role to post-ratification precedent or to concerns about sound policy. Almost never does he discuss precedent as potentially relevant to how the Constitution should be interpreted today, even when he calls for sweeping revisions of current doctrine, and he rarely alludes specifically to considerations of functional desirability. Although I agree with Rosenkranz that the Constitution's text, structure, and history are important, I, like many others, believe that other considerations, including precedent and consequences, should also matter to constitutional adjudication.<sup>38</sup> Settled precedent should not be cast aside lightly. When there is a choice between otherwise legally plausible arguments and interpretations, considerations of normative desirability should affect the balance.<sup>39</sup>

In the next three Parts of this Article, I shall follow the avenues of inquiry that these three methodological assumptions respectively suggest. I shall begin by questioning Rosenkranz's assumption that the meaning of constitutional language should necessarily determine the structure of judicial review. Then, assuming for the sake of argument that the structure of judicial review should reflect the meaning of the provisions on which Rosenkranz rests his thesis, I identify some respects in which more work would be required to give adequate support to his textual and historical arguments. Finally, I turn to issues involving the pertinence of precedent and value- or policy-based arguments to constitutional adjudication. Although I allude briefly to the much mooted issue of whether and if so when precedent should trump what otherwise would be the clearly ascertainable

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38 See, e.g., FALLON, IMPLEMENTING THE CONSTITUTION, *supra* note 28, at 45–55 (developing a “typology of constitutional argument”); Fallon, *supra* note 27, at 1194–209 (discussing various “kinds of factors that the Court characteristically and appropriately takes into account” in resolving constitutional matters). Even some originalists would make exceptions for their otherwise originalist theories to continue to adhere to well-established precedent. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 411–12 (2012) (“The chief barrier against a wrenching purge—by originalism or any other theory of interpretation—is the doctrine of stare decisis.”).

39 My approach to constitutional theory and my defenses of the methodological commitments described in the text are “interpretive” in Professor Dworkin’s sense of the term. See RONALD DWORKIN, LAW’S EMPIRE 45–86 (1986) (characterizing “interpretive” theories as reflecting interacting considerations of “fit” and normative attractiveness). For further discussion of Dworkin’s approach to American constitutional practice, see Fallon, *supra* note 27, at 1192 & n.11, 1231–37. Following Dworkin, I believe that a theory of interpretation of the Constitution of the United States should aspire to fit and rationalize the implicit rules and understandings that have evolved to structure interpretation of our particular Constitution—most of which was written in the eighteenth century—at this point in constitutional history.

constitutional meaning, I shall focus more on issues—which I believe that Rosenkranz’s work raises—about the pertinence of precedent and policy when evidence regarding the originally understood public meaning is plausibly viewed as supporting dramatically novel conclusions, but is not clear-cut.

### III. THE ROLE OF “IMPLEMENTING” DOCTRINES IN CONSTITUTIONAL ADJUDICATION

Although Rosenkranz seems to regard it as beyond question that the original public meaning of provisions empowering and restraining non-judicial branches of government should determine the structure of judicial review, that proposition is by no means self-evident. For my own part, I believe—as even some originalists acknowledge<sup>40</sup>—that questions concerning how courts should implement the Constitution turn partly on considerations besides the claims about the meaning of the provisions empowering and restraining government actors on which Rosenkranz entirely rests his case. Above I gave two examples of judicially developed doctrines to implement the Constitution that lack clear foundations in the Constitution’s text or the original public meaning of particular constitutional provisions. One involved modern severability doctrines, the other strict judicial scrutiny. As I shall explain more fully below, Rosenkranz appears to reject the possibility of statutory severability under constitutional provisions that have “Congress” as their grammatical subjects. And he plainly insists that statutes cannot be subjected to “facial” tests such as the strict judicial scrutiny test under provisions that have the President or the courts as their objects.

In my view, if Rosenkranz’s thesis aims wholly to overthrow or substantially to displace doctrines such as these, then it would generate unacceptable consequences, and his proposal to restructure constitutional litigation in light of the subjects and objects of the Constitution should be rejected on that basis. Alternatively, if Rosenkranz were to construe his theory as leaving a substantial scope for implementing doctrines that are not strictly derivable from the Constitution’s text and structure, and for severability doctrines in particular, then his proposed restructuring of constitutional litigation would have relatively little practical bite. If there is a “Goldilocks” interpretation of Rosenkranz’s thesis that constitutional meaning dictates the structure of constitutional litigation in all cases—one under which it would be

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40 See *supra* note 28 and accompanying text.

neither too strong to be tolerable nor too weak to be interesting—then it will take more work by Rosenkranz to show exactly what it is. Or so I am presently inclined to believe. To develop this thesis, I will look first at the cases that Rosenkranz says uniquely and necessarily involve facial challenges, and then at those that he says are inherently as applied, and see what would follow if his prescriptions were adopted. I shall then, finally, say a few words about the application of his thesis in cases challenging actions by the states and their officials.

*A. Separability Doctrine in First Amendment Litigation*

With respect to challenges that Rosenkranz depicts as necessarily facial, his thesis would be too strong if it allowed no room whatsoever for separability by insisting that any statute with even a single invalid application is therefore necessarily unconstitutional in toto. Imagine, for example, that Congress enacts a multi-part revision of the tax code. Although most parts of the statute do not affect the freedom of speech in any way, assume that one provision (out of hundreds) provides for a special levy on the press. That provision, we may suppose, violates the First Amendment.<sup>41</sup> The question then is: does the statute stand or fall as a whole, or can the provision providing for a levy on the press be severed from the rest, so that the remainder can stand? Modern severability doctrine would clearly call for partial, rather than total, invalidation of the statute, with all but the flawed provision surviving.<sup>42</sup> So, I believe, would common sense. If Rosenkranz's theory required a different result, then I would adjudge it too strong. It would dictate a potentially grievously improvident outcome—imagine vast chunks of the tax code being thrown out as unconstitutional as tax day approached!—and for no particularly good end.

The consequences of Rosenkranz's position would be even stronger, stranger, and less tolerable if it applies to cases in which legislation is enacted in the form of a multi-part package that spans a variety of topics. Suppose Congress enacts, and the President signs, a bill that, in different sections, makes appropriations for the Defense

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<sup>41</sup> *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 590 (1983) (invalidating a state tax that disproportionately burdened the press).

<sup>42</sup> *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (concluding that although the Medicaid "portion of the Affordable Care Act violates the Constitution," the remedy for that violation "does not require striking down other portions of the Affordable Care Act"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 328–36 (2010) (considering the "facial" constitutionality of one section of a federal campaign finance statute without suggesting that other parts of the law might be invalid).

Department, funds but also reduces benefits under an entitlement program, and amends the tax code. If Rosenkranz would maintain that a single provision that infringed the freedom of speech could not be severed from the rest, then his stance would seem to me not only disturbingly imprudent, but also bizarre.

As I noted above, however, I do not mean to press my objection too strongly, for Rosenkranz might be able to qualify his thesis. He might imaginably say, for example, that each provision of a multi-part statute should count as a distinct law unto itself and that only the invalid provision should therefore be struck down, even though the provisions were all packaged together and the vote on some of them might have depended on the packaging. Admission of this foothold for severability doctrine would weaken his thesis quite considerably, however, and begin to undermine his claim that it would have sharp practical implications.

Now consider a different example, designed to test whether a sensible approach to First Amendment litigation does not sometimes require recognition of the separability of statutory language even within a single provision. Suppose Congress enacts a provision making it a crime to ship in interstate commerce any material that is “obscene or lewd.”<sup>43</sup> Let us assume that the statute would be valid if it prohibited the shipment only of “obscene” material but invalid if it prohibited the shipment only of “lewd” material. Must the provision stand or fall as a whole on the ground that it is all one law? Under modern severability doctrine, the prohibition against the shipment of “lewd” material would be struck down, but the prohibition against obscenity would continue to stand.<sup>44</sup> To me, this would seem the clearly most sensible result. Indeed, as I shall explain below, I would think it potentially defensible, even on Rosenkranz’s preferred ground of textual meaning: it would be linguistically plausible to read the First Amendment’s command that Congress may make “no law . . . abridging the freedom of speech” to permit a distinction, within a statute, between “law abridging the freedom of speech,” which is thus invalid, and law that does not abridge the freedom of speech and therefore can stand. If Rosenkranz’s theory will not per-

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43 *Cf. Reno v. ACLU*, 521 U.S. 844, 849 (1997) (addressing the constitutionality of a federal statute restricting “obscene or indecent” speech on the Internet).

44 *See id.* at 883 (effectively striking the words “or indecent” from the statute while allowing the rest to stand); *see also* Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 CALIF. L. REV. 915, 955 (2011) (“[T]he Court will reject a facial challenge on severability grounds if it can identify a relatively surgically precise way of curing the [constitutional] defect . . .”).

mit this result, I would again conclude that it is “too strong.” The theory would impose substantial costs—and arguably, quite gratuitously so, if severability is permitted in the hypothetical case of a multi-part statute, only one part of which trenches on the freedom of speech.

Now, finally, consider a case in which modern separability doctrine would view some invalid statutory applications—as distinct from bits of statutory text—as separable from valid ones.<sup>45</sup> An example might be a statute forbidding federal employees from participating in federal election campaigns.<sup>46</sup> Must it be either valid in toto or invalid in toto? Once again, modern separability doctrine would allow invalid applications to be severed from valid ones, at least as long as the statute is not substantially overbroad.<sup>47</sup> By contrast, Rosenkranz quite clearly wants to forbid severability in this kind of case. According to him, statutes that are challenged under the First Amendment are either valid or invalid on their faces,<sup>48</sup> and here, I am assuming, there is nothing that can be severed from the face of the statute.

Even in this kind of case, there are two interlocking difficulties with Rosenkranz’s apparent stance toward severability doctrine that, in conjunction, point to the conclusion that his position is unacceptably strong. First, the demand that statutes with some allegedly invalid applications must be judged without possibility of separability would impose nearly impossible burdens on courts to specify exactly what a statute means on the first occasion of its application. In order to know whether a statute had even a single invalid application, a court would need to be able to imagine—when the statute was first challenged—every possible case to which it might, as a matter of statutory construction, apply.<sup>49</sup> To be sure, the implementing doctrines that now structure constitutional adjudication require some effort by

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45 See Fallon, *supra* note 44, at 928 n.48 (“The presumption of severability can apply both to linguistically distinguishable bits of statutory text and to invalid applications of an otherwise undifferentiated statutory provision.”).

46 Cf. *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 568–81 (1973) (rejecting an anticipatory over breadth and vagueness challenge to the Hatch Act, which forbade federal employees from taking an “active part in political management or in political campaign” (internal quotation marks omitted) (quoting 5 U.S.C. § 7324(a)(2))).

47 See, e.g., *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 477–78 (1995) (finding a statute forbidding federal employees from speaking or writing invalid as applied to lower-level employees, but noting that the rationale of the decision would not necessarily apply to, and that the statute might be applied against, higher-level employees).

48 See Rosenkranz, *supra* note 1, at 1236 (“A challenge to an action . . . of Congress must be *facial*.”).

49 See Fallon, *supra* note 29, at 1330–31 (discussing the difficulty of specifying a statute’s meaning in the absence of concrete examples to anchor the analysis).

the courts to determine how broadly a statute extends to hypothetical cases. To determine whether a statute is “substantially overbroad” or “narrowly tailored” to a compelling interest, a court must make a rough determination of the range of cases to which a challenged provision would extend. But a court need not decide in advance whether a statute would apply to every imaginable case that it might reach, because a few invalid applications would not suffice to invalidate a statute in toto. Second, at the conclusion of its effort to specify whether a statute would apply to all imaginable cases that might generate questions about its reach, a court would potentially need to hold the statute facially invalid on the basis of unlikely occurrences or bizarre hypotheticals. This approach would require a vast departure from traditional approaches to First Amendment litigation that have made “substantial over breadth” a condition of facial invalidation.<sup>50</sup> The now prevailing approach to severability in First Amendment litigation has, on the whole, proved sensible in practice. In my view, a court should hesitate long before adopting an approach with such substantial practical drawbacks as Rosenkranz’s appears to have.<sup>51</sup>

#### *B. Doctrinal Tests That Structure Facial Challenges*

Just as the meaning of the First Amendment should not dictate the scrapping of separability doctrine (even if Rosenkranz were right about the meaning of the First Amendment), neither should the meaning of constitutional provisions that have the President or the courts as their objects dictate that facial challenges are categorically impossible under such provisions. Once again, implementing doc-

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<sup>50</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 769–73 (1982) (holding that a statute challenged as unconstitutionally overbroad under the First Amendment will not be invalidated on that ground unless it is “substantially overbroad”).

<sup>51</sup> Even European constitutional courts that have the power to exercise “abstract review”—that is, to make a preenforcement determination of a law’s constitutionality outside of ordinary litigation between adverse parties—will often sever unconstitutional applications of statutes and employ saving constructions and balancing tests in order to narrow the range of future cases in which a law can be applied, rather than make all-or-nothing determinations of its validity. See Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2777–78 (2003) (highlighting similarities between European abstract review and American facial challenges). Notably, recent experience in France suggests that a system of pure abstract review is undesirable insofar as courts cannot subsequently invalidate constitutionally troubling applications of statutes that survive initial review. See Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as a First Resort in France*, 43 N.Y.U. J. INT’L L. & POL. 15, 18 (2010) (pointing out that constitutional difficulties sometimes arise too late for review). Other countries avoid this difficulty by supplementing abstract review with “concrete” review arising from ordinary litigation. *Id.*

trines—including tests, such as the strict scrutiny formula, that can frame facial challenges—have an important role to play that no strictly grammatical thesis could or should displace.

Just for the sake of argument, let us stipulate that Rosenkranz has correctly identified the meaning of the provisions of the Bill of Rights written in the passive voice: in nearly every case, they express prohibitions directed against the President and the courts, rather than Congress. Even if we assume that many of the provisions of the Bill of Rights have the President and the courts as their immediate objects, this assumption would not answer the question of how courts should approach cases in which the trigger for presidential or judicial action would arise from a *law* enacted by Congress. To see why, imagine that Congress enacts a law directing officials of the executive branch to engage in allegedly unconstitutional action. For example, suppose Congress passes a statute requiring the performance of a strip search before any person of Middle Eastern descent is permitted to board an airplane. Not wishing to submit to the indignity of a discriminatory strip search, a person of Middle Eastern descent sues for an injunction.

In a case such as this, in which a statute furnishes the occasion and motivation for executive or judicial action by purporting to compel it, what is at issue for all practical purposes is the validity of Congress's statutory directive. And it seems to me only sensible that the courts should be able to structure litigation, as they now do, in light of the practical realities.<sup>52</sup> Within the currently prevailing doctrinal

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<sup>52</sup> Rosenkranz defends the practical attractiveness of his approach by citing the case of *United States v. Booker*, 543 U.S. 220 (2005), in which the Supreme Court found that congressionally authorized federal Sentencing Guidelines violated the Sixth Amendment as applied to some cases. "Having framed the issue this way, the Court then had no choice but to embark upon an adventure in lawmaking by severance" that his approach would have avoided, he argues. Rosenkranz, *supra* note 2, at 1048. With regard to *Booker*, the details of the Court's severability holding seem to me to be mistaken, largely for the reasons that Justice John Paul Stevens advanced in a dissenting opinion in which he argued that the statute should have been severed differently. See *Booker*, 543 U.S. at 272–73, 283 (Stevens, J., dissenting in part). Yet the Court's more basic decision to treat the challenge to the federal Sentencing Guidelines as one that could potentially have resulted in facial invalidation seems to me to have been correct. Acting pursuant to powers that include the Necessary and Proper Clause, Congress had purported to make the Sentencing Guidelines mandatory in every case to which they applied. In order to determine whether the mandate could be applied to the *Booker* case, the Court had to reach conclusions about the meaning of the Sixth Amendment that showed the extent to which the Guidelines could and could not be applied to other cases. Thus far, I would say, the Court's mode of proceeding could not be faulted. Moreover, if the Court then went awry in its severability analysis, then its case-specific error by no means shows the desirability of a wholesale abandonment of severability doctrine. Among its other implications, such abandonment could lead to improvident rulings that entire statutes are invalid based on provisions or

framework, a court would ask whether a statute directing the President to discriminate on the basis of race or national origin is necessary to promote a compelling governmental interest.<sup>53</sup> If the court applied that test, and if the statute failed it, then the conclusion would follow that the statute was invalid on its face.

In resisting the conclusion that my hypothesized case involves a properly facial challenge, Rosenkranz might choose either of two alternative lines of analysis. First, he might insist on overthrowing the existing doctrinal structure by, for example, maintaining that a court should simply ignore the law that Congress has enacted or, perhaps, treat it as relevant only for establishing that a plaintiff of Middle Eastern descent was likely enough to be strip-searched to have standing to sue. Under this approach, litigation would focus on the permissibility of executive officials' strip-searching of the particular parties to a particular lawsuit, not the permissibility of the discriminatory classification contained in the statute. The question would be whether the individual search was "unreasonable," not whether the classification violated equal protection.<sup>54</sup> If Rosenkranz took this position, then his thesis would seem to me to be "too strong." In my judgment, an insistence that the courts could not address the permissibility of Congress's directive would be objectionably obfuscatory and ultimately dysfunctional because it would wash out of the case both the reason that the threat of a strip search would seem real—namely, the hypothetical statutory directive—and one of the principal grounds for objection—namely, the mandated discrimination on the basis of race or national origin.<sup>55</sup> More generally, Rosenkranz's analysis would threaten the use of many currently applicable doctrinal tests, including strict judicial scrutiny, to enforce any constitutional guarantee that does not have "Congress" as its grammatical subject. If constitutional litigation could not focus on statutes in challenges to federal action under provisions not having "Congress" as their subjects, then

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applications that would now be deemed severable, as I have argued above. An argument that attacks severability doctrine as applied to all cases is therefore too strong. And an argument that severability doctrine was misapplied in a particular case fails to establish the need for a restructuring of constitutional adjudication that would eliminate severability questions across the board.

<sup>53</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>54</sup> U.S. CONST. amend. IV; *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

<sup>55</sup> Insofar as the permissibility of race-based classifications would now occur under the Due Process Clause, a further question would be whether Rosenkranz would tolerate the application of this branch of "substantive due process" at all. *See Rosenkranz, supra* note 2, at 1042 ("[S]etting . . . substantive due process to one side, the object of the Due Process Clause is not Congress, but the President.").



the occasions for litigation would multiply radically. It would be much harder to establish that the rationale for a decision in one case—for example, finding that it would be unreasonable to strip search a particular person absent greater grounds for individualized suspicion than her family heritage and any other currently known facts supplied—would apply to another case. If so, the efficacy of the courts as guarantors against governmental misconduct would diminish accordingly.

Eschewing this “too strong” position, Rosenkranz might alternatively maintain that his claim that most Bill-of-Rights-based challenges are necessarily as-applied is a purely logical one, with few practical ramifications: as a formal matter, the court can only inquire into what the Executive can permissibly do, even if, as a practical matter, the court must do so by applying a doctrinal test, such as the strict scrutiny formula, that focuses on whether Congress had sufficient justification for enacting a statute purporting to require executive action of a particular kind. If Rosenkranz’s thesis were construed in this way, then a court could render opinions making it clear that statutes prescribing unreasonable or discriminatory searches or cruel and unusual punishment could not be applied to anyone under any circumstances, and those opinions would serve as controlling precedents in all future cases involving those statutes. But this position would save Rosenkranz’s thesis only by making his claim that facial challenges are impossible under constitutional provisions written in the passive voice too weak to hold much interest.

One further potential anomaly of Rosenkranz’s position also bears notice. Suppose now that Congress authorizes a federal executive agency, subject to supervision by the President, to engage in rulemaking, and suppose further that the agency issues regulations that, if enacted by Congress, would have been subject to facial challenge as invalid under the First Amendment. Because the regulations were issued by an executive agency, are they subject only to an as-applied challenge, even though they operate with the same force of law as would a statute that would trigger, and indeed demand, a facial challenge? If so, then this odd consequence would heighten my sense that Rosenkranz’s thesis proves too much.

### *C. Different Rules for Challenges to State and Federal Legislation?*

In the articles that he has published to date, Professor Rosenkranz has said relatively little about the structure of litigation challenging state action and legislation under incorporated provisions of the Bill of Rights. Once again, however, he would appear to confront a

“Goldilocks” problem. Because most of the provisions of the Bill of Rights apply against the states, and because the Fourteenth Amendment’s incorporating language has “no State” as its grammatical subject, Rosenkranz appears to contemplate that state legislatures can violate guarantees that, in their unincorporated form, apply only against the President and the courts and that therefore would not permit facial challenges to congressionally enacted legislation.<sup>56</sup> If constitutional adjudication were restructured in accordance with his thesis, a state statute prescribing unconstitutional searches or cruel and unusual punishments would thus be subject to a facial challenge, whereas an identical federal statute would not. In the already confused doctrine governing the availability of facial challenges, the introduction of this distinction would predictably generate yet more vexation and inconsistency. Alternatively, any interpretive complexity that Rosenkranz might introduce to avoid this odd conclusion would risk undermining the bold revisionism in which the attraction of his thesis largely inheres.

The problem here—if such is the word—is a general one: the more broadly a textual or historical thesis (such as Rosenkranz’s) sweeps, the more likely it is to generate tension not only with settled interpretations of constitutional language, but also with judicially established tests and mechanisms for implementing otherwise vague language and historical understandings. Sometimes revisionary theses should undoubtedly be accepted. At the very least, however, recognition of a distinction between constitutional interpretation and constitutional implementation should cause one to think twice about when theses about the historical meaning of constitutional language should displace implementing devices—such as those reflected in separability doctrine and the “strict judicial scrutiny” test—that find their justifications more in functional than in purely linguistic or historical grounds in the first place.

#### IV. SOME QUESTIONS ABOUT THE CONSTITUTION’S ORIGINAL PUBLIC MEANING

In arguing that the “subjects” and “objects” of constitutional provisions do not necessarily dictate the entire structure of judicial review, I have so far assumed that Professor Rosenkranz has accurately identified the original public meanings of the various provisions on which his thesis depends. But determining whether he has applied

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<sup>56</sup> See *supra* notes 21–24 and accompanying text.

his own methodological assumptions correctly in all cases will also pose some daunting challenges for those seeking to come fully to grips with his claims. In so saying, I mean to tread cautiously. I am neither a legal historian nor an accomplished practitioner of the art of reasoning from “structure and relationship”—the phrase coined by Charles Black to describe the interpretive methodology of discerning the meaning of one constitutional provision through inferences concerning its interconnections with others.<sup>57</sup> Accordingly, I am unprepared to characterize Rosenkranz as having erred on any specific historical or linguistic point. Nevertheless, it is easy to identify instances in which the cautious among us will want to await more evidence and argument before making up our minds. Two examples will suffice to illustrate the point.

One involves Rosenkranz’s largest claim, which is that the structure of judicial review that he champions emerges inexorably from the Constitution’s grammar and original public meaning.<sup>58</sup> Insofar as this is a historical claim, assessment of its validity depends on an examination of how reasonable members of the Founding generation would have understood the judicial role in constitutional cases. This question has spurred the development of a large literature, marked by myriad theories concerning the anticipated judicial role.<sup>59</sup> According to some scholars, the historically predominant view was that courts would invalidate legislation only in cases of clear mistake by the legislature concerning the Constitution’s requirements.<sup>60</sup> According to others, it was widely understood that all of the branches of government would interpret the Constitution for themselves, with judicial interpretations enjoying no hierarchical “supremacy.”<sup>61</sup> Before embracing Professor Rosenkranz’s textually and historically based conclusion that all First Amendment challenges are necessarily facial challenges—to take just one particularly salient example—I would

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57 See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Reasoning from structure and relationship can be difficult to execute persuasively. BOBBITT, *supra* note 27, at 84–85. Since Black himself, the most masterly practitioner of the art is Akhil Amar. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

58 See Rosenkranz, *supra* note 1, at 1210 (“[C]areful attention to constitutional grammar can reveal—and will reveal—nothing less than the structure of judicial review.”).

59 For a brief summary, see RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 70–72 (6th ed. 2009).

60 See, e.g., SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 80 (1990); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 342–49.

61 E.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 106–11 (2004).

want to test it carefully against the complex, conflicted body of evidence bearing on Founding-era expectations concerning the judicial role.

Without having purported to carry out the requisite inquiry, I would call attention to one recent work of historical scholarship that seems closely on point. In a study of historical understandings of statutory severability, or the question whether invalid portions or applications of statutes can be severed from valid ones, Professor Kevin Walsh argues that courts in the early nineteenth century declined to enforce statutory provisions insofar as they were “repugnant” to the Constitution, but took it for granted that challenged provisions otherwise remained enforceable.<sup>62</sup> I do not know whether Walsh reviewed the relevant cases with Rosenkranz’s thesis in mind or whether subsequent researchers might reach a different conclusion if they parsed the data set to distinguish constitutional cases based on the varied grammatical “subjects” of the diverse constitutional provisions under which challenges were brought. Nevertheless, Walsh’s scholarship suggests that it is a historically open question whether constitutional provisions conferring powers and establishing restraints on Congress and the President would have been understood to have the implications for the structure of judicial review that Rosenkranz claims.

A second example of a question meriting careful assessment involves Rosenkranz’s more specific claim about the precise prohibition that the First Amendment embodies. As I construe his argument, he believes that when the First Amendment prescribes that “Congress shall make no law . . . abridging the freedom of speech,” the term “law” refers to the totality of any bill that Congress passes and the President signs.<sup>63</sup> To test this claim, let us begin by recalling two hypothetical statutes that I introduced earlier: one is a multi-part tax statute, with just one provision that abridges the freedom of speech, and the other is a prohibition against the shipment in interstate commerce of any “obscene or lewd” material, under doctrinal rules that permit the regulation of “obscenity” but not of lewd publications that fall short of being obscene. Above I argued that even if these statutes constituted laws abridging the freedom of speech, the grammatical structure of the First Amendment should not preclude sever-

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<sup>62</sup> Walsh, *supra* note 29, at 765–67.

<sup>63</sup> See Rosenkranz, *supra* note 1, at 1236–37 (approvingly quoting Thomas Jefferson’s determination that a successful First Amendment challenge renders an “act of the Congress” altogether void).

ability doctrines that would uphold their valid parts. Now I want to suggest a different possible objection to Rosenkranz's thesis.

Although Rosenkranz seems to assume that the phrase "no law" must refer to the entirety of any bill that Congress enacts and the President signs, it would seem just as linguistically plausible to me to conclude that insofar as my hypothesized statutes trench on "the freedom of speech," they constitute "law . . . abridging the freedom of speech," and thus are invalid, but that insofar as they do not abridge the freedom of speech, they are "*law that does not abridge the freedom of speech*" and can therefore stand. In other words, I would think it linguistically plausible, in light of the evident purpose of the First Amendment to protect only utterances that lie within "the freedom of speech," to hold that the word "law" does not necessarily refer to entire enactments, but can sometimes refer instead, more narrowly, to the specific dictates or prohibitions that legislation establishes. In short, purely as a twenty-first-century linguistic matter, it does not seem to me to be absolutely necessary to conclude that a statutory provision that has nothing to do with speech—as in the multi-part tax statute that I hypothesized—is "law abridging the freedom of speech" just because it is packaged with law that plainly does abridge the freedom of speech. If I am right that the language of the First Amendment does not necessarily dictate Rosenkranz's conclusion, it would be wiser, in my judgment, to follow the counsel of John Marshall that, when a provision would permit both a provident and an improvident interpretation, the more provident interpretation should be preferred.<sup>64</sup>

So far, however, in discussing what the First Amendment does and does not proscribe, I have talked only about twenty-first-century linguistic intuitions, not about the Amendment's original public meaning. It is, of course, a distinct, historical question how informed, linguistically competent Americans of the Founding generation would have understood the First Amendment's application to cases involving statutes that overstep constitutional bounds in part, but only in part. In reference to this question, to which I do not pretend to know the answer, suffice it to say that Rosenkranz's evidence seems somewhat thin. Apart from noting that Thomas Jefferson pardoned

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<sup>64</sup> See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) ("Is that construction of the Constitution to be preferred which would render [government] operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?").

all violators of the Alien and Sedition Acts,<sup>65</sup> he offers almost no evidence concerning eighteenth- or early-nineteenth-century understandings. Not being an originalist, I would not necessarily regard such evidence as determinative of how the Constitution ought to be interpreted today, but I would, at least, think it relevant in assessing whether Rosenkranz had established his thesis about the original public meaning.

Imaginably, Rosenkranz might take exception to this assertion. As I have said, I understand his theory to embody claims about the original public meaning of relevant constitutional provisions, not about how members of the eighteenth-century public actually understood them. This is a subtle but significant difference. Questions about original public meaning are partly hypothetical: they ask how an intelligent, well-informed, grammatically adept person would have correctly understood the meaning of a provision.<sup>66</sup> And the answers to such questions will not necessarily depend on what members of the Founding generation, who might have misapprehended the meaning or proper application of the words of the First Amendment, actually thought.<sup>67</sup> At the very least, however, actual-eighteenth-century understandings would provide relevant evidence of what the words of the First Amendment meant in their eighteenth-century context.

To summarize, although Rosenkranz's historical and linguistic claims appear plausible, and may indeed be correct, I do not think that he has so far marshaled enough evidence to rule out all plausible competing views about the implications of the Constitution's text and structure with respect to some highly salient points, notably including the meaning of "no law" in the First Amendment.

#### V. THE PERTINENCE OF PRECEDENT AND PRUDENCE IN CASES OF TEXTUAL AND HISTORICAL UNCERTAINTY

The final line of analysis that I wish to pursue involves the pertinence of judicial precedent and prudence in assessing not only Rosenkranz's theory, but also other similarly revisionary theories that depend on claims about original constitutional meanings. To begin, let us imagine that a litigant presses a constitutional claim that all

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<sup>65</sup> See, e.g., Rosenkranz, *supra* note 1, at 1235–38.

<sup>66</sup> See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (distinguishing between the original meaning of the Equal Protection Clause and original expectations concerning its application and arguing that its original public meaning forbade sex-based discrimination that tended to subordinate women even if most of the public did not so apprehend in 1868).

<sup>67</sup> *Id.*

agree cannot succeed unless she can persuade a court—let us suppose it is the Supreme Court—to embrace Professor Rosenkranz’s thesis. For example, imagine that the litigant demands the total invalidation of a multi-part tax statute, only one provision of which bears in any way on the freedom of speech. In considering what the Court, or one of its Justices, ought to do in light of the arguments and evidence that Rosenkranz has so far presented, let us put aside my argument that courts should sometimes employ “implementing” doctrines that are not dictated by the Constitution’s linguistic or historical meaning. We can assume, instead, that the question is solely about how to interpret the phrase “no law” as it appears in the First Amendment. On this assumption, the question becomes just how persuasive would Rosenkranz’s arguments and evidence need to be to justify a court in deciding a case on the basis of it.

In framing this question, I want to distinguish it from the question that would arise if a court adjudged that Rosenkranz had decisively proved his thesis. Even then, of course, it would remain debatable whether *stare decisis* ought to prevail over the originally understood linguistic implications of “the subjects of the Constitution.” In my view, past judicial precedents permitting the severance of statutes challenged on First Amendment grounds, coupled with the practical costs of adopting Rosenkranz’s prescriptions, would probably justify a deviation from the original textual meaning.<sup>68</sup> Some originalists might agree,<sup>69</sup> though others, of course, would not.<sup>70</sup> But I shall not dwell on this scenario because in the case of Rosenkranz’s thesis, as of most original theses about the Constitution’s semantic and historical meaning that are presented for the first time in the twenty-first century, the notion that there could be no significant uncertainty is almost certainly unrealistic (even if it is theoretically imaginable).

I thus return to the question of what a judge ought to do with Rosenkranz’s thesis if she thought it quite plausibly correct—let us say fifty-one percent likely to be right—but not clearly proven. When

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<sup>68</sup> See generally Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008) (defending the proposition that initially erroneous precedent should sometimes prevail over what otherwise would be the best interpretation of the Constitution’s meaning).

<sup>69</sup> See, e.g., SCALIA & GARNER, *supra* note 38, at 411–14 (embracing a role for *stare decisis* in constitutional adjudication).

<sup>70</sup> See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) (maintaining that although originalism can accord limited roles to *stare decisis*, “[w]here a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place”).

this assumption is conjoined with others that I have made in framing the issue, Rosenkranz's theory presents a recurring problem or puzzle, but one that is rarely formulated in general terms. A large, provocative, and controversial literature debates the pertinence of original understandings or original public meanings to constitutional adjudication, but most often on the assumption that original public meanings are known. Too seldom discussed is the very real and common problem of how judges should deal with textual and historical uncertainty, as presented when path-breaking scholarship presents plausible but not clearly demonstrated claims of textual meaning or historical truth.

In many cases, we know that members of the Founding generation disagreed among themselves about the meaning or application of constitutional language. James Madison famously said that because the Constitution was vague in many respects, its meaning would need to be "liquidated" through subsequent practice and precedent.<sup>71</sup> But the Framers could, and did, disagree, even in cases in which the contending parties did not acknowledge vagueness. Uncertain about whether the Constitution would permit Congress to create a Bank of the United States, George Washington—who had presided over the Constitutional Convention—sought the advice of then-Secretary of State Thomas Jefferson and then-Secretary of the Treasury Alexander Hamilton.<sup>72</sup> Jefferson answered no, Hamilton yes.<sup>73</sup> To cite just one more example, James Madison believed that Congress's power to tax and spend for the general welfare<sup>74</sup> was limited to taxing and spending in connection with the exercise of other enumerated congressional powers.<sup>75</sup> Hamilton, by contrast, thought that Congress's power was a more general one, confined only by the requirement that exactions and outlays must aim to promote the general welfare.<sup>76</sup>

The difficulty of generating reasonably determinate, demonstrably true conclusions about the original public meaning of constitutional language is surely not a reason to abandon the quest for historical knowledge or to eschew reliance on close textual analysis as a consid-

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71 THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003).

72 Joseph M. Lynch, *The Federalists and The Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 21–22 (2000).

73 *Id.* at 21–23.

74 See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

75 THE FEDERALIST NO. 41, at 258–59 (James Madison) (Clinton Rossiter ed., 2003).

76 Alexander Hamilton, *Report on Manufactures* (1791), reprinted in 2 THE FOUNDERS' CONSTITUTION 446–47 (Philip B. Kurland & Ralph Lerner eds., 1987).



eration in constitutional adjudication. Nonetheless, an awareness of the frequently provisional and uncertain character of even scrupulously developed textual and historical claims furnishes a ground for concluding that it would be deeply misguided for the Supreme Court to renounce existing doctrine and reach an otherwise improvident conclusion whenever five Justices are provisionally persuaded by new textual and historical scholarship. A theory that would base all decisions exclusively on what seems to be the best available textual and historical evidence, even when that evidence is sketchy or mixed and has not yet withstood the test of time, could easily produce an endless process of doctrinal reformation and counter-reformation.

In my view, the uncertainty of the arguments and evidence supporting Rosenkranz's thesis should thus be deemed highly pertinent. As I have explained, I think that the language of the First Amendment would permit other readings. Simply as a policy matter, it would seem imprudent to prescribe across the board that statutory validity must always be an all-or-nothing matter under constitutional provisions with Congress as their grammatical subject. And I would therefore conclude that precedents establishing the possibility of statutory severability, like many other entrenched precedents that may be incompatible with the Constitution's original understanding or original public meaning, ought to be followed.

My interests here, however, are as much methodological as they are immediately substantive. Whether one agrees or disagrees with my policy judgments, Rosenkranz's thesis seems to me to raise a clear, potentially hard question about how ready courts should be to embrace radically revisionist theories that might reasonably be deemed more likely than not to be true, but that certainly are not clearly established, in light of the currently adduced arguments and evidence. Assuming that textual and historical claims can be more or less securely supported by evidence, I doubt that any algorithm could be produced to specify exactly how well supported any particular claim should have to be in order to justify an otherwise regrettable constitutional decision. I am very confident, however, that the essence of good judging lies in good practical judgment. Although I do not fault Professor Rosenkranz for failing to address the significance of uncertainty and prudence in constitutional adjudication, I think these considerations highly pertinent to how the courts should receive his theory.

Scholars have a different role. To those of us who teach Federal Courts and Constitutional Law, Rosenkranz has presented a challenge that we cannot responsibly ignore.

## CONCLUSION

*The Subjects of the Constitution* and *The Objects of the Constitution* are ingenious and provocative. They make a rich contribution to scholarly and historical debate. In this Article, I have tried to express my admiration for Professor Rosenkranz's contribution to ongoing scholarly discussion, while at the same time advancing reasons for skepticism about his largest theses, which awe me with their boldly imaginative sweep.