

# FACIAL CHALLENGES, LEGISLATIVE PURPOSE, AND THE COMMERCE CLAUSE

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## ABSTRACT

Over the past decade or so, the Supreme Court has issued an extraordinary and highly controversial series of decisions concerning the scope of Congress's power. Yet beneath the surface of the debate over the federalism cases lies a parallel dispute that has received far less academic notice. This dispute concerns the *proper mode of judicial review* in cases testing the scope of congressional power. The uncertainty is greatest in the Commerce Clause area, where the Court's recent cases—including its 2005 decision in *Gonzales v. Raich*—have shown a strong preference for facial challenges, in sharp contrast to the Court's traditional inclination toward as-applied review. This article explores several possible rationales for the Court's use of facial review in Commerce Clause cases, and concludes that the soundest explanation lies in an understanding of the Clause's meaning that incorporates a requirement of appropriate legislative purpose.

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## **FACIAL CHALLENGES, LEGISLATIVE PURPOSE, AND THE COMMERCE CLAUSE**

*David L. Franklin*

### **INTRODUCTION**

Facial challenges are in the news.

The foregoing sentence is, of course, an exaggeration. In truth, the question of whether statutes ought to be challenged as unconstitutional on their face or merely as applied to particular facts is one that only a lawyer could love. The general public remains largely—and no doubt blissfully—unaware of the question. Nevertheless, a series of high-profile events over the past year has brought the issue of facial challenges back into prominence for judges and scholars, across several domains of constitutional law. Consider:

*Abortion rights.* During the confirmation hearings of Justice Samuel A. Alito, Jr., in January 2006, the nominee’s critics focused a great deal of attention on his partial dissent in the Third Circuit’s 1991 *Casey* case, which later became the Supreme Court’s 1992 *Casey* case.<sup>1</sup> (They thought, probably correctly, that Alito’s opinion indicated his general opposition to abortion rights.) In that opinion, Judge Alito voted to uphold Pennsylvania’s spousal notification statute. Noting that the plaintiffs had launched a facial challenge against the statute, Judge Alito reasoned that “proof that the provision would adversely affect an unknown number of women with a particular combination of characteristics could not suffice” to demonstrate its unconstitutionality.<sup>2</sup> The Supreme Court pointedly rejected Judge Alito’s reasoning on this issue.<sup>3</sup> Later in January 2006, the Supreme Court directly confronted the question of facial challenges in the abortion rights context.<sup>4</sup> The First Circuit had facially invalidated a New Hampshire parental notification statute because it did not contain a health exception. In Sandra Day O’Connor’s valedictory opinion as a justice, the Court unanimously remanded to allow the lower courts to fashion a narrower remedy, and expressed a strong preference for as-applied rather than facial invalidation. “Generally speaking,” said the Court, “when confronting a constitutional flaw in a statute, we try to limit the solution to the

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<sup>1</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff’d in part & rev’d in part*, 505 U.S. 833 (1992).

<sup>2</sup> *Id.* at 722 n.1 (Alito, J., dissenting).

<sup>3</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 887-98 (1992).

<sup>4</sup> *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006).

problem.”<sup>5</sup>

*Fourteenth Amendment enforcement authority.* In January 2006, in *United States v. Georgia*, the Supreme Court upheld Title II of the Americans with Disabilities Act<sup>6</sup> as applied to a disabled inmate in a state prison.<sup>7</sup> In a brief and unanimous opinion by Justice Scalia, the Court assumed that the allegations in the inmate’s complaint were sufficient to state valid claims under the Eighth Amendment, and held on that basis that Title II, as applied to those allegations, was a valid exercise of Congress’s power to abrogate state sovereign immunity under Section 5 of Fourteenth Amendment. This ruling followed a similar holding in the 2004 case of *Tennessee v. Lane*, which upheld Title II as applied to the denial of the fundamental right of disabled individuals to gain access to the courts.<sup>8</sup> The *Georgia* and *Lane* decisions marked a departure from a series of cases beginning in 1997 in which the Court invalidated—apparently on their face—several federal statutes on the ground that they exceeded Congress’s Fourteenth Amendment enforcement authority.<sup>9</sup>

*Commerce Clause authority.* During the confirmation hearings of Chief Justice John G. Roberts, Jr., in September 2005, the nominee’s critics focused a great deal of attention on then-Judge Roberts’s brief separate opinion in what became widely known as the “hapless toad case.”<sup>10</sup> (They thought, probably incorrectly, that Judge Roberts’s opinion indicated he would vote to

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<sup>5</sup> *Id.* at 967. Distinguishing the 2000 case of *Stenberg v. Carhart*, 530 U.S. 914 (2000), in which the Court struck down a Nebraska statute on its face for failure to include a health exception, the Court noted simply that “the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn.” *Ayotte*, 126 S. Ct. at 969. The following week, the Court issued a similar opinion concerning campaign finance, remanding to allow the lower courts to entertain an as-applied challenge to the McCain-Feingold statute. *See Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam).

<sup>6</sup> 42 U. S. C. § 12131 *et seq.* (2000 ed. and Supp. II 2002).

<sup>7</sup> 126 S. Ct. 877 (2006).

<sup>8</sup> 541 U.S. 509 (2004).

<sup>9</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001). *But see Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). The Court has also expressed a reluctance to entertain facial challenges in cases challenging exercises of Congress’s Spending Clause authority. *See Sabri v. United States*, 541 U.S. 600, 609-10 (2004); *Salinas v. United States*, 522 U.S. 52 (1997).

<sup>10</sup> *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc).

strike down the Endangered Species Act as exceeding Congress's Interstate Commerce Clause power.) In that opinion, Judge Roberts construed the Supreme Court's precedents to mean that "a facial challenge can succeed only if there are no circumstances in which the Act at issue can be applied without violating the Commerce Clause."<sup>11</sup> Earlier in 2005, in *Gonzales v. Raich*,<sup>12</sup> the Court had upheld against Commerce Clause challenge the application of the federal Controlled Substances Act ("CSA") to medicinal users of marijuana within California who either cultivated their own cannabis or obtained it for free from within the state.<sup>13</sup> Although the Court itself characterized *Raich* as an as-applied challenge, its reasoning and result strongly suggested that as-applied challenges under the Commerce Clause will not receive a friendly reception at the Court. Indeed, *Raich* has already been described as putting an end to the short-lived flowering of such challenges in the lower courts.<sup>14</sup>

This recent burst of attention to the issue of facial challenges will no doubt spark discussion and debate among scholars and practitioners on a number of fronts. But it is the Court's Commerce Clause cases—and *Raich* in particular—that stand out, because they pose several unanswered questions. How can we explain the seemingly paradoxical fact that the Court's earlier decisions in *United States v. Lopez*<sup>15</sup> and *United States v. Morrison*,<sup>16</sup> which vindicated facial challenges under the Commerce Clause, ended up unleashing a torrent of as-applied challenges in the lower courts,<sup>17</sup> while *Raich*, which dealt with an as-applied challenge, ended up cementing the Court's commitment to facial review? Why do justices such as Antonin Scalia who oppose broad use of facial challenges in cases involving individual rights appear to favor it in cases involving congressional power, while justices such as John Paul Stevens

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<sup>11</sup> *Id.* at 1160.

<sup>12</sup> 125 S. Ct. 2195 (2005).

<sup>13</sup> *Id.*

<sup>14</sup> See Glenn H. Reynolds & Brandon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 918 (2005) ("Whatever the effects of *Raich* on lower courts ... one thing is clear: the as-applied challenges to which lower courts had been warming are likely over."); Randy Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743 (2005).

<sup>15</sup> 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990 as beyond Congress's power under the Commerce Clause).

<sup>16</sup> 529 U.S. 598 (2000) (invalidating the civil remedy provisions of the Violence Against Women Act as beyond Congress's power under the Commerce Clause).

<sup>17</sup> See Glenn H. Reynolds & Brandon P. Denning, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003) (noting that lower courts treated *Lopez* and *Morrison* as invitations to engage in as-applied review).

who favor broader use of facial challenges in individual rights cases appear to oppose it in congressional power cases? And, most central to this article: Given the Court's recent reaffirmations of its general preference for as-applied constitutional challenges—even in areas like Section 5 of the Fourteenth Amendment<sup>18</sup> and abortion rights,<sup>19</sup> where earlier decisions had seemed to embrace one form or another of facial review<sup>20</sup>—why does the Court favor facial challenges in Commerce Clause cases? This article offers answers to those questions.

The argument proceeds in three stages. Part I frames the issue by describing the Court's recent federalism decisions and revealing that beneath the surface of the contentious debate over the substance of judicial doctrine lies an equally thorny set of questions involving the appropriateness of facial challenges in cases testing the scope of Congress's power. These questions are particularly difficult in the context of the Commerce Clause, where the Supreme Court's recent decisions have suggested a strong preference for facial challenges, in sharp contrast to the Court's traditional inclination toward as-applied review.

Part II lays the theoretical groundwork for answering those questions by explaining the distinction between facial and as-applied challenges, as well as the crucial but underappreciated distinction between two types of facial challenge: the overbreadth facial challenge and the valid-rule facial challenge.<sup>21</sup>

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<sup>18</sup> *United States v. Georgia*, 126 S. Ct. 877 (2006).

<sup>19</sup> *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006).

<sup>20</sup> For apparently facial invalidations under Section 5 of the Fourteenth Amendment, see *Boerne*, 521 U.S. at 511, 532-33; *Florida Prepaid*, 527 U.S. at 646-68; *Kimel*, 528 U.S. at 82-83, 86-91; *Morrison*, 529 U.S. at 601, 613; *Garrett*, 531 U.S. at 373-74. For an apparently facial validation under Section 5, see *Hibbs*, 538 U.S. at 735-40. *Tennessee v. Lane* seemed to mark the Justices' dawning awareness that review under Section 5 need not be facial. In an amusing moment from the oral argument in *Lane*, Justice Breyer asked counsel for the State how a court could declare a statute facially invalid as exceeding Congress's Section 5 authority. Justice Scalia retorted: "Justice Breyer's question, how can you do that, reminds me of, you know, there's a story about the Baptist minister who was asked whether he believed in total immersion baptism, and he said, believe in it, I've seen it done." *Tennessee v. Lane*, transcript of oral argument, 2004 WL 136390, at \*13 (Jan. 13, 2004) (No. 02-1667). For an illuminating discussion of facial challenges and federalism that emphasizes the Section 5 cases, see Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005).

For facial invalidations involving abortion rights, see, e.g., *Stenberg*, 530 U.S. at 922; *Casey*, 505 U.S. at 887-98.

<sup>21</sup> I borrow these terms from Marc Isserles's insightful article on the topic of facial challenges. See Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998). For a thought-provoking application of Isserles's taxonomy in the administrative law context, see Stuart Buck, *Salerno vs. Chevron: What to do About Statutory Challenges*, 55 ADMIN. L. REV. 427 (2003).

Briefly put, an overbreadth facial challenge argues that a statute is unconstitutional on its face because it sweeps within its coverage an unacceptably large proportion of constitutionally unregulable activities.<sup>22</sup> By contrast, a valid-rule facial challenge argues that a statute is invalid on its face because of a constitutional infirmity that inheres in the statute as written, regardless of the facts or circumstances surrounding particular applications.<sup>23</sup> This Part argues next that scholars have erred by analyzing all facial challenges as if they were of the overbreadth as opposed to the valid-rule variety. That misimpression, Part II explains, has led to two further errors: an overemphasis on statutory severability as the key factor in determining whether facial review is appropriate, and an assumption that facial review is called for if and only if the constitutional claimant expressly frames her challenge in facial terms.<sup>24</sup> Rather, the appropriateness of facial challenges—particularly valid-rule facial challenges—is a function of the interaction between the challenged statute and the applicable substantive constitutional doctrine.

Building on this groundwork, Part III examines the possible rationales for the Court's use of facial review in Commerce Clause cases. First, this Part canvasses the Court's case law concerning the proper mode of judicial review in Commerce Clause cases and concludes that no consistent pattern emerges from the precedential record: facial review, though discernable in earlier eras, has become predominant in the Court's jurisprudence only since *Lopez*. Next, Part III explores several accounts of substantive constitutional meaning or judicial doctrine that could plausibly explain the Court's turn to the facial perspective in Commerce Clause cases. It examines, in turn, a formalist conception that characterizes rights as zones of privileged conduct while envisioning government power as extending to the limits of its internally

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<sup>22</sup> Overbreadth facial challenges, at least in the First Amendment area, are also characterized in practice by the requirement that the claimant's own activity be constitutionally regulable. See *infra* text accompanying note 72. I do not view this requirement as essential to the definition of an overbreadth facial challenge, or to the distinction between overbreadth and valid-rule facial challenges.

<sup>23</sup> See *infra* Part II.A-B for a more detailed discussion of the distinction between overbreadth facial challenges and valid-rule facial challenges.

<sup>24</sup> This article uses the phrase "constitutional claimant" (or simply "claimant") to refer to any person challenging the constitutional validity of an action taken against her by the government. Traditionally in American law, the classic constitutional claimant was a defendant, facing criminal or other enforcement action brought by the government and seeking to interpose a constitutional claim as a defense. In recent decades, however, with the rise of actions for injunctive and declaratory relief, it has become commonplace for constitutional claims to be advanced by plaintiffs. And because this article focuses on challenges to the scope of congressional power rather than individual rights challenges, a term such as "right-holder" would be inappropriate. Hence the neutral term "claimant."

defined scope; an understanding of the interstate commerce power as plenary or judicially unconstrained; and a conception of the Commerce Clause as including a prohibition on overbreadth. It concludes, however, that these rationales do not adequately account for the Court's resort to facial review. Instead, Part III demonstrates that the soundest explanation for the Court's turn to facial review in Commerce Clause cases lies in an understanding of the Clause's meaning that incorporates a requirement of appropriate legislative purpose. Part III concludes by setting forth and then responding to descriptive, normative, and theoretical objections to this purpose-based conception of the commerce power.

### I. FRAMING THE ISSUE: UNANSWERED QUESTIONS

Over the past decade or so, the Supreme Court has issued an extraordinary series of decisions concerning the scope of Congress's power. In the wake of the Court's 1995 ruling constraining the scope of the Interstate Commerce Clause in *Lopez*<sup>25</sup>—and particularly after its even more ambitious holding in *Morrison*<sup>26</sup>—it appeared to many that the Rehnquist Court had sparked a “federalism revolution.”<sup>27</sup> Additional cases restricting Congress's power to regulate state government officials,<sup>28</sup> Congress's power to abrogate state sovereign immunity,<sup>29</sup> and Congress's power to legislate pursuant to its Fourteenth Amendment enforcement power<sup>30</sup> all gave added ammunition to the charge that the Court was revolutionizing the constitutional law of

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<sup>25</sup> 514 U.S. 549 (1995).

<sup>26</sup> 529 U.S. 598 (2000). *Morrison* was a more ambitious holding than *Lopez* because, unlike the Gun-Free School Zones Act, the Violence Against Women Act (VAWA) was supported by detailing congressional findings concerning the effect of the regulated activity on the national economy. In addition, VAWA was arguably an appropriate exercise of Congress's Fourteenth Amendment enforcement authority, as it aimed to remedy gender-based inequities in the criminal justice systems of the states.

<sup>27</sup> See, e.g., Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053 (2001) (discussing the “constitutional revolution we are living through”); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS L. J. 569, 618 (2003) (discussing “the federalism revolution of the second Rehnquist Court”); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1690 (2004) (discussing “the federalism revolution of the Rehnquist Court”).

<sup>28</sup> *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>29</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>30</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Morrison*, 529 U.S. at 619-27; *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001).

federalism.

More recently, however, the picture has become blurred, as the Court has handed down several decisions curtailing, or at least failing to follow through on, its most adventurous federalism projects.<sup>31</sup> The result has at times seemed closer to confusion than revolution; discerning a pattern behind the Court's decisions on the scope of federal power is a difficult task. Indeed, it would not be absurd to surmise that some federalism-minded members of the Court—including the recently retired Justice O'Connor—simply said “thus far and no further,” without supplying a compelling theory to explain their chosen stopping point.<sup>32</sup> As of this writing, it is far too early to tell whether the replacements of the late Chief Justice Rehnquist by John Roberts and Justice O'Connor by Samuel Alito will lend a new spark to the movement to restrict federal power.

All of this—the seeming “federalism revolution” and its apparent petering-out of late—has been the subject of sustained scholarly attention.<sup>33</sup> Yet beneath the surface of the primary confusion of the federalism holdings, a secondary confusion has persisted on the Court without receiving nearly as much academic notice. This secondary confusion concerns the *proper mode of judicial review* in cases testing the scope of congressional power. In particular, the justices of the Supreme Court—and increasingly after *Lopez*, judges on the lower federal courts—appear to be uncertain about whether challenges to the scope of Congress's power ought to be reviewed on a “facial” or an “as-applied” basis.

The confusion is at its greatest in the Commerce Clause area.<sup>34</sup> The

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<sup>31</sup> *Reno v. Condon*, 528 U.S. 141 (2000); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Raich*, 125 S. Ct. 2195 (2005).

<sup>32</sup> In light of *Raich*, Brandon Denning and Glenn Reynolds have complained that we are stuck with an “Emily Litella Court,” after the Gilda Radner character from the early years of Saturday Night Live who would regularly kvetch about some topic or other, only to eventually say, “Never mind.” Denning & Reynolds, *supra* note 14, at 919.

<sup>33</sup> On the federalism revolution, see, e.g., the authorities cited *supra* note 27. On the petering-out, see, e.g., Bradley W. Joondeph, *The Deregulatory Valence of Justice O'Connor's Federalism* (forthcoming 2006) (on file with author); M. Elizabeth Magill, *The Revolution That Wasn't*, 99 NW. U. L. REV. 47, 47 (2004); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004); Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 142 (2001) (“Despite the clamor over the Court's new federalism doctrine, it has in fact only modestly trimmed congressional power.”).

<sup>34</sup> There seems to be a movement toward as-applied review with respect to other sources of federal authority, such as Section 5 of the Fourteenth Amendment and the Spending Clause. See, e.g., *Lane*, 541 U.S. 509 (Section 5); *Georgia*, 126 S. Ct. 877 (Section 5); *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (Spending Clause); *Salinas v. United States*,

Court decided the groundbreaking *Lopez* case on a facial basis: Chief Justice Rehnquist's majority opinion invalidated the Gun-Free School Zones Act for all purposes and in all circumstances—and showed virtually no interest in the particular facts of the case at bar.<sup>35</sup> Likewise, in *Morrison*, the Court invalidated the civil remedy provision of the Violence Against Women Act on its face, without pausing to inquire whether the particular act of gender-motivated violence at issue in the case before it, or other such acts that might have arisen in subsequent cases, could have had a substantial effect on interstate commerce.<sup>36</sup> Moreover, in both cases, the Court emphasized that the challenged statute lacked a “jurisdictional element”—that is, a saving clause on the face of the law which would require the constitutionally requisite connection to interstate commerce to be pleaded and proven in every action brought thereunder.<sup>37</sup> The Court apparently reasoned that the presence of a jurisdictional element would ensure the facial validity of the challenged statute,<sup>38</sup> such that the only available “as-applied challenge” to such a statute—if one could call it that—would be an argument that the statute did not apply

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522 U.S. 52 (1997) (Spending Clause); *see generally* Metzger, *supra* note 20. On the other side of the equation, the Court appears unreflectively to apply facial review in cases involving the separation of powers and the “anti-commandeering” doctrine. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417 (1998) (separation of powers); *Bowsher v. Synar*, 478 U.S. 714 (1986) (separation of powers); *Printz v. United States*, 521 U.S. 898 (1997) (anti-commandeering); *New York v. United States*, 505 U.S. 144 (1992) (anti-commandeering).

<sup>35</sup> *See Lopez*, 514 U.S. at 559-61 (describing the categories of activity that Congress is permitted to regulate under the Commerce Clause and concluding that possession of guns near schools is not such an activity). *See Metzger, supra* note 20 (describing *Lopez* and *Morrison* as facial invalidations). As Metzger notes, *see id.* at 907, the Court in *Lopez* does mention in a summary paragraph that “[r]espondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce,” 514 U.S. at 567, but nothing in the opinion appears to turn on this observation, which is therefore probably best read as not detracting from the facial character of the rest of the Court’s opinion.

<sup>36</sup> *See Morrison*, 529 U.S. at 608-09, 613-19 (reiterating from *Lopez* the categories of activity that Congress is permitted to regulate under the Commerce Clause and concluding that violence against women is not such an activity).

<sup>37</sup> *See Lopez*, 514 U.S. at 561 (“§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”); *Morrison*, 529 U.S. at 613 (“§ 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”).

<sup>38</sup> For instance, the post-*Lopez* version of the Gun-Free School Zones Act, which does contain a jurisdictional element, 18 U.S.C.A. § 922(q)(2)(A), has been upheld in the lower courts. *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999); *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005).

to the facts of a particular case, simply as a matter of statutory construction.<sup>39</sup> Relatedly, in subsequent cases, the Court has avoided direct confrontation with the Commerce Clause by construing statutes narrowly to avoid potential doubts about whether they exceed Congress's regulatory power.<sup>40</sup>

Not surprisingly, *Lopez* and *Morrison* unleashed a torrent of Commerce Clause challenges in the lower courts. And, also understandably, in many of these cases—particularly the criminal ones—constitutional claimants argued that federal statutes exceeded Congress's Commerce Clause authority both on their face and as applied. What is rather surprising is that some lower courts took *Lopez* and *Morrison* as an invitation to invalidate federal statutes on Commerce Clause grounds, *but only as applied to the claimant and others similarly situated*.<sup>41</sup> For example, in 2001 the Sixth Circuit held that the federal child pornography statute exceeded the federal commerce power as applied to a defendant who took pictures of a minor who was nearly 18 years old, where the photographer did not intend to distribute the pictures to others.<sup>42</sup> Likewise, in 2003 the Ninth Circuit invalidated the same statute as applied to “simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution, or for any economic or commercial use, including the exchange of the prohibited material for other prohibited material.”<sup>43</sup> The Eleventh Circuit followed suit, striking down the child pornography statute as applied to intrastate possession of child pornography where the diskettes on

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<sup>39</sup> The converse of the proposition in the text, however, is not true; that is, the absence of a jurisdictional element does not doom a statute to facial invalidity. See *Sabri*, 541 U.S. at 605 (“We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook...”); see also *United States v. Ho*, 311 F.3d 589, 604-05 (5th Cir. 2002); *Rancho Viejo*, 323 F.3d at 1068; *United States v. Morales-DeJesus*, 372 F.3d 6, 14 (1st Cir. 2004).

<sup>40</sup> See, e.g., *United States v. Jones*, 529 U.S. 848 (2000) (holding, in order to avoid constitutional doubts, that a residence not used for any commercial purpose is not covered by the federal arson statute); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (holding, in order to avoid constitutional doubts, that the definition of “navigable waters” under the Clean Water Act does not include intrastate waters used as habitat by migratory birds).

<sup>41</sup> See generally Reynolds & Denning, *supra* note 17 (noting that lower courts treated *Lopez* and *Morrison* as invitations to engage in as-applied review). In such cases, courts struggled with the question of how to characterize the appropriate activity or subclass for purposes of as-applied review. For a helpful and engaging guide to that question, see John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).

<sup>42</sup> *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001).

<sup>43</sup> *United States v. McCoy*, 323 F.3d 1114, 1115 (9th Cir. 2003).

which the pornography was copied traveled in interstate commerce before they contained the images in question.<sup>44</sup>

The Ninth Circuit soon reaffirmed its as-applied approach to the Commerce Clause in holding that the federal prohibition on machine gun possession was unconstitutional as applied to the possession of a homemade machine gun made partly out of ready-made parts that had traveled in interstate commerce and partly out of parts the defendant had machined himself.<sup>45</sup> “[T]he Supreme Court has always entertained as-applied challenges under the Commerce Clause,” wrote Judge Kozinski. “Indeed, it is hard to believe the Court would ever eliminate as-applied challenges for one particular area of constitutional law.”<sup>46</sup> And, of course, the Ninth Circuit’s decision in the *Raich* case, later reversed by the Supreme Court, was an as-applied invalidation of the Controlled Substances Act under the Commerce Clause.<sup>47</sup>

Adding to the confusion, in the years following *Lopez* and *Morrison* several lower courts *upheld* statutes against Commerce Clause attack, but only as applied, reserving for future litigation the question whether the statute could validly be enforced in other circumstances. Thus, in 2003 the Fifth Circuit upheld the Endangered Species Act (“ESA”) as applied to the “Cave Species,” several endangered arachnids and insects threatened by the activities of a real estate developer.<sup>48</sup> Similarly, in 2003 the D.C. Circuit upheld the ESA as applied to a real estate developer’s proposed housing project, which the United States Fish and Wildlife Service concluded jeopardized the continued existence of the arroyo southwestern toad.<sup>49</sup> And the Tenth Circuit, in April 2005, upheld the federal child pornography statute as applied to a defendant who transported boys across state lines for illicit photography for which they were compensated.<sup>50</sup> In that case, Judge McConnell maintained that “[t]he existence

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<sup>44</sup> *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004), *cert. granted, vacated and remanded*, 126 S. Ct. 321 (2005). *See also* *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005), *cert. granted, vacated and remanded*, 125 S. Ct. 2938 (2005) (invalidating federal child pornography statute as applied to intrastate production and possession).

<sup>45</sup> *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), *cert. granted, vacated and remanded*, 125 S. Ct. 2899 (2005).

<sup>46</sup> *Id.* at 1141, 1142.

<sup>47</sup> *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *rev’d sub. nom. Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

<sup>48</sup> *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 125 S. Ct. 2898 (2005).

<sup>49</sup> *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *reh’g en banc denied*, 334 F.3d 1158 (2003), *cert. denied*, 540 U.S. 1218 (2004).

<sup>50</sup> *United States v. Riccardi*, 405 F.3d 852 (10th Cir., Apr 19, 2005), *cert. denied*, 126 S. Ct. 299 (2005).

and coherence of ‘as applied’ challenges under the Commerce Clause necessarily presupposes that the constitutionality of some applications of a facially valid statute will, and some will not, have sufficient nexus to interstate commerce, and that this will be based on the particular facts of the case.”<sup>51</sup>

By contrast, other lower court judges, post-*Lopez/Morrison*, suggested that Commerce Clause review should always—or nearly always—be facial in nature. For instance, Judge Trott of the Ninth Circuit dissented from an as-applied invalidation of the child pornography statute, contending that facial challenges were *de rigueur* in Commerce Clause cases: “Congress has declared that an entire class of activities substantially affects interstate commerce. That activity is child pornography. To the statute, it is immaterial that the particular child pornography under scrutiny was not produced for sale or trade.”<sup>52</sup> Judge Trott suggested that the panel majority’s ostensibly as-applied disposition made sense only if understood either as (a) an act of statutory interpretation holding that the statute did not to apply to interstate non-commercial possession, or (b) in effect a facial invalidation of the statute on grounds of overbreadth.<sup>53</sup> And on the Third Circuit, then-Judge Alito appeared to argue in a dissent that the federal machine gun possession statute was invalid on its face, owing to its lack of either a jurisdictional element or legislative findings showing a link between intrastate possession of machine guns and interstate commerce.<sup>54</sup>

Then came *Raich*, in which the Court appeared (at least at first glance) to take a sharp turn away from its previous facial approach to the Commerce Clause. Justice Stevens’s majority opinion took pains to characterize *Raich* as an as-applied challenge, distinct from the facial challenges entertained in *Lopez*

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<sup>51</sup> *Id.* at 869. See also, e.g., *United States v. Ho*, 311 F.3d 589 (5th Cir. 2002), *cert. denied*, 539 U.S. 914 (2003) (upholding certain provisions of the Clean Air Act and their implementing regulations as applied to defendant’s circumvention of asbestos abatement requirements).

<sup>52</sup> *McCoy*, 323 F.3d at 1141 (Trott, J., dissenting) (emphasis in original).

<sup>53</sup> *Id.* at 1140 (Trott, J., dissenting).

<sup>54</sup> *United States v. Rybar*, 103 F.3d 273, 287 (3d Cir. 1996) (Alito, J., dissenting), *cert. denied*, 522 U.S. 807 (1997). Alito dissented from an opinion that appeared to uphold the machine gun statute on its face. *Id.* at 276-85. See generally Nathaniel Stewart, Note, *Turning the Commerce Clause on its Face: Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE WESTERN L. REV. 161 (2004) (asserting that text and structure of Commerce Clause necessitate judicial inquiry into classes of activities rather than claimant’s particular conduct).

To add further perplexity to the mix, at least one lower court judge argued that as-applied challenges are *sometimes* available under the Commerce Clause, but only where the facts being used to distinguish the claimant’s case are not facts that go to the economic or commercial nature of the claimant’s conduct. See *United States v. Morales-DeJesus*, 372 F.3d 6, 17-20 (1st Cir. 2004) (Lipez, J., dissenting).

and *Morrison*:

Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that where 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.<sup>55</sup>

But the Court's insistence that it was sidestepping facial review in *Raich* rang hollow. In reality, the Court refused to take meaningful account of the particular nature or extent of the respondents' activities, or of the "subclass" of conduct carved out by the Ninth Circuit and by California law, saying only that Congress could rationally view the subclass as an essential part of a comprehensive regulatory scheme.<sup>56</sup> Moreover, the outcome in the case—upholding the federal drug trafficking statute even as applied to the respondents, while declining to overrule *Lopez* or *Morrison*—strongly suggests that the Court simply disfavors as-applied challenges altogether in the Commerce Clause area.<sup>57</sup> After all, if the *Raich* claimants, whose activities were neither interstate nor commercial, could not launch a successful as-applied challenge to an otherwise valid statute, it stands to reason that virtually no one can. *Raich* is, in essence, a *facial validation* of the Controlled Substances Act for Commerce Clause purposes.

In short, *Lopez*, *Morrison*, and *Raich* all resulted in facial adjudications, an outcome that clashes with the Court's usual preference for as-applied review. Why was a majority of the Court in *Raich* unwilling to engage in as-applied invalidation, a disposition that is familiar and regularly employed in many areas of constitutional law? And—perhaps even more puzzlingly, in light of the Court's subsequent decisions upholding exercises of Congress's Section 5 authority as applied in *Lane* and *Georgia*—why was the majority in *Lopez* and *Morrison* unwilling *even to entertain the possibility* that the statutes challenged in those cases could be upheld as applied in particular circumstances, say, on the grounds that a particular gun carried near a school

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<sup>55</sup> *Raich*, 125 S. Ct. at 2209 (citations and internal quotation marks omitted). The Court attempted to explain its divergence from its prior facial approach in terms of the arguments made by the parties, but the explanation seems incomplete, if not disingenuous. As I explain *infra* Part II.C, the choice between facial and as-applied review does not turn on the way in which a claimant frames her challenge.

<sup>56</sup> *Raich*, 125 S. Ct. at 2211-12.

<sup>57</sup> See *supra* text accompanying notes 12-14.

has traveled in interstate commerce (as the vast majority of guns no doubt have)<sup>58</sup> or that a particular gender-based assault could substantially affect interstate commerce?

This article provides answers to these vexing questions. But first some theoretical groundwork must be laid.

## II. AS-APPLIED CHALLENGES, OVERBREADTH FACIAL CHALLENGES, AND VALID-RULE FACIAL CHALLENGES

### A. The distinction between as-applied and facial challenges.

The conventional account of the distinction between facial vs. as-applied challenges begins with the simple observation that a constitutional claimant may challenge the constitutionality of a statute in two ways. She can challenge the validity of the statute “on its face”—that is, she can argue that the statute as a whole is unconstitutional as written or authoritatively construed.<sup>59</sup> Alternatively, she can challenge the validity of the statute “as applied”—that is, she can argue that the statute produced an unconstitutional result when it was applied to her.<sup>60</sup> Typically, facial and as-applied challenges are not mutually exclusive options for a constitutional claimant: with one important exception to be mentioned shortly, the same claimant in the same case can generally launch both facial and as-applied challenges to the same statute.<sup>61</sup>

Given that federal courts insist upon a concrete “case or controversy” before exercising jurisdiction and are reluctant to invalidate any more of a legislature’s handiwork than is necessary, the as-applied mode of judicial review has traditionally been the predominant one.<sup>62</sup> To understand the classic

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<sup>58</sup> See Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 953 (1997) (“Most guns are manufactured in one of two states and are then shipped to other states.”).

<sup>59</sup> The phrasing here is inevitably somewhat imprecise: a claimant could launch a “facial” challenge without arguing that an entire statute is invalid. A facial challenge can allege the invalidity of a particular statutory provision. The important point is that the challenged provision’s constitutional validity would be adjudicated without reference to the particular facts of the claimant’s situation.

<sup>60</sup> Or, in the case of a pre-enforcement challenge, that the statute *will* produce an unconstitutional result as soon as it is applied to her in the future. The distinction between facial and as-applied challenges bears no necessary relation to the distinction between pre- and post-enforcement challenges.

<sup>61</sup> The exception is First Amendment overbreadth, discussed *infra* at text accompanying notes 65-72.

<sup>62</sup> See, e.g., *Ayotte*, 126 S. Ct. at 967-69 (explaining the Court’s general preference for as-applied invalidation, on grounds of judicial restraint, administrability, and legislative intent).

idea of an as-applied challenge, imagine a statute that makes it a crime to disturb the peace. A flag-burning antiwar protester charged with violating this hypothetical statute would be best served to argue that the statute violates his constitutional rights as applied. While the disturbing-the-peace statute might be perfectly constitutional on its face,<sup>63</sup> he would argue that its application to him, a peaceful protester engaged in “symbolic speech,” violates his First Amendment rights.<sup>64</sup>

Because the as-applied mode of review makes such a natural fit with traditional federal-court principles of justiciability and judicial restraint, it is only in the past half-century or so that the distinction between facial and as-applied challenges has become a major focus of judicial and academic debate. The issue rose to prominence in the context of the First Amendment, and more particularly in the context of an exception to as-applied review known as the overbreadth doctrine. I shall argue later that the overbreadth doctrine does not represent the most important type of facial challenge, but because for many judges and scholars overbreadth is the paradigm for all facial challenges, it is worth addressing first and in some detail.

The 1981 case of *Schad v. Borough of Mt. Ephraim* nicely illustrates the doctrine of overbreadth.<sup>65</sup> In *Schad*, a city had enacted an ordinance prohibiting all live entertainment in any commercial zone.<sup>66</sup> The operators of an adult bookstore that offered coin-operated booths featuring nude dancers challenged the statute under the First Amendment. The Court held the statute invalid on its face, concluding that it swept within its prohibition too wide a swath of protected speech, including “the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment,”<sup>67</sup> without sufficient justification. In an overbreadth case like *Schad*, the Court has explained, the claimant is permitted to raise a claim of facial invalidity largely because of a judicial concern that the challenged statute would otherwise “chill” the protected expression of parties other than the claimant.<sup>68</sup> Thus, in

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<sup>63</sup> I am unaware of any case in which the Supreme Court has held that a traditional disturbance of the peace statute is facially unconstitutional.

<sup>64</sup> *Cf.* *Cohen v. California*, 403 U.S. 15 (1971) (invalidating disturbance of the peace statute as applied to defendant who appeared in county courthouse wearing a jacket bearing the words “Fuck the Draft”).

<sup>65</sup> 452 U.S. 61 (1981).

<sup>66</sup> *Id.* at 63 & n.1.

<sup>67</sup> *Id.* at 66.

<sup>68</sup> *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 521 (1972). In the First Amendment area, the Court has stated that a statute must sweep in a “substantial” amount of protected

effect, the overbreadth claimant vindicates the constitutional rights of third parties not before the Court.<sup>69</sup> Because concerns about chilling effects and the rights of third parties are not limited to the First Amendment context, the Court has sometimes applied a species of overbreadth doctrine in other types of individual rights cases. The “undue burden” test in the area of abortion rights, for example, has much in common with overbreadth analysis.<sup>70</sup>

The fact that a claimant may not have a valid as-applied challenge—for instance, at the time of *Schad*, it was unclear whether nude dancing was a form of protected expression within the ambit of the First Amendment<sup>71</sup>—is no barrier to raising an overbreadth challenge. To the contrary, the Court has stated that claimants to whom a valid as-applied challenge is available are not permitted to bring a First Amendment overbreadth challenge. In the 1985 case of *Brockett v. Spokane Arcades, Inc.*, the Court held that a facial challenge alleging First Amendment overbreadth could not be brought by a claimant who alleged that his own expressive conduct was constitutionally protected.<sup>72</sup> In other words, as-applied challenges and facial challenges of the First

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speech in order for an overbreadth facial challenge to succeed. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

<sup>69</sup> See, e.g., *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 392-93 (1988); *Sec’y of State v. J.H. Munson*, 467 U.S. 947, 956 (1984). It is important to note that the claimant must still possess Article III standing to challenge the statute in federal court. Although the Court continues to view overbreadth as an exception to the usual limitations on third-party standing, it has made clear that those limitations are prudential and do not flow from Article III. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 n.7 (2004).

<sup>70</sup> See, e.g., John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 264-71 (1994) [hereinafter Dorf, *Facial Challenges*] (showing that, in cases concerning “fundamental rights” under the Due Process Clause, the Court has often applied something that looks very much like overbreadth review, asking whether the challenged statute on its face unduly burdens or chills protected conduct).

The Court itself has stated that there are other doctrinal areas besides the First Amendment in which it has “recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term).” *Sabri*, 541 U.S. at 609-10, citing *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (right to travel); *Stenberg*, 530 U.S. at 938-946 (abortion rights); *Boerne*, 521 U.S. at 532-35 (Section 5 of the Fourteenth Amendment). But see *Ayotte*, 126 S. Ct. 961 (suggesting a return on the part of the Court to a preference for as-applied review even in the abortion area).

<sup>71</sup> See *Schad*, 452 U.S. at 66 (“[A]s the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.”) (citations omitted); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (holding that nude dancing “is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so”).

<sup>72</sup> 472 U.S. 491, 503 (1985).

Amendment overbreadth variety are mutually exclusive. This holding appears to be limited to First Amendment overbreadth, as opposed to overbreadth generally. It is also subject to criticism on the grounds that it extends greater judicial solicitude to those engaged in constitutionally unprotected conduct than to those whose conduct is protected.<sup>73</sup>

With the as-applied and overbreadth challenges behind us (and the valid-rule facial challenge still ahead of us), we can ask the question that has preoccupied courts and scholars for many years, particularly in the individual rights context: In what circumstances should a statute be struck down on its face? The Court's traditional answer has been: rarely. The Court has explained that the act of striking down a statute on its face stands in tension with several traditional components of the federal judicial role, including a preference for resolving concrete disputes rather than abstract or speculative questions; a deference to legislative judgments; and a reluctance to resort to the "strong medicine" of constitutional invalidation unless absolutely necessary.<sup>74</sup> Accordingly, the Court has consistently held, at least in the individual rights context, that facial invalidations should be the exception rather than the rule.<sup>75</sup>

The Court laid down what appeared to be a general rule for the availability of facial challenges in *United States v. Salerno*, which involved a facial challenge to the Bail Reform Act under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment. The Court emphasized that a claimant raising a facial challenge carries a "heavy burden."<sup>76</sup> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully," observed Chief Justice Rehnquist for the Court, "since the challenger must establish that no set of circumstances

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<sup>73</sup> The claimant could also raise a nonconstitutional challenge, arguing that the court should adopt a narrow construction of the statute such that the claimant's conduct is deemed unregulated simply as a matter of statutory construction. Such an argument would be strengthened by a showing that the broader interpretation would violate the Constitution, or at least raise difficult constitutional questions. Strategies of constitutional avoidance have a long pedigree and are commonly used by courts where statutory language permits (and sometimes even where it doesn't). The practical result from the standpoint of the claimant is comparable to an as-applied invalidation, with the important difference being that the court does not bring the full power of judicial review to bear on the statute. *See generally* Adrian Vermeule, *Saving Constructions*, 85 GEO. L. J. 1945 (1997); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

<sup>74</sup> *See, e.g., Broadrick*, 413 U.S. at 610-11 ("[C]ourts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.").

<sup>75</sup> *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *Younger v. Harris*, 401 U.S. 37, 52-53 (1971).

<sup>76</sup> 481 U.S. 739, 745 (1987).

exists under which the Act would be valid.”<sup>77</sup> The Court in *Salerno* expressly exempted overbreadth challenges from its “no set of circumstances” requirement, but stated that overbreadth challenges were restricted to “the limited context of the First Amendment.”<sup>78</sup> The Court in *Salerno* had little difficulty concluding that constitutionally valid applications of the Bail Reform Act existed, and thus rejected the defendants’ facial challenges.<sup>79</sup>

Lower courts in many cases have treated *Salerno* as setting forth an across-the-board threshold test for the availability of facial challenges, regardless of the constitutional clause being relied upon by the claimant, with the exception of First Amendment overbreadth claims and (in most circuits) abortion rights claims.<sup>80</sup> But other courts, and several scholars, have criticized the *Salerno* test as a normative matter, or denied its broad applicability as a descriptive matter, or both.<sup>81</sup> As Marc Isserles has described, critics of *Salerno* have argued that the “no set of circumstances” test consigns all facial challenges to inevitable failure, because courts can always envision some hypothetical valid application of the challenged statute; leaves litigants with no

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 746-55.

<sup>80</sup> See, e.g., *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 & n.10 (3d Cir. 2003); *United States v. Robinson*, 367 F.3d 278, 290 (5th Cir. 2004); *Rosen v. Goetz*, 410 F.3d 919, 933 (6th Cir. 2005); *Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Eng’rs*, 335 F.3d 607, 619-20 (7th Cir. 2003); *United States v. Ballinger*, 395 F.3d 1218, 1224 & n.2 (11th Cir. 2005); cf. *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc) (“Given *United States v. Salerno* ... a facial challenge can succeed only if there are no circumstances in which the Act at issue can be applied without violating the Commerce Clause”); *Nat’l Abortion Fed’n v. Gonzales*, No. 04-5201-CV, at \*11-12 (2d Cir., Jan. 31, 2006) (Walker, C.J., concurring).

*Salerno*, as mentioned, expressly excludes First Amendment overbreadth claims from the scope of its self-styled threshold test. 481 U.S. at 745. As for the abortion rights context, most circuits currently apply the *Casey* “undue burden” test, as augmented by the *Stenberg* health exception requirement, rather than *Salerno*. See, e.g., *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 627-28 (2005) (collecting cases); *Carhart v. Gonzales*, 413 F.3d 791, 794-95 (8th Cir. 2005), cert. granted, 2006 WL 385614 (U.S. Feb. 21, 2006) (No. 05-380) (discussing the tension between the *Casey/Stenberg* and *Salerno* standards); *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (“While we have held that *Casey* ‘overruled *Salerno* in the context of facial challenges to abortion statutes,’ we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so.”) (citation omitted); *Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens*, 287 F.3d 910, 919 (10th Cir. 2002).

<sup>81</sup> See, e.g., Dorf, *supra* note 70; Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063, 1072 n.34 (1997); John Christopher Ford, *The Casey Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1445 (1997).

real incentive to launch a facial as well as an as-applied challenge; has little grounding in pre-*Salerno* case law and was arguably dicta in *Salerno* itself; and unduly privileges First Amendment overbreadth over other forms of facial challenge.<sup>82</sup>

On the Supreme Court itself, Justice Stevens has emerged as the primary champion of a narrow reading of *Salerno* in the individual rights context, and Justice Scalia as its primary defender. For instance, in the 1999 case of *City of Chicago v. Morales*, Justice Stevens (writing for a plurality of four justices) held a gang loitering ordinance facially unconstitutional on vagueness grounds under the Due Process Clause.<sup>83</sup> Justice Scalia, in dissent, vigorously insisted that the plurality's disposition ran afoul of *Salerno*'s requirement, since (according to Justice Scalia) it was possible to imagine a scenario in which the ordinance's application to a particular group of loiterers would not be impermissibly vague.<sup>84</sup> In response, Justice Stevens's plurality opinion asserted that "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."<sup>85</sup> Justices Stevens and Scalia have also clashed over the facial vs. as-applied issue in separate statements concerning the denial of certiorari in abortion cases.<sup>86</sup> The 2006 *Ayotte* decision did not so much resolve this clash as institute a temporary truce: Justice O'Connor's brief opinion for a unanimous Court never mentions *Salerno* and leaves it to the lower courts to fashion an appropriate remedy to address the risks posed by a parental notification statute that lacks an express

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<sup>82</sup> Isserles, *supra* note 21, at 372-75.

<sup>83</sup> *Chicago v. Morales*, 527 U.S. 41, 55, 64 (1999).

<sup>84</sup> *Id.* at 81-83 (Scalia, J., dissenting) (imagining a thinly disguised version of *West Side Story* unfolding on the South Side of Chicago).

<sup>85</sup> *Id.* at 55 n.22 (Stevens, J., opinion of the Court).

<sup>86</sup> Compare *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of certiorari) ("While a facial challenge may be more difficult to mount than an as-applied challenge, the dicta in *Salerno* 'does not accurately characterize the standard for deciding facial challenges,' and 'neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.'") with *id.* at 1178 (Scalia, J., dissenting from the denial of certiorari) ("It has become questionable whether, for some reason, this clear principle [i.e., *Salerno*'s "no set of circumstances" test] does not apply in abortion cases"). See also, e.g., *Ada v. Guam Soc. of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of certiorari) (explaining that the Ninth Circuit's facial invalidation of a Guam law outlawing abortions except in cases of medical emergency "seems to me wrong, since there are apparently some applications of the statute that are perfectly constitutional").

exception for cases of medical emergency.<sup>87</sup>

Although Justices Stevens and Scalia have yet to resolve their debate over the circumstances in which facial challenges are properly entertained by courts, a proper understanding of that debate can be greatly enhanced by identifying a second type of facial challenge, distinct from the overbreadth challenge—namely, the valid-rule facial challenge.<sup>88</sup>

### **B. Valid-rule facial challenges.**

A valid-rule facial challenge asserts that a statute is invalid on its face as written and authoritatively construed, when measured against the applicable substantive constitutional doctrine, without reference to the facts or circumstances of particular applications. The groundwork for the current understanding of valid-rule facial challenges was laid by Henry Monaghan in a celebrated 1981 article reinterpreting First Amendment overbreadth doctrine.<sup>89</sup> According to Monaghan, First Amendment overbreadth claims are not grounded in an exception to the usual prudential rules against third-party standing.<sup>90</sup> Instead, Monaghan argues, overbreadth claims are best understood as instances of the general principle that every litigant must be permitted to vindicate his *own* right to be judged by a constitutionally valid rule of law:

The operative rule, either as enacted or construed, must conform to the Constitution. Thus, in addition to a claim of privilege, a litigant has always been permitted to make another, equally “conventional” challenge: He can insist that his conduct be judged in accordance with a rule that is constitutionally valid. In sharp contrast to a fact-dependent privilege claim, a challenge to the content of the rule applied is independent of the specific facts of the litigant’s predicament. Rather, it speaks to the relationship between the facial content of the rule being applied to the facts and the applicable constitutional law, and it insists that that rule itself be valid.<sup>91</sup>

On Monaghan’s view, First Amendment overbreadth doctrine, properly understood, flows not from some special exception to the *procedural* threshold requirements of standing but from the *substantive* requirements of the First Amendment itself, particularly the requirements of legislative precision and

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<sup>87</sup> *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006).

<sup>88</sup> I have borrowed the term “valid rule facial challenge” (with an additional hyphen) from Marc Isserles. See Isserles, *supra* note 21.

<sup>89</sup> Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

<sup>90</sup> *Id.* at 13.

<sup>91</sup> *Id.* at 8.

least-restrictive means.<sup>92</sup>

Monaghan's specific reinterpretation of First Amendment overbreadth doctrine, it should be noted, has not been embraced by the Supreme Court, which generally continues to view overbreadth as an exception to the bar on third-party standing.<sup>93</sup> But his insight that litigants have a personal right to be judged according to a valid rule of law can be viewed as underlying several holdings of the Supreme Court,<sup>94</sup> and has won broad acceptance among scholars.<sup>95</sup>

Marc Isserles builds upon Monaghan's basic insight by reconciling *Salerno* with the broad availability of facial challenges in some areas of constitutional law outside the First Amendment.<sup>96</sup> As Isserles demonstrates, critics of *Salerno* make the common error of assuming that all facial challenges are of the overbreadth variety.<sup>97</sup> Isserles, by contrast, draws a sharp distinction between overbreadth challenges and what he calls "valid rule facial challenges." Unlike Monaghan, Isserles accepts at face value the Court's repeated statements that overbreadth facial challenges are usually barred by rules prohibiting third-party standing, i.e., rules forbidding one person to raise the constitutional claims of another.<sup>98</sup> Where overbreadth facial challenges are permitted—typically, though not exclusively, in cases involving First Amendment rights—it is because the Court is willing to grant a narrow

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<sup>92</sup> *Id.* at 24-25, 37-39.

<sup>93</sup> See, e.g., *Broadrick*, 413 U.S. at 612 ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.") (citation omitted); *but see* *New York v. Ferber*, 458 U.S. 747, 768 n.21 (1982) (citing Monaghan for the proposition that "[a] person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face").

<sup>94</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 n.3 (1992); *see also generally* Dorf, *supra* note 70 (arguing that the valid rule requirement explains much of existing Supreme Court constitutional law doctrine).

<sup>95</sup> See Dorf, *supra* note 70; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) [hereinafter Fallon, *As-Applied*]; Isserles, *supra* note 21; *but see* Matthew D. Adler, *Rights Against Rules: the Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 160 (1998) [hereinafter Adler, *Rights Against Rules*] ("Unlike Monaghan, I think it is a grave mistake to conceptualize this judicial task as resting upon the proposition that, in his words: '[A] litigant has always had the right to be judged in accordance with a constitutionally valid rule of law.'").

<sup>96</sup> See Isserles, *supra* note 21.

<sup>97</sup> *Id.* at 366.

<sup>98</sup> *Id.* at 366, 370.

exception to the usual prohibition on third-party standing, principally in order to prevent parties not before the court from being “chilled” in the exercise of protected rights for fear of prosecution. The important point, for Isserles, is that a statute that is subject to invalidation for unconstitutional overbreadth still has—indeed, by definition must have—some constitutionally valid applications. Thus, *Salerno* does not apply to overbreadth challenges, as the Court itself recognized in that case.

The second type of facial challenge is the “valid rule facial challenge.” Following Monaghan, Isserles argues that in addition to arguing overbreadth, a claimant may assert her own personal right to be judged under a constitutionally valid rule of law.<sup>99</sup> The valid-rule facial challenge differs from the overbreadth facial challenge in that it does not require any exception to the normal rules barring third-party standing, and it does not depend for its success on an examination of the constitutionality of any number of actual or potential statutory applications.<sup>100</sup> On the contrary, because the constitutional infirmity inheres in the statute as it is written and authoritatively construed, that infirmity could be said to pervade all of the statute’s actual or potential applications.<sup>101</sup> For the same reason, the question of statutory severability is not relevant in the context of a successful valid rule facial challenge, because there are no “valid applications” to remain behind after the invalid ones are severed.<sup>102</sup> Thus, Isserles concludes,

[a] valid rule facial challenge is a constitutional challenge that, if successful, satisfies *Salerno*’s “no set of circumstances”

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<sup>99</sup> *Id.* at 387.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 407-08. Statutory severance may still come into play, of course, if a particular provision of a larger statute is struck down facially as an invalid rule of law. Though the provision as a whole would be invalidated, the remainder of the statute could stand, assuming the applicable test for severability is satisfied.

In a similar vein, a statute might take the form of a rule plus an exception, as in Dorf’s example of a statute that criminalizes murder but exempts lynching. Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269, 288-89 (2000) [hereinafter Dorf, *Heterogeneity*]. If the grammatically separable exception for lynching is deemed invalid, it is probably wisest for a court to hold only that the exception is invalid, rather than the entire statute. Of course, a federal court will often refrain from making such severance decisions if the statute under review is a state statute that has not been authoritatively construed; the choice of whether to strike some or all of the statute should be left to the state. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942). In addition, Due Process concerns could prevent partial invalidation if the challenger could have reasonably relied on the pre-invalidation version of the statute without fair notice of its unconstitutionality. *See Fallon, As-Applied, supra* note 95, at 1345 n.124.

language. That language, however, does not set forth an application-specific method of proof or a facial challenge “test,” but is rather a descriptive claim about a statute that on its face expresses an invalid rule of law.<sup>103</sup>

A successful valid-rule facial challenge is not always available to claimants. But, as Isserles explains, its availability is not a function of *Salerno*’s “no set of circumstances” formulation (which merely *describes* a successful valid rule facial challenge). “Rather, a court’s choice between facial and as-applied invalidation is constrained by the structural relationship between the kind of constitutional challenge asserted, the way in which the statute is written and authoritatively construed, and the substantive constitutional doctrine on which the challenge is based.”<sup>104</sup> *Salerno* is thus not a universally applicable threshold requirement for the availability of a facial challenge, but instead is best viewed as a rather clumsy articulation of the state of affairs that obtains when a valid-rule facial challenge succeeds: there are no valid “applications,” because the rule itself is constitutionally deficient.<sup>105</sup>

The case of *R.A.V. v. City of St. Paul*<sup>106</sup> provides convenient illustrations of both types of facial challenge. The case involved a First Amendment challenge to a city ordinance that made it a misdemeanor to display a symbol or other object “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>107</sup> The Minnesota Supreme Court had given the ordinance a limiting construction, holding that it applied only to “fighting words,” i.e., expressions which themselves inflict harm or incite imminent violence and are not protected by the First Amendment.<sup>108</sup> The constitutional claimant was a juvenile whose conduct—burning a cross on the lawn of a black family—plainly could have been proscribed by any number of valid

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<sup>103</sup> Isserles, *supra* note 21, at 387.

<sup>104</sup> *Id.* at 423.

<sup>105</sup> To be sure, it would not be linguistically incoherent to maintain that *Salerno* states a threshold requirement even for valid-rule facial challenges, in the sense that an intrinsically defective statute by definition cannot have any valid applications. Such an attempt to resuscitate *Salerno* as an across-the-board prerequisite for facial review, however, would be both needlessly circuitous and potentially misleading, because the court’s inquiry in a valid-rule facial challenge has nothing to do with the circumstances of particular applications, and because fanciful potential “valid applications,” even of an invalid rule, are often easy enough to concoct.

<sup>106</sup> 505 U.S. 377 (1992).

<sup>107</sup> *Id.* at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).

<sup>108</sup> *Id.* at 380-81.

statutes.<sup>109</sup> Writing the opinion of the Court for five justices, however, Justice Scalia held the challenged ordinance facially unconstitutional because it discriminated among acts of symbolic speech on the basis of their content.<sup>110</sup> Even though the claimant’s own conduct was constitutionally unprotected, the content discrimination on the face of the ordinance rendered it an invalid rule for all purposes, because such discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”<sup>111</sup> Justice White, writing for four justices, agreed that the ordinance was facially invalid, but reached this conclusion on overbreadth grounds, reasoning that the statute (even as narrowed by the Minnesota Supreme Court) swept in an unacceptable amount of constitutionally protected speech.<sup>112</sup> Both opinions resulted in facial invalidation—and in both, the fact that the claimant’s conduct was constitutionally regulable made no difference—but Justice Scalia’s opinion for the Court treated the case as a valid-rule facial challenge, while Justice White’s opinion treated it as an overbreadth facial challenge.<sup>113</sup>

**C. Determining when facial review is appropriate: specification, severability, and substantive constitutional doctrine.**

Scholars agree that facial adjudication occurs more frequently than the Supreme Court’s stingy, and ostensibly broadly applicable, test in *Salerno* would indicate. Michael Dorf, in particular, has demonstrated that facial challenges turn out to be far more common than the Supreme Court has thus far seen fit to admit; in short, the “exception to the rule” is not especially exceptional after all.<sup>114</sup> Most importantly from the point of view of this article, facial challenges

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<sup>109</sup> *Id.* at 380 & n.1.

<sup>110</sup> *Id.* at 381-95.

<sup>111</sup> *Id.* at 387 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

<sup>112</sup> *Id.* at 411-14 (White, J., concurring).

<sup>113</sup> *R.A.V.* also provides some support for another of this article’s claims: that the claimant’s own framing of his case is not dispositive of the availability of a valid-rule facial challenge. As Justice White pointed out, *id.* at 398 n.1 (White, J., concurring), the claimant in *R.A.V.* framed his challenge almost exclusively in overbreadth terms, yet this did not prevent a majority of the Court from addressing the case as a valid-rule facial challenge.

<sup>114</sup> Dorf, *Facial Challenges*, *supra* note 70. Richard Fallon, in an influential article, disagrees to some extent. Fallon concludes that facial challenges ought to be relatively rare, and that for reasons of institutional prudence courts should err on the side of using the traditional as-applied model. *See* Fallon, *As-Applied*, *supra* note 95, at 1352. Only where “constitutional values are unusually vulnerable,” especially when individual liberties are subject to a potential chilling effect, should courts readily adopt “tests that invite rulings of facial invalidity and preclude the case-by-case curing of statutory defects.” *Id.*

often succeed where a court concludes that a statute is motivated by an impermissible legislative purpose.<sup>115</sup> Doctrinal tests that turn at least in part on an examination of legislative purpose—and that result in valid-rule facial review—are often used under the Equal Protection, Free Speech, dormant Commerce, and Establishment Clauses.<sup>116</sup> In addition, as Isserles points out, facial review may be appropriate in cases applying “suspect classification” tests under the Equal Protection and Free Speech Clauses,<sup>117</sup> and “void for vagueness” tests under the Free Speech and Due Process Clauses. In all of these doctrinal areas, the Court has adopted substantive tests of constitutional validity which focus attention on the terms of the statute itself, or its purpose, history or structure, rather than on particular applications—in short, the Court has engaged in valid-rule facial review.

Some constitutional doctrines are not as readily conducive to facial review, but do not necessarily lend themselves to traditional as-applied treatment either. Such hybrid doctrines include those which call for some degree of regulatory “fit,” either via a “narrow tailoring” or “least restrictive alternative” test, a “congruence and proportionality” test, or a general balancing of the state’s regulatory interests with the importance of the individual freedom at stake.<sup>118</sup> On the one hand, such doctrines often require a court to make an empirical or predictive judgment about how the challenged statute has been or will be applied, and the likely effects of such application—the kind of judgment that is well suited to as-applied adjudication. On the other hand, such doctrines typically ask the court to assess the “fit” between regulatory means and ends at the level of the statute itself, regardless of the validity of particular applications. Thus, as Isserles points out, “even though [the narrow tailoring] inquiry necessarily involves an empirical judgment about the world, means/end scrutiny is a generalized inquiry that does not involve an assessment of particular, fact-dependent features of specific statutory applications.”<sup>119</sup>

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<sup>115</sup> *Id.* at 264-271.

<sup>116</sup> Isserles, *supra* note 21, at 440.

<sup>117</sup> *Id.* at 442-43. Fallon also includes a category he labels “forbidden content” tests, used in those rare areas in which the Court has held that enactment of a particular form of statute is entirely off-limits to the legislature. Fallon, *As-Applied*, *supra* note 95, at 67, 83-84. An example might include a statute establishing a tax or fee as a prerequisite to voting. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

<sup>118</sup> Isserles, *supra* note 21, at 446-48.

<sup>119</sup> *Id.* at 446.

Perhaps the fullest analysis of the circumstances in which facial challenges ought to be entertained has been provided by Richard Fallon.<sup>120</sup> On Fallon's view, the key considerations in determining the appropriateness of facial adjudication are what he calls "specification" and "separability."<sup>121</sup> Fallon argues that substantive doctrinal tests should be viewed as calling for facial review only when those tests "require that a statute be relatively fully specified at the time of its first application and, relatedly, call for a 'facial' determination of constitutional validity."<sup>122</sup> When a statute is deemed invalid under such a test, "its otherwise valid subrules will be deemed inseparable from valid ones and therefore unenforceable."<sup>123</sup>

Fallon's criterion of specification is useful and sensible: it would be imprudent for a court to strike down a statute in all its applications if the court were unsure what those applications might turn out to look like. But it is his concept of separability that has attracted the most attention; other scholars, both before and after Fallon, have placed great emphasis on this concept in seeking to explain when facial review is appropriate.<sup>124</sup> For example, Michael Dorf seeks to explain the *Salerno* "no set of circumstances" rule by arguing that it sets forth an implicit "presumption of severability."<sup>125</sup> When a court applies this presumption, Dorf reasons, it in effect tells the claimant, "This statute is constitutionally valid as applied to you. As for its allegedly unconstitutional applications to other people, we will wait for those cases to arise. And we'll assume now that if we do get around to striking down other applications of this statute, those applications will prove to be severable, leaving the valid remainder of the statute (including the part that we apply to you today) intact."<sup>126</sup> Similarly, Gillian Metzger places the notion of a presumption of

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<sup>120</sup> Fallon, *As-Applied*, *supra* note 95.

<sup>121</sup> *Id.* at 1325 & n.31 (adapting the terms "specify" and "specification" from Henry S. Richardson, *Specifying Norms As a Way to Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFF. 279 (1990)).

<sup>122</sup> Fallon, *As-Applied*, *supra* note 95, at 1342.

<sup>123</sup> *Id.*

<sup>124</sup> Most other scholars, such as Dorf and Metzger, use the more common term "severability" rather than Fallon's term "separability." Nothing appears to turn on this semantic distinction.

<sup>125</sup> Dorf also views this presumption as implicit in the much earlier case of *Yazoo & Mississippi R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912), in which the Court rejected a Due Process and Equal Protection challenge to a statute requiring railroads to promptly settle claims for lost or damaged goods, holding that the statute was constitutional as applied to the facts of the case at bar. Indeed, Dorf sometimes refers to the "*Yazoo/Salerno* presumption of severability." See, e.g., Dorf, *Facial Challenges*, *supra* note 70, at 251.

<sup>126</sup> *Id.* at 249.

severability at the center of her argument that facial challenges should not be the norm in cases arising under Congress's Fourteenth Amendment enforcement power.<sup>127</sup>

Yet the centrality of severability analysis to the question of facial vs. as-applied review has been overstated by these commentators, primarily because they have approached the question from the standpoint of overbreadth as the exclusive model for facial challenges. Contrary to the existing literature, not all successful facial challenges entail overcoming a presumption of severability, for two related reasons. First, these commentators' emphasis on severability gives short shrift to the possibility of *facial validation*. Typically, when a court rebuffs a constitutional challenge, it leaves open the possibility of later as-applied challenges, as Dorf rightly points out. But, at least in certain doctrinal contexts, courts can go further, not only rejecting the claimant's facial challenge but declaring or implying that constitutional claims of the kind raised by the claimant simply cannot be successfully pressed against the challenged statute.

Perhaps the simplest example of a facial validation arises in the context of what Dorf himself, in a paper co-authored with Matthew Adler, has called a "constitutional existence condition."<sup>128</sup> All federal statutes must be enacted in accordance with the procedures set forth in Article I, Section 7 of the Constitution. If a statute were challenged as lacking a constitutional existence condition, and the challenge failed on the merits, the Court's ruling would result in a facial validation. To taking the limiting case, imagine that a claimant alleges that a statute is unconstitutional because the version of the bill passed by Congress was printed in a different typeface from the one signed by the President. A court that reached the merits of such a claim would no doubt hold that the difference in typeface was constitutionally irrelevant: the statute is valid on its face and no further as-applied challenges are necessary to assess its validity.<sup>129</sup> (If this example strikes some readers as too absurd to contemplate, consider the possibility of facial validations resulting from challenges under structural provisions such as the Appointments Clause, the Origination Clause, the Article I, section 7 requirement of bicameralism and

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<sup>127</sup> See, e.g., Metzger, *supra* note 20 at 876 ("[T]he debate regarding the availability of facial challenges, in particular facial overbreadth challenges, is really a debate about statutory severability—that is, whether unconstitutional text or applications of a statute should be presumed severable or nonseverable in a given context.") (citation omitted).

<sup>128</sup> See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105 (2003).

<sup>129</sup> A court might well not reach the merits. Cf. *Field v. Clark*, 143 U.S. 649 (1892) (version of bill passed by both houses of Congress and presented to the President constitutes authoritative text, and courts will not look behind that text).

presentment, or the separation of powers more generally.)<sup>130</sup> The constitutional existence condition example demonstrates that scholars such as Fallon, Dorf and Metzger overstate their case when they suggest that facial challenges are appropriate only where the court has good reason to insist that a statute be separable. In the existence condition case, the question of separability (or severability) would not arise.<sup>131</sup>

The second—and related—reason why the severability approach is not fully adequate to the task of describing challenges to congressional power is the ubiquity of valid-rule facial challenges. The existence condition challenge hypothesized above is of course a valid-rule facial challenge. Fallon, Dorf, and Metzger argue that a successful facial challenge always entails overcoming a presumption against severability because they view facial challenges from the standpoint of what Marc Isserles has called the “overbreadth assumption.”<sup>132</sup> If one’s paradigm of a facial challenge is the overbreadth facial challenge—i.e., the statute is valid as applied to the claimant but must be struck down because it is invalid in a substantial portion of its other actual or potential applications—then interpreting *Salerno* as setting forth a presumption of severability makes eminent sense. Except in the domains where overbreadth doctrine applies, the story goes, the unprotected claimant will not get the benefit of constitutional protections accorded to other parties not before the Court; the statute’s application to those other parties can be invalidated, and presumably severed, in later litigation. But in the context of a valid-rule facial challenge, it is difficult to make sense of a “presumption of severability”: either the statute is valid as a whole (as in the typeface example) or it is invalid as a whole. In neither case does severability—or, indeed, the entire notion of individual “applications”—become relevant.<sup>133</sup>

It should not come as a surprise that the facial vs. as-applied debate cannot be reduced to a question of severability. Severability is, after all, a matter of statutory interpretation and remedial discretion, not a matter of constitutional law. To take an elementary illustration, a court might declare a particular statutory subsection to be unconstitutional on its face—even under

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<sup>130</sup> See Adler & Dorf, *supra* note 128, at 1148.

<sup>131</sup> Indeed, in a case challenging a constitutional existence condition, Fallon’s criterion that the statute be “fully specified” at the time of adjudication (i.e., its operative legal meaning fully determined) would also be irrelevant. The existence condition case is unusual, however, because the meaning of the statute is irrelevant to the merits of the constitutional challenge; typically, specification is a relevant criterion.

<sup>132</sup> Isserles, *supra* note 21, at 375-82.

<sup>133</sup> To put it differently, severability can be relevant in identifying (and preserving) valid subrules of otherwise invalid rules, but is of little use in identifying invalid subrules of otherwise valid rules. I am grateful to Michael Dorf for this formulation of the point.

the exacting *Salerno* test—and yet sever the facially unconstitutional subsection, allowing the remainder of the statute to stand intact.<sup>134</sup> Conversely, a court could conceivably invalidate a statute only “as applied” to a particular set of circumstances, and yet conclude as a matter of statutory interpretation that the legislature would not have intended the statute to stand unless it covered those circumstances; the result would be, for all practical purposes, indistinguishable from a facial invalidation.

What these examples illustrate is that the severability question and the facial vs. as-applied review question stand on distinct grounds. Severability is a function of (a) statutory structure and coherence, i.e., the capacity of a statute to survive once one or more of its applications have been invalidated; (b) legislative intent, i.e., an inquiry into whether the legislature would have wished its handiwork to remain after some portion of it had been struck down; and (c) institutional competency, i.e., the limits on the ability or readiness of a federal court to reformulate a partially invalidated federal statute, or to attempt to discern how the highest court of a state would treat or construe a partially invalidated state statute.<sup>135</sup> The proper mode of constitutional review, by contrast, is a function of the applicable substantive constitutional doctrine, as manifested in the breadth or narrowness of a court’s holding.

The same considerations reveal why the choice between facial and as-applied review will not inevitably turn on the claimant’s framing of her own challenge. Because the proper mode of review is a function of the applicable substantive doctrine, the parties will not always be in a position to determine whether the court engages in as-applied or facial review. In particular, if substantive doctrine points the court towards valid-rule facial review, it seems unlikely that the claimant would be able to prevent the adjudication from focusing on the language, history, and structure of the statute in comparison to applicable constitutional requirements, rather than on facts about the claimant’s own activities.<sup>136</sup> Conversely, if as-applied review is called for by the nature of the applicable substantive doctrine, the claimant cannot require the

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<sup>134</sup> See, e.g., *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (striking down legislative veto provision on its face but severing it from remainder of statute); *United States v. Booker*, 543 U.S. 220 (2005) (facially invalidating, but severing, provision making the United States Sentencing Guidelines mandatory in federal criminal cases).

<sup>135</sup> See generally *Booker*, 543 U.S. at 756-771 (opinion of Breyer, J., for the Court).

<sup>136</sup> Nor is it obvious, from a strategic point of view, why a claimant would wish to restrict herself to an as-applied challenge under such circumstances, with limited exceptions. A case like *Raich* is such an exception, because a facial Commerce Clause attack on the Controlled Substances Act was doomed to failure, and because it was not yet clear that the Court disfavored as-applied challenges in the Commerce Clause context.

court to entertain a facial challenge, as the Supreme Court has pointed out on numerous occasions.<sup>137</sup>

The foregoing discussion conveys a broader lesson, namely, that there is no rigid analytic dichotomy between as-applied and facial challenges. Metzger rightly points out that “[t]he distinction between facial and as-applied challenges is more illusory than the ready familiarity of the terms suggests.”<sup>138</sup> Fallon concurs that “familiar and recurring kinds of tests illustrate how as-applied adjudication can inevitably result in facial invalidations.”<sup>139</sup> As he observes, “there is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her.”<sup>140</sup> Because of the effect of stare decisis and the nature of legal reasoning, an “as-applied” invalidation by the United States Supreme Court will usually have effects that go far beyond the particular claimant at bar to encompass all those similarly situated to the claimant in relevant respects. Conversely, a “facial” challenge may attack a particular statutory title, subsection, or even a statutory phrase, on the grounds that the challenged enactment is unconstitutional as written or authoritatively construed. Indeed, what makes a facial challenge distinctive is not that it challenges an entire statute, but that it challenges the targeted enactment, however broadly or narrowly defined, *as it is written and authoritatively construed*. As a leading treatise once observed, a facial challenge “puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves the facts only insofar as it is necessary to establish that the rule served as a basis for decision.”<sup>141</sup> Not only are facial and as-applied challenges less antipodal than is often assumed, but it can be argued that the overbreadth facial challenge serves as a kind of bridge between the traditional as-applied challenge and the valid-rule facial challenge: it shares with the former an

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<sup>137</sup> See *Yazoo & Mississippi R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912); *United States v. Salerno*, 481 U.S. 739 (1987); *Sabri v. United States*, 541 U.S. 600 (2004).

<sup>138</sup> Metzger, *supra* note 20, at 880. See also Fallon, *As-Applied*, *supra* note 95, at 1341 (arguing that “facial challenges are less categorically distinct from as-applied challenges than is often thought”); Dorf, *Facial Challenges*, *supra* note 70, at 294 (arguing that “[t]he distinction between as-applied and facial challenges may confuse more than it illuminates,” and that “[i]n some sense, any constitutional challenge to a statute is both as-applied and facial”); see generally Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 HOFSTRA L. REV. 647 (2001).

<sup>139</sup> Fallon, *As-Applied*, *supra* note 95, at 1338.

<sup>140</sup> *Id.* at 1324.

<sup>141</sup> PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 662 (3d ed. 1988). Regrettably, subsequent editions of Hart and Wechsler’s treatise have replaced this definition of facial challenge with one based on the misleading language of the *Salerno* case.

emphasis on the facts of particular applications, and with the latter the practical effect of an all-or-nothing disposition. In most instances, then, whether a judicial opinion is treated as an example of “facial” or “as-applied” review is likely to be a function of the breadth of the court’s holding, as dictated by the applicable substantive constitutional doctrine—not a function of severability analysis nor of the claimant’s pleading strategy.

### III. RATIONALES FOR A FACIAL CHALLENGE APPROACH TO THE COMMERCE CLAUSE

Although a great deal of scholarship has been devoted to ascertaining when facial challenges are appropriate in the context of individual rights, far less scholarly attention has been paid to that distinction in the context of the scope of congressional power. The prominent exception is Gillian Metzger,<sup>142</sup> whose insightful analysis largely emphasizes cases arising under Section 5 of the Fourteenth Amendment<sup>143</sup> and pays comparatively little attention to Commerce Clause cases.<sup>144</sup> Moreover, insofar as she addresses such cases, Metzger (like Fallon and Dorf) focuses largely on whether the Court’s Commerce Clause doctrine calls for a departure from the usual “presumption of severability.”<sup>145</sup> Metzger does not explore the possibility of a valid-rule facial approach to Commerce Clause litigation.

This Part explores several possible rationales on which such an approach might be grounded. First, however, it will be useful to survey the Supreme Court’s Commerce Clause precedents to determine how the Court has historically approached such cases. As we shall see, the Court’s Commerce Clause cases, prior to *Lopez*, do not form a consistent pattern of either facial or

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<sup>142</sup> David Driesen has noted that the Court appears to favor facial challenges in the Commerce Clause area, a trend that he applauds because in his view it departs from the customary federal-court insistence on concreteness in adjudication and limits judicial interference with the political process. See David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 884 (2004). See also Stewart, *supra* note 54.

<sup>143</sup> Indeed, Metzger’s analysis favoring as-applied review in Section 5 cases appears to have been implicitly adopted by the Court in *United States v. Georgia*, 126 S. Ct. 877 (2006). On as-applied challenges and Section 5, see also Kevin S. Schwartz, Note, *Applying Section 5: Tennessee v. Lane and Judicial Conditions On The Congressional Enforcement Power*, 114 YALE L. J. 1143 (2005).

<sup>144</sup> See Metzger, *supra* note 20 at 905-13, 929-31 (discussing Commerce Clause cases and concluding that, with the possible exception of *Lopez* and *Morrison*, they do not depart from the ordinary presumption of severability).

<sup>145</sup> See, e.g., *id.* at 929 (“Perhaps most importantly, nothing in the class-of-activities analysis under the Commerce Clause mandates a nonseverability presumption and corresponding use of *Salerno*-style facial challenges.”).

as-applied review. Since *Lopez*, the Court—or at least a controlling bloc of justices on the Court—has taken a facial approach to the Commerce Clause.

### A. Precedent

The 1869 case of *United States v. DeWitt*,<sup>146</sup> which has been cited as the first Supreme Court decision to strike down a federal enactment as exceeding the Interstate Commerce power,<sup>147</sup> is representative of the Court’s early decisions on the subject. It is not entirely clear whether the Court in *DeWitt* proceeded on a facial or as-applied basis. On the one hand, the Court answered a certified question from a lower federal court by flatly declaring unconstitutional Section 29 of the Internal Revenue Act, which made it a misdemeanor to make or sell, anywhere in the United States, dangerously combustible illuminating oils, such as those mixed with naphtha.<sup>148</sup> On the other hand, the Court suggested that its decision invalidated the statute only insofar as the statute attempted to illegalize purely intrastate activity: “As a police regulation, relating exclusively to the internal trade of the State, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation.”<sup>149</sup>

Some early cases take a more clearly facial approach, coupling facial invalidation with an express refusal to sever unconstitutional applications. The *Trade-Mark Cases*<sup>150</sup> provide an example. At issue were the trademark acts of 1870 and 1876, which provided for the registration of trademarks and for civil and criminal penalties against trademark counterfeiters and infringers. The Court first noted that the statutes lacked a jurisdictional element,<sup>151</sup> and then proceeded to note that the “indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in [interstate] commerce.”<sup>152</sup> Finally, the Court refused to limit its holding to an as-applied invalidation:

[W]hile it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and

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<sup>146</sup> 76 U.S. 41 (1869).

<sup>147</sup> *Lopez*, 514 U.S. at 597 (Thomas, J., concurring) (citing *DeWitt* as “the first time a Court struck down a federal law as exceeding the power conveyed by the Commerce Clause”).

<sup>148</sup> *DeWitt*, 76 U.S. at 43.

<sup>149</sup> *Id.* at 45.

<sup>150</sup> 100 U.S. 82 (1879).

<sup>151</sup> *Id.* at 97 (“Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate.”).

<sup>152</sup> *Id.* at 98.

void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.<sup>153</sup>

Similarly, in the 1908 *Employers' Liability Cases*,<sup>154</sup> the Court facially invalidated the original version of the Federal Employers' Liability Act, holding that by establishing a workers' compensation scheme for all common carriers engaged in interstate commerce, the statute "of necessity includes subjects wholly outside of the power of Congress to regulate commerce."<sup>155</sup> As in the *Trade-Mark Cases*, the Court refused to sever invalid applications from valid ones.<sup>156</sup> The Court's broad approach in the *Trade-Mark Cases* and the *Employers' Liability Cases*—like its identical approach in an earlier case involving Congress's Fifteenth Amendment enforcement power, upon which the Court relied heavily in these later cases<sup>157</sup>—has been criticized by subsequent courts and commentators.<sup>158</sup> Other decisions, notably including those that upheld the validity of the federal lottery trafficking statute<sup>159</sup> and the Mann (or White Slave) Act<sup>160</sup> are probably best characterized as "facial validations": since the statutes in question expressly regulated the transport of goods between states, they were impervious to Commerce Clause attack.<sup>161</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> 207 U.S. 463 (1908).

<sup>155</sup> *Id.* at 498.

<sup>156</sup> *See id.* at 501.

<sup>157</sup> *See* *United States v. Reese*, 92 U.S. 214, 221 (1876).

<sup>158</sup> *See, e.g.*, *United States v. Raines*, 362 U.S. 17, 23 (1960) (singling out the *Trade-Mark* and *Employers' Liability Cases* as among those "rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in every application."); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888* (1985) at 393-95, 430 (criticizing the narrow view of severability exemplified by *Reese* and the *Trade-Mark Cases*).

<sup>159</sup> *Champion v. Ames*, 188 U.S. 321 (1903).

<sup>160</sup> *Hoke v. United States*, 227 U.S. 308 (1913); *Caminetti v. United States*, 242 U.S. 470 (1917).

<sup>161</sup> *See, e.g.*, *Champion*, 188 U.S. at 363; *Hoke*, 227 U.S. at 323.

In other early cases, however, the Court appeared to proceed on an as-applied basis, although again the categorization of individual cases is not always free from doubt. For example, in the 1881 case of *Lord v. Goodall, Nelson & Perkins Steamship Co.*,<sup>162</sup> the Court upheld, as applied to a vessel employed exclusively in moving cargo on the Pacific Ocean between San Francisco and San Diego, a statute limiting a vessel owner's liability for the loss of that vessel's cargo. Although this would appear to be a classic as-applied validation, the Court injected an aspect of facial review into its decision by noting that the statute contained a jurisdictional element exempting vessels used in rivers or inland navigation, and concluding therefore that the statute "is relieved from the objection that proved fatal to the trade-mark law which was considered in *Trade-Mark Cases*. The commerce regulated is expressly confined to a kind over which Congress has been given control."<sup>163</sup>

Similarly, between 1899 and 1908, the Court in several cases upheld the constitutionality of the Sherman Antitrust Act as applied to the facts or allegations in the particular cases at bar.<sup>164</sup> Likewise, several of the Court's well-known pre-New Deal Commerce Clause cases, including *Southern Railway v. United States*,<sup>165</sup> the *Shreveport Rate Cases*,<sup>166</sup> and *Stafford v. Wallace*,<sup>167</sup> appear to be best characterized as as-applied validations.<sup>168</sup>

In the years immediately preceding the Court's New Deal "switch in time," the Court briefly returned to an aggressive posture of facial invalidation. Thus, in the 1935 case of *Railroad Retirement Board v. Alton Railroad Co.*,<sup>169</sup> the Court struck down the Railroad Retirement Act as unconstitutional on its face, holding that "a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, but as a means of assuring a particular class of employees

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<sup>162</sup> 102 U.S. 541 (1881).

<sup>163</sup> *Id.* at 544-45.

<sup>164</sup> See *Addyston Pipe & Steel v. United States*, 175 U.S. 211 (1899); *Northern Sec. v. United States*, 193 U.S. 197 (1904); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Loewe v. Lawlor* (The Danbury Hatters Case), 208 U.S. 274 (1908).

<sup>165</sup> 222 U.S. 20 (1911).

<sup>166</sup> 234 U.S. 342 (1914).

<sup>167</sup> 258 U.S. 495 (1922).

<sup>168</sup> See also, e.g., *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1 (1923).

<sup>169</sup> 295 U.S. 330 (1935).

against old age dependency.”<sup>170</sup> The “sick chicken case,” *A.L.A. Schechter Poultry Corp. v. United States*,<sup>171</sup> seems to facially invalidate the live poultry codes promulgated under the National Industrial Recovery Act, and *Carter v. Carter Coal Co.*<sup>172</sup> seems to do the same with respect to the Bituminous Coal Conservation Act.<sup>173</sup> None of these cases uses the language of “facial” or “as-applied” invalidation, however, and the analysis is made still more difficult by the presence in these cases of additional grounds of invalidity, such as the non-delegation doctrine<sup>174</sup> and the Due Process Clause.<sup>175</sup>

As is well-known, from 1937 to 1995 the Court did not invalidate a single federal statute on Commerce Clause grounds.<sup>176</sup> This simple fact makes it difficult to categorize the Court’s holdings as either facial or as-applied. Generally, the Court during this era was careful to frame its decisions, particularly those concerning federal regulation of intrastate activity, in the language of as-applied review.<sup>177</sup> A prominent and oft-cited example, drawn

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<sup>170</sup> *Id.* at 374. The Court pointedly refused to sever invalid provisions or applications from valid ones, stating that “as to some of the features we hold unenforceable, it is ‘unthinkable’ and ‘impossible’ that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them.” *Id.* at 362.

<sup>171</sup> 295 U.S. 495 (1935).

<sup>172</sup> 298 U.S. 238 (1936).

<sup>173</sup> *See id.* at 315-16 (refusing to sever the price-fixing provisions of the statute from the labor provisions, but holding instead that they fall together); *but see id.* at 316-17 (“If there be in the act provisions, other than those we have considered, that may stand independently, the question of their validity is left for future determination when, if ever, that question shall be presented for consideration.”).

<sup>174</sup> *See Schechter*, 295 U.S. at 529-542.

<sup>175</sup> *See R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 350 (1935); *Carter Coal*, 298 U.S. at 311-12.

<sup>176</sup> An arguable exception is *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), but this decision is best viewed as resting on implicit, or “Tenth Amendment,” limitations on federal power rather than on the Commerce Clause, *see id.* at 841 (appellants concede that challenged statute is “undoubtedly within the scope of the Commerce Clause”), and was in any case overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 529 (1985). Similarly, the Court’s invalidation of a federal statute in *New York v. United States*, 505 U.S. 144 (1992), rested on “Tenth Amendment” grounds rather than Commerce Clause grounds.

<sup>177</sup> *See, e.g., NLRB v. Jones & Laughlin Steel*, 301 US 1, 30 (1937) (“[W]e are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute.”); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964) (“We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution.”); *Katzenbach v. McClung*, 379

from outside the Commerce Clause context, is the 1960 case of *United States v. Raines*.<sup>178</sup> In *Raines*, the government sought to enforce the Civil Rights Act of 1957 to prevent officials of the State of Georgia from denying blacks the right to vote. The officials argued—and the district court held—that because the statute by its terms prohibited “any person” from denying the right to vote on the basis of race, it was susceptible of unconstitutional application (i.e., application to private rather than state actors) and therefore should be deemed unconstitutional as a whole.<sup>179</sup> The Supreme Court reversed, holding that the statute was valid as applied to the state officers at bar, and declining to rule as to its potential application to private parties.<sup>180</sup> Similarly, in its most recent (and extensive) discussion of the facial vs. as-applied distinction in the congressional power context (this time in the context of the Spending Clause), the Court has indicated that as-applied treatment is favored, and that facial challenges, particularly those of the overbreadth variety, “are especially to be discouraged.”<sup>181</sup>

On the other hand, the Court continued to use broad and effectively facial reasoning in upholding direct federal regulation of the interstate transport of goods,<sup>182</sup> and of commerce in goods that had traveled in interstate commerce in the past,<sup>183</sup> and even of noncommercial activities involving goods

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US 294, 305 (1964) (“The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude.”); *Perez v. United States*, 402 U.S. 146, 146 (1971) (“The question in this case is whether Title II of the Consumer Credit Protection Act, as construed and applied to petitioner [a local loan shark], is a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution.”) (citation omitted).

<sup>178</sup> 362 U.S. 17 (1960).

<sup>179</sup> *Id.* at 20.

<sup>180</sup> *Id.* at 24-25; *see also* *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) (reaffirming appropriateness of as-applied review in cases testing the scope of Congress’s power to enforce Thirteenth Amendment and right to interstate travel); *but see* *United States v. Reese*, 92 U.S. 214 (1875) (striking down federal statute on its face as beyond the scope of Congress’s Fifteenth Amendment enforcement power when statute contained no state action limitation).

<sup>181</sup> *Sabri v. United States*, 541 U.S. 600, 609 (2004). *See also* *Salinas v. United States*, 522 U.S. 52 (1997).

<sup>182</sup> *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 114 (1941) (“The power of Congress over interstate commerce ‘is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution.’” (quoting *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

<sup>183</sup> *See* *United States v. Sullivan*, 332 U.S. 689, 696 (1948) (upholding labeling requirements of federal Food, Drug, and Cosmetic Act even as applied to intrastate sale, and “without regard to ... how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment”).

that had traveled in interstate commerce in the past.<sup>184</sup> Most importantly for present purposes, the cumulative effect of the Court's decisions upholding every challenged federal regulation of local activity *affecting* interstate commerce could be viewed as the functional equivalent of facial validation. Incidentally, this cumulative effect illustrates the illusory quality of the supposed bright line that separates facial from as-applied review: If a federal commodity price control statute is constitutional as applied to a farmer who consumes his own home-grown wheat,<sup>185</sup> and a federal consumer protection statute is constitutional as applied to a local loan shark,<sup>186</sup> an observer could be forgiven for concluding that no activity, however local, will be held to fall outside the scope of the commerce power. This impression of a de facto regime of facial validation was only reinforced by the Court's frequent reminders 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."<sup>187</sup> Once the Commerce Clause becomes a "Hey, you-can-do-whatever-you-feel-like Clause,"<sup>188</sup> the distinction between facial and as-applied challenges in the commerce power context is a purely academic matter.

Then came *Lopez* and *Morrison*. As previous commentators have noted,<sup>189</sup> it seems best to describe those decisions as facial invalidations. In *Lopez*, the Court trains its focus almost exclusively on the terms of the Gun Free School Zones Act, noting that the statute "*by its terms* has nothing to do with 'commerce' or any sort of economic enterprise";<sup>190</sup> "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce";<sup>191</sup> is not accompanied by legislative findings concerning the effects of the regulated activity on interstate commerce;<sup>192</sup> and can be connected to interstate

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<sup>184</sup> See *Scarborough v. United States*, 461 U.S. 563, 575 (1977) (interpreting a federal criminal statute to prohibit possession by convicted felons of a firearm that has traveled in or affected interstate commerce, and strongly suggesting that Congress may regulate intrastate, noncommercial activity involving goods that have crossed state lines).

<sup>185</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>186</sup> *Perez v. United States*, 402 U.S. 146, 154 (1971).

<sup>187</sup> *Id.* (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

<sup>188</sup> Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995).

<sup>189</sup> Metzger, *supra* note 20 at 876; see generally Stewart, *supra* note 142.

<sup>190</sup> *Lopez*, 514 U.S. at 560.

<sup>191</sup> *Id.* at 561.

<sup>192</sup> *Id.* at 562.

commerce only through an attenuated series of inferences.<sup>193</sup> To be sure, at the end of Chief Justice Rehnquist’s opinion for the Court there is a brief mention of the particular facts of the case at bar, but even then the point of the exercise seems to be to emphasize that the statute is far removed from any obvious matter of interstate commerce: “Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.”<sup>194</sup>

*Morrison* has a similarly facial cast. The Court begins by describing its task as one of determining whether the civil remedy provision of the Violence Against Women Act “falls within Congress’ power under Article I, § 8, of the Constitution.”<sup>195</sup> It then follows the methodology of *Lopez*, noting that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity”;<sup>196</sup> that the statute “contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce”;<sup>197</sup> that Congress’s findings were inadequate to support the statute’s validity;<sup>198</sup> and that the connection between the conduct regulated by the statute and interstate commerce is attenuated.<sup>199</sup> Although *Lopez* and *Morrison* do not expressly state that they are facial challenge cases, the Court has since characterized them as such.<sup>200</sup>

This picture seems to be reversed in *Raich*, but only at first sight. On the surface, Justice Stevens’ opinion for the Court appears to proceed along as-applied lines. Thus, for example, the Court takes pains to note that, in explicit contrast to *Lopez* and *Morrison*, “respondents ask us to excise individual applications of a concededly valid statutory scheme.”<sup>201</sup> To be sure, the Court

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<sup>193</sup> *Id.* at 564, 567.

<sup>194</sup> *Id.* at 567.

<sup>195</sup> *Morrison*, 529 U.S. at 607.

<sup>196</sup> *Id.* at 613.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 614-15.

<sup>199</sup> *Id.* at 615-16.

<sup>200</sup> See *Raich*, 125 S. Ct. at 2209 (“[I]n both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress’ commerce power in its entirety.”). Another seemingly facial holding—though this time a validation rather than an invalidation—is *Pierce County v. Guillen*, 537 U.S. 129 (2003) (upholding against Commerce Clause challenge a federal statute providing evidentiary and discovery privilege in state court for reports involving potential accident sites or hazardous roadway conditions compiled in order to receive federal highway funds).

<sup>201</sup> *Raich*, at 2209.

assesses the statute's validity as applied to an entire subclass of regulated activities (i.e., "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law"<sup>202</sup>) rather than as applied to the respondents' activities alone, but the decision still purports to limit itself to an examination of Congress's power to regulate that discrete subclass:

The question, however, is whether Congress' . . . decision to include this narrower 'class of activities' within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities . . . was an essential part of the larger regulatory scheme.<sup>203</sup>

As noted above, however, *Raich* is best understood as a facial validation, and as a strong signal of the Court's rejection of an as-applied approach to Commerce Clause review.<sup>204</sup>

A separate strain in the Court's case law has involved the invocation of the doctrine of saving constructions. As early as 1838, in *United States v. Coombs*, the Court noted that the technique of reading statutes narrowly to avoid constitutional questions was available in cases testing the scope of Congress's power.<sup>205</sup> In *Coombs*, however, this discussion seems to have been dicta. The Court appeared to uphold the challenged statute on its face, concluding that the Necessary and Proper Clause gave Congress the requisite authority to provide criminal sanctions for plundering even those wrecked or distressed ships that had run aground above the high water mark and might therefore seem beyond the reach of the federal admiralty jurisdiction.<sup>206</sup> The Court therefore pointedly declined to issue a narrowing construction, despite the arguable ambiguity of the statute.<sup>207</sup>

By contrast, in the well-known 1895 case of *United States v. E.C. Knight*,<sup>208</sup> the Court used the narrowing construction technique to affirm the

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<sup>202</sup> *Id.* at 2201.

<sup>203</sup> *Id.* at 2211.

<sup>204</sup> See *supra* text accompanying notes 12-14.

<sup>205</sup> 37 U.S. 72, 75-76 (1838).

<sup>206</sup> See *id.* at 74-75.

<sup>207</sup> See *id.* at 75, 80.

<sup>208</sup> 156 U.S. 1 (1895).

dismissal of a suit by the United States for injunctive and equitable relief against five sugar companies for violating the Sherman Antitrust Act. After holding that manufacturing precedes interstate commerce and is not a part of it, the Court proceeded to construe the Sherman Act not to apply to the activities of the sugar companies.<sup>209</sup> Similarly, in a 1909 Commerce Clause case the Court held that “[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”<sup>210</sup> Though more common in earlier years, the saving construction method was used during the heyday of Commerce Clause deference in a case to hold that the jurisdictional element in a statute that made it a crime to “receive[], possess[], or transport[] in commerce or affecting commerce [...] any firearm” modified all the preceding elements<sup>211</sup>; and the method has been revived post-*Lopez*, to hold that a private, owner-occupied home does not qualify as “property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce” within meaning of the federal arson statute,<sup>212</sup> and to hold that the Army Corps of Engineers’ definition of “navigable waters” under the Clean Water Act to include intrastate waters used as habitat by migratory birds exceeded the Corps’ statutory authority.<sup>213</sup>

This review of precedent suggests that the Court has not historically followed a consistent pattern of either facial or as-applied adjudication in the Commerce Clause area. The preference for facial challenges evinced by *Lopez*, *Morrison*, and *Raich* appears to be a relatively new phenomenon. The remainder of this Part explores several rationales that might explain that preference: a formalist conception that views rights as discrete zones of privileged conduct but envisions powers as extending to the limits of their internally defined scope; an understanding of the Commerce Clause that views Congress’s power under that clause as plenary, or at least judicially unconstrained; a conception of Commerce Clause challenges as overbreadth facial challenges; and an understanding of the Commerce Clause grounded in a

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<sup>209</sup> *Id.* at 10. Justice Harlan complained that the majority had offered a cramped reading of the Necessary and Proper Clause, *id.* at 39-40 (Harlan, J., dissenting), and observed that “[w]hile the opinion of the court in this case does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed.” *Id.* at 42 (Harlan, J., dissenting).

<sup>210</sup> United States *ex rel.* Att’y Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909). *See also* Texas v. E. Tex. R.R. Co., 258 U.S. 204, 217 (1922).

<sup>211</sup> United States v. Bass, 404 U.S. 336, 339 (1971).

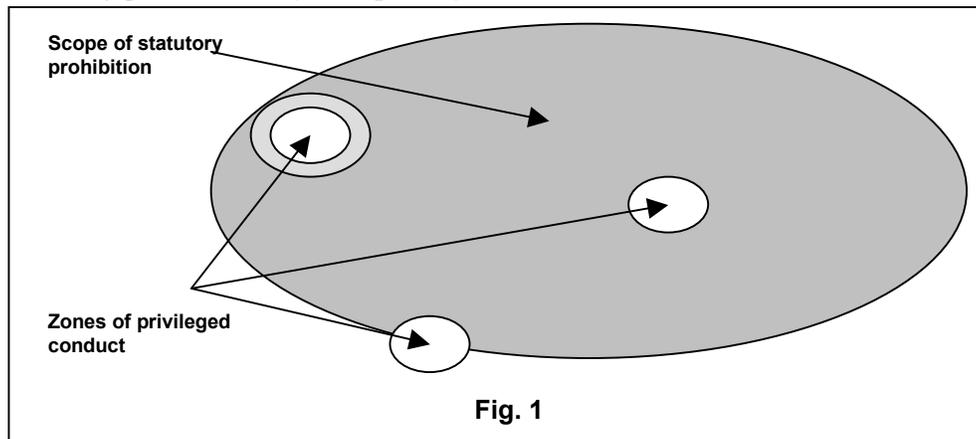
<sup>212</sup> Jones v. United States, 529 U.S. 848 (2000).

<sup>213</sup> Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159 (2001).

requirement of appropriate legislative purpose. I conclude that a controlling bloc of justices is motivated by an understanding of the Commerce Clause's meaning that includes a requirement of appropriate legislative purpose, and that this provides the soundest explanation for the Court's movement toward valid-rule facial review in Commerce Clause cases.

**B. The formalist conception: rights as zones of privileged conduct.**

It could be argued that individual rights cases in general should be adjudicated on an as-applied basis, while cases testing the limits of federal power in general should be adjudicated on a facial basis, on the ground that rights-based cases entail judicial protection of zones of privileged conduct while powers cases do not. I label this argument the *formalist conception*. The formalist conception holds that constitutional *rights* provisions, as construed by the Court over time, grant their holders the privilege to engage in particular activities (speaking, confronting witnesses against them in court, obtaining abortions without undue burdens, and so on), any law to the contrary notwithstanding. On this view of “rights as trumps,”<sup>214</sup> as-applied review is especially well-suited to claims involving rights, because the individual right to engage in particular forms of conduct authorizes a court to carve out subclasses of exemption from the otherwise concededly valid scope of a statutory prohibition. (See Figure 1.)

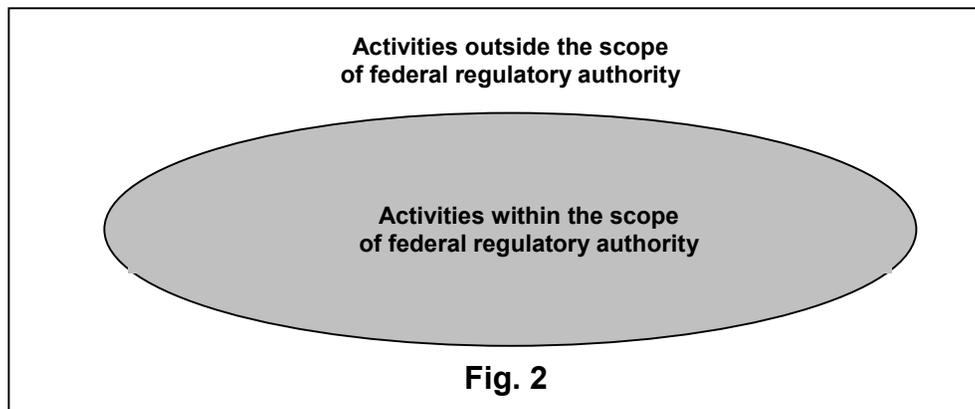


Thus, a statute generally prohibiting littering can be adjudged unconstitutional as applied to political leafletting because the claimant has a First Amendment right to engage in the privileged conduct of political leafletting (represented by

<sup>214</sup> The vision of rights as “trumps,” sufficient to override otherwise valid regulations, is most prominently expressed in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1977). Dworkin has been described as a “sophisticated formalist.” Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1146 (1999).

one of the white ovals in Figure 1).<sup>215</sup> But the statute continues to be a validly enforceable exercise of government power as applied to the broad range of nonexpressive littering (represented by the shaded area in Figure 1).<sup>216</sup>

By contrast, on the formalist conception, constitutional *powers* provisions simply extend until they exhaust their own internally defined scope. Any limitations on the governmental authority conferred by a power-granting provision, therefore, are already present by negative implication in the provision's own definition, rather than being carved out as oases of privileged conduct. The court's task is to adumbrate the boundary that separates authorized from unauthorized regulation, not to excise discrete zones of exempted conduct. (See Figure 2.)



<sup>215</sup> *Schneider v. State*, 308 U.S. 147 (1939); for discussion, see *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

<sup>216</sup> Three additional features of Figure 1 are worth noting. First, if the unshaded zones were to occupy an exceptionally large proportion of the shaded area, the statute might be struck down on its face on grounds of overbreadth, particularly if First Amendment expressive freedoms were at stake. Second, some conduct that is unquestionably protected by the Constitution may lie outside of a challenged statute's prohibitory ambit. (This possibility is represented by the white oval that straddles the boundary of the shaded area.) In cases that present this kind of intersection between a zone of protected conduct and the outer boundary of a statutory prohibition, courts will often invoke the classic version of the canon of constitutional avoidance and will construe the statute not to apply to the protected conduct. Third, zones of *unquestionably* protected conduct may well be surrounded by penumbras of *arguably* protected conduct. (This possibility is represented by the medium-gray oval in the upper left of the diagram.) In such cases, courts will often invoke the modern version of the canon of constitutional avoidance and will construe the statute to apply neither to the arguably nor to the unquestionably protected conduct. On the distinction between the "classical" and "modern" constitutional avoidance canons, see Vermeule, *Saving Constructions*, *supra* note 73, at 1949; Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, (forthcoming 2006, on file with author) at 13-17.

The formalist conception makes a convenient fit with the intellectual history of Commerce Clause precedent canvassed above in Part III.A. During periods when the Court has adhered to a formalist vision of the Commerce Clause, such as the immediate pre-1937 era of *Alton Railroad*,<sup>217</sup> *Schechter Poultry*,<sup>218</sup> and *Carter Coal*,<sup>219</sup> as well as the era inaugurated by *Lopez*,<sup>220</sup> the Court has favored a facial approach to Commerce Clause adjudication.<sup>221</sup> By contrast, during periods when the Court adhered to a functionalist vision of the Commerce Clause, such as the period from 1937 to 1995, the as-applied approach has generally predominated.<sup>222</sup> The formalist conception perhaps gains additional credibility from the Court's abandonment of the "dual federalism" model of federal and state power.<sup>223</sup> The Court's decision, in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>224</sup> to repudiate its short-lived effort at defining unregulable spheres of traditional State governmental activity suggests that the model of federalism as marking out spheres of conduct immune from federal regulation is obsolete.<sup>225</sup> Rather, the federal government, as Chief Justice Marshall put it in *McCullough v. Maryland*, "though limited in its powers, is supreme within its sphere of action."<sup>226</sup>

This formalist argument for presumptively facial review in cases challenging the scope of congressional power has considerable intuitive

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<sup>217</sup> 295 U.S. 330 (1935).

<sup>218</sup> 295 U.S. 495 (1935).

<sup>219</sup> 298 U.S. 238 (1936).

<sup>220</sup> 514 U.S. 549 (1995).

<sup>221</sup> See *supra* notes 169-175, 189-200.

<sup>222</sup> See *supra* notes 176-188.

<sup>223</sup> *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1852); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 808 n.6, and § 5-11, at 862-77 (3d ed. 2000); BORIS I. BITTKER, *BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE* §§ 4.03, 6.02[C], 6.03 (1999). See also EDWARD S. CORWIN, *THE COMMERCE POWER AND STATES' RIGHTS* 115-172 (1936).

<sup>224</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>225</sup> Some recent statements from the Court, however, indicate that the vision of dual federalism may not be entirely dead. See, e.g., *Lopez*, 514 U.S. at 568-83 (1995) (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 156-57 (1992) (O'Connor, J., opinion of the Court); *Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J., opinion of the Court) (invoking "historical understanding and practice[,] the structure of the Constitution, and ... the jurisprudence of this Court" in striking down the Brady Act on anti-commandeering grounds).

<sup>226</sup> 17 U.S. (4 Wheat.) 316, 406 (1819).

appeal—and, if accepted, would suggest the appropriateness of facial review in cases involving all heads of federal authority, including but not limited to the Commerce Clause.<sup>227</sup> However, the argument ultimately proves unconvincing, for two reasons.

First, as the discussion in Part II of valid-rule facial challenges demonstrates, the argument dramatically misdescribes the constitutional law of individual rights. Individual rights are not invariably, or even usually, defined in terms of zones of privileged conduct. Indeed, relatively few constitutional rights have been interpreted to create a sphere of conduct that is immune to government regulation.<sup>228</sup> Rather, in most areas of constitutional law, from the First Amendment to the Equal Protection, Due Process, and Establishment Clauses, the Court has made clear that even successful litigants cannot protect their conduct behind a shield of constitutional impunity. Conduct which cannot be validly regulated in a given instance by Statute A could be validly regulated by Statute B. What matters in most cases is the nature of the regulation: Statute B may be appropriately precise where Statute A was unconstitutionally vague; Statute B may be evenhanded where Statute A was impermissibly underinclusive; Statute B may be neutral in its purpose where Statute A was motivated by illegitimate legislative animus, and so on. This is why, as discussed in Part II, facial review in individual rights cases is far more common than is conventionally recognized.<sup>229</sup> Indeed, some statutes, such as those motivated by an illegitimate purpose, are vulnerable to being struck down on their face under valid-rule facial review. In such instances, at least, Matthew Adler is correct that constitutional rights under the American system of judicial review are “rights against rules.”<sup>230</sup>

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<sup>227</sup> Cf. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) (“When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional as applied to him. When, on the other hand, a federal statute is challenged as going beyond Congress’s enumerated powers, under our precedents the court first asks whether the statute is unconstitutional on its face.”) (citations omitted).

<sup>228</sup> See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729-30 (“Rights are not general trumps against appeals to the common good or anything else; instead, they are better understood as channelling the kinds of reasons government can invoke when it acts in certain arenas. Moreover, this is not an exceptional doctrine for aberrational contexts but a pervasive feature of many constitutional rights.”).

<sup>229</sup> See *supra* Part II.B.

<sup>230</sup> Matthew D. Adler, *Rights Against Rules*, *supra* note 95. Adler’s argument is rich and complex, and this article does not take a position on his larger claims, or those raised in opposition by Richard Fallon. For their colloquy, see Fallon’s paper, *As-Applied*, *supra* note 95, to which Adler replied in the same issue of the Harvard Law Review: Matthew D. Adler,

This is not to say that zones of privileged activity do not play an important role in constitutional law. Some rights, as Michael Dorf has put it, really are “rights *simpliciter*.”<sup>231</sup> A particularly unambiguous example is the right not to be enslaved, enshrined in the Thirteenth Amendment.<sup>232</sup> Any statute or other government action—or indeed any private action—that results in involuntary servitude is to that extent unconstitutional, and a court’s judgment so declaring is likely to take on an “as-applied” cast.<sup>233</sup> Similarly, rights against executive enforcement action or fundamental unfairness in the judicial process are often best characterized as rights to a sphere of privileged conduct: the privilege against compelled self-incrimination, the right to be free of unreasonable searches and seizures, and the right not to be tortured are good examples. Additionally, the Court has arguably carved out some rights *simpliciter* in the area of fundamental rights of private autonomy and free expression, areas which are accordingly characterized by an as-applied or an overbreadth mode of review. When such rights are at stake, the reviewing court is typically called upon to identify a logical subclass of regulated activities and determine whether that subclass must be exempted from regulation, either via constitutional invalidation plus severance or via narrowed statutory construction.<sup>234</sup>

This explains why, in the famous case of *United States v. Carolene Products Co.*, the Court upheld a federal regulatory statute against facial challenge but went on “recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason... .”<sup>235</sup> While this passage, read out of context, could be taken to assert that the Court was willing to entertain claims arguing that a particular application of a federal statute lies beyond the

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*Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371 (2000).

<sup>231</sup> Dorf, *Heterogeneity*, *supra* note 102, at 270.

<sup>232</sup> U.S. CONST. amend. XIII.

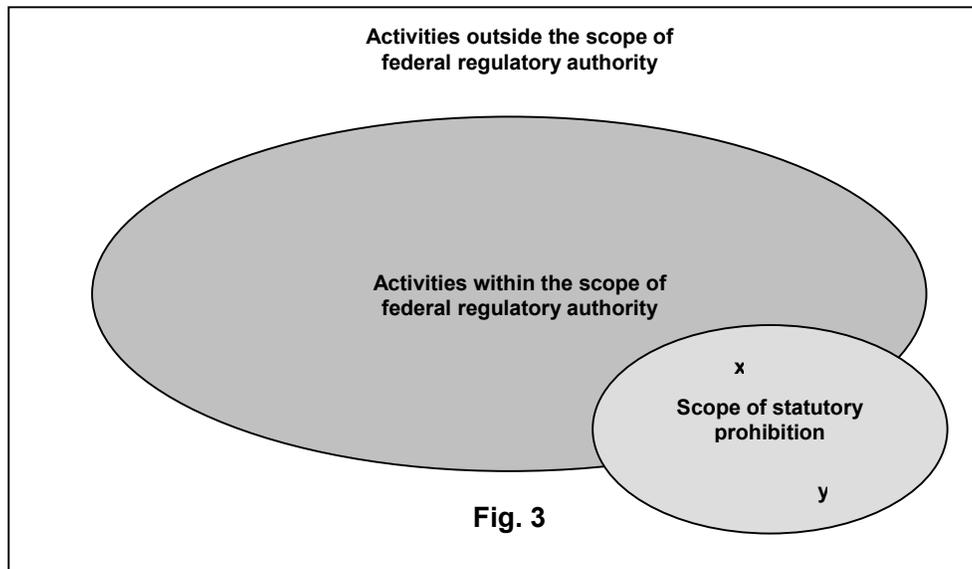
<sup>233</sup> Not inevitably, though—a statute that declared “All Republicans are hereby declared slaves of Democrats” would surely be judged invalid on its face, under both the Thirteenth Amendment and the Equal Protection Clause.

<sup>234</sup> Of course, even fundamental rights can be validly abridged when the government can demonstrate that such abridgment is a narrowly tailored means to achieve a compelling governmental interest. Though an analysis of the proper mode of adjudication in fundamental rights cases lies beyond the scope of this article, it can be argued that the narrow tailoring prong of strict scrutiny calls for a kind of overbreadth review. *See, e.g.*, Isserles, *supra* note 21, at 416-17 (noting that the Court “has suggested that ‘overbreadth’ and ‘narrow tailoring’ are different expressions for precisely the same constitutional defect.”).

<sup>235</sup> 304 U.S. 144, 153-54 (1938).

outer bounds of federal power, in fact it occurs during a part of the opinion dealing with the claimant's Fifth Amendment Due Process argument.<sup>236</sup> It is thus sounder to read this passage as leaving open the possibility that particular applications might be subject to an as-applied, Due Process–based challenge. By the same token, the Supreme Court in *Raich* remanded the case to the lower courts for adjudication of the medical marijuana users' substantive due process claim, which would indeed be addressed on an as-applied basis.<sup>237</sup>

The notion of rights as shields for privileged conduct fails to provide a sound basis for differential treatment of rights claims and powers claims for a second, complementary reason. Even if one accepts the vision described by Figure 2, and envisions federal power as extending until it exhausts its internally defined scope, it does not follow that as-applied review is inappropriate in the context of a challenge to the scope of federal power. This can be seen by examining Figure 3, which superimposes onto Figure 2 a medium-gray oval representing the scope of activities prohibited by a federal regulatory statute as authoritatively construed.



Even if the federal court's principal task is to determine the boundary of permissible federal authority, there is no compelling reason in theory or practice why it could not perform this task through a series of as-applied adjudications. The Court could invalidate statutes insofar as, but only insofar as, they purport to regulate activities that fall outside the scope of the relevant enumerated power. Thus, for example, a court in Case 1 could adjudicate the

<sup>236</sup> *Id.*

<sup>237</sup> *Raich*, 125 S. Ct. at 2215.

federal statute represented in Figure 3 to be valid as applied to the activity represented by the letter *x*, but in Case 2 could adjudicate it to be invalid as applied to the activity represented by the letter *y*. This, after all, was the approach proposed by Justice O'Connor in her dissent in *Raich*.<sup>238</sup>

In short, the formalist conception of rights as shields for privileged conduct cannot serve as the rationale for an across-the-board distinction between the proper mode of judicial analysis in rights cases as opposed to powers cases. Both rights claims and powers claims are, to borrow Dorf's term, "heterogeneous"—they can and should be framed in either facial or as-applied terms, depending on the interaction between the challenged statute and the underlying substantive constitutional doctrine.<sup>239</sup>

### C. The commerce power as plenary or judicially unconstrained.

The simplest way to justify a facial approach to Commerce Clause cases would be to posit that federal regulatory power in the age of the globally interconnected economy has effectively become plenary. Or, more sensibly—at least from the standpoint of a theory of judicial review that takes comparative institutional capacity seriously<sup>240</sup>—one could argue that limits on the commerce power ought not to be judicially enforceable. This latter view was expressed by Herbert Wechsler in his celebrated (though often criticized) article on "The Political Safeguards of Federalism," and other scholars who

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<sup>238</sup> Cf. *Raich*, 125 S. Ct. at 2224 (O'Connor, J., dissenting) ("A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation . . . recognize that medical and nonmedical . . . uses of drugs are realistically distinct and can be segregated, and regulate them differently. . . . Respondents challenge only the application of the CSA to medicinal use of marijuana.").

<sup>239</sup> As a descriptive matter, one might add that the formalist conception's sharp divide between rights-based claims and power-based claims stands in tension with the Court's repeated insistence that the system of federalism is ultimately designed to enhance individual freedom. See, e.g., *Morrison*, 529 U.S. at 616 n.7 ("the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power"); *New York v. United States*, 505 U.S. 144, 182 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals"); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'") (quoting *Garvia*, 469 U.S. at 572 (Powell, J., dissenting)). The formalist conception is not flatly inconsistent with these statements, however. Judicially enforced federalism could serve indirectly to enhance individual freedom without marking off discrete zones of protected conduct.

<sup>240</sup> See generally Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing that legal interpretation should be guided by considerations of institutional capacity and institutional incentives).

have followed in Wechsler's footsteps.<sup>241</sup> On this view, the distinction between facial and as-applied review in Commerce Clause cases would vanish: no Commerce Clause claimant would prevail in court, no matter how his claim was characterized. A court that forthrightly adopted such an approach would perhaps best be described as engaging in *facial validation*, as described earlier: not only does the particular claimant at bar have no valid constitutional claim, but neither does any other actual or potential claimant.<sup>242</sup> Indeed, in its strongest form, this approach could render Commerce Clause arguments effectively nonjusticiable.<sup>243</sup>

This was the approach that held sway on the Court between 1937 and 1995, in terms of outcomes if not in terms of rationale. And it is quite possible that this view, or something like it, continues to be held by the bloc of four justices who dissented in *Lopez*, *Morrison*, and several other recent federalism cases: Justices Stevens, Souter, Ginsburg, and Breyer.<sup>244</sup> To be sure, these justices are sometimes willing to construe federal statutes narrowly in light of federalism concerns,<sup>245</sup> or to sign on to opinions that use clear statement rules in an effort to focus the attention of the political branches on

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<sup>241</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL CONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000). Cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (adopting the political safeguards of federalism view, at least with regard to the question whether Congress may regulate the States in the exercise of traditional governmental functions: "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes"). For critiques of the Wechsler approach, see Frank Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999); John O. McGinnis and Ilya Somin, *Federalism vs. States' Rights: A Defense Of Judicial Review In A Federal System*, NW. U. L. REV. 89 (2004); *Garcia*, 469 U.S. at 565 n.9: "Professor Wechsler, whose seminal article in 1954 proposed the view adopted by the Court today, predicated his argument on assumptions that simply do not accord with current reality." (Powell, J., dissenting).

<sup>242</sup> See *supra* text accompanying notes 127-128.

<sup>243</sup> See Choper, *supra* note 241, at 175.

<sup>244</sup> See, e.g., *Lopez*, 514 U.S. at 609 (Souter, J., dissenting) ("The commerce power, we have often observed, is plenary."); *id.* at 615-31 (Breyer, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76-101 (1996) (Stevens, J., dissenting); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 648-65 (1999) (Stevens, J., dissenting).

<sup>245</sup> See, e.g., Justice Ginsburg's opinion for the Court in *United States v. Jones*, 529 U.S. 848 (2000).

the traditional prerogatives of the States,<sup>246</sup> but they appear unlikely to vote to strike down any plausibly rational federal statute on Commerce Clause grounds, either facially or as applied.

These justices, however, do not command a majority on the current Court. To the contrary, the five-justice majority in *Lopez* emphatically stated that the Constitution “withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation,”<sup>247</sup> and refused to conclude “that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.”<sup>248</sup> In the same spirit, the Court rejected the government’s assertion that gun possession near schools affects interstate commerce by noting that “if we were to accept the Government’s arguments, we [would be] hard pressed to posit any activity by an individual that Congress is without power to regulate.”<sup>249</sup> Likewise, in *Morrison*, the Court reaffirmed that “even under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.”<sup>250</sup> What’s more, the Court went out of its way to make clear that these “bounds” were meant to be judicially enforceable, asserting that “[u]nder our written Constitution, ... the limitation of congressional authority is not solely a matter of legislative grace.”<sup>251</sup>

A view of the interstate commerce power as plenary or judicially unconstrained may well provide the best explanation for the decision of the four *Lopez/Morrison* dissenters to join the majority in *Raich*. But to explain fully the pattern of outcomes on the current Court, we must attempt to understand the approach taken by other justices, particularly those who were part of the majority in *Lopez*, *Morrison*, and *Raich*: Justices Scalia and Kennedy.<sup>252</sup> The basis for these justices’ apparent preference for facial review in Commerce Clause must be sought in some other rationale.

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<sup>246</sup> *Cf. Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006) (holding that the Controlled Substances Act does not authorize the Attorney General to prohibit the use of federally scheduled drugs to perform assisted suicide, in part because “the background principles of our federal system ... belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States’ police power”).

<sup>247</sup> *Lopez*, 514 U.S. at 567.

<sup>248</sup> *Id.* (citations omitted).

<sup>249</sup> *Id.* at 564.

<sup>250</sup> *Morrison*, 529 U.S. at 608 (citing *Lopez*, 514 U.S. at 557).

<sup>251</sup> *Id.* at 616.

<sup>252</sup> The late Chief Justice Rehnquist, the retired Justice O’Connor, and Justice Thomas were all willing to entertain an as-applied challenge in *Raich*. It is too early to predict

#### D. Commerce Clause review as overbreadth review.

Perhaps what looks like facial adjudication in the Commerce Clause area is really just a version of traditional overbreadth review. On this view, when the Court facially invalidates statutes as exceeding the commerce power—even when the claimant’s activity itself is federally regulable—it does so because an unacceptably large proportion of the activities regulated by the challenged statute lies beyond the reach of that power.

The idea that existing Commerce Clause doctrine incorporates an overbreadth component has some appeal.<sup>253</sup> By embracing such an idea, one could concede that much of the Court’s recent jurisprudence (*e.g.*, *Lopez* and *Morrison*) has a facial cast, while denying that the Court has entertained valid-rule facial challenges in this area. One might argue, for example, that the Court never asked whether Alfonso Lopez’s gun had traveled in interstate commerce because, even if his particular transaction was regulable, an unacceptably large proportion of the transactions covered by the Gun-Free School Zones Act were not. By the same token, it could be argued, even if some acts of gender-based violence involve interstate travel or substantially affect interstate commerce, the outcome in *Morrison* was grounded in the judgment that the large majority of assaults on women have no such nexus to interstate commerce. Moreover, the Court’s emphasis of late on the curative powers of statutory jurisdictional elements dovetails nicely with an overbreadth conception of Commerce Clause: the jurisdictional element ensures that the scope of federal regulation is precisely coterminous with the class of validly regulable activities.

An overbreadth conception of Commerce Clause review gains some additional plausibility from the Court’s recent cases involving Congress’s enforcement authority under Section 5 of the Fourteenth Amendment. In the 1997 case of *City of Boerne v. Flores*, the Court embarked on a new approach to determining whether federal legislation is a valid exercise of Congress’s Section 5 authority “to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].”<sup>254</sup> Such legislation, the Court held, may remedy or prevent conduct that does not itself violate the Fourteenth Amendment, but

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the approach of Chief Justice Roberts or Justice Alito, but even if their views were to track those of their predecessors, there does not appear to be a majority on the Court in favor of as-applied review in Commerce Clause cases.

<sup>253</sup> As early as *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Supreme Court confronted the question of overbreadth in the context of a challenge to state legislative power. *Id.* at 102. The Court, however, did not directly endorse this contention, choosing instead to strike down the New York statute on its face as incompatible with federal statute law under the Supremacy Clause.

<sup>254</sup> 521 U.S. 507 (1997).

may not alter the substantive content of constitutional rights.<sup>255</sup> To implement this new approach, the Court announced a new doctrinal test: “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>256</sup> The Court soon set about applying this “congruence and proportionality” test to invalidate several federal statutes (and statutory provisions purporting to abrogate state sovereign immunity).<sup>257</sup> These were facial invalidations: the Court did not look to the particular facts of the claimant’s case, but proceeded by identifying the constitutional right Congress sought to enforce, determining whether Congress had assembled a record detailing a pattern of state violations of the right, and then determining whether the challenged statute was a congruent and proportional response to that pattern.<sup>258</sup>

The congruence and proportionality test does not lend itself to easy or precise categorization, but it seems best to view it as a species of narrow tailoring or overbreadth test.<sup>259</sup> Thus, for example, in *Boerne* the Court stated that “[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional,”<sup>260</sup> and that in light of this requirement, the Religious Freedom Restoration Act’s “sweeping coverage” doomed it to facial invalidation.<sup>261</sup> This reasoning was repeated in subsequent cases, as the Court

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<sup>255</sup> *Id.* at 518-19.

<sup>256</sup> *Id.* at 520.

<sup>257</sup> See *id.* at 529-36 (applying the congruence and proportionality test to invalidate the Religious Freedom Restoration Act as applied to state and local government action); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (invalidating provision of Patent and Plant Variety Protection Remedy Clarification Act); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (invalidating provision of Trademark Remedy Clarification Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (invalidating provision of Age Discrimination in Employment Act); *Morrison*, 529 U.S. at 619-27 (invalidating civil remedy provision of VAWA); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (invalidating provision of Americans with Disabilities Act).

<sup>258</sup> See Metzger, *supra* note 20, at 875.

<sup>259</sup> See Sabri, 541 U.S. at 609-10 (characterizing *Boerne* as an overbreadth case); Metzger, *supra* note 20, at 917 (“The fact that the test represents a form of narrow tailoring may justify deviating from the presumption of severability at least insofar as to require courts to entertain what are in essence facial overbreadth challenges.”); Catherine Carroll, *Note, Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026 (2003).

<sup>260</sup> 521 U.S. at 532.

<sup>261</sup> *Id.*

invalidated the Patent Remedy Act in light of its “indiscriminate scope,”<sup>262</sup> held that the Age Discrimination in Employment Act “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard,”<sup>263</sup> and concluded that the duty of reasonable accommodation under the Americans with Disabilities Act (ADA) “far exceeds what is constitutionally required.”<sup>264</sup> The Court took a facial approach even in its 2003 decision *upholding* the Family and Medical Leave Act, paying no heed to the specific facts of the case at bar and concluding that the Act’s remedy—though “prophylactic,” i.e., broader than the underlying constitutional violation—did not sweep so broadly as to exceed Congress’s Section 5 authority.<sup>265</sup> To be sure, the overbreadth model of Section 5 adjudication has a more difficult time accounting for the Court’s more recent decisions in *Tennessee v. Lane*<sup>266</sup> and *United States v. Georgia*,<sup>267</sup> which upheld Title II of the ADA as applied. Even these decisions, however, can be squared with the overbreadth model—so long as we make the assumption, as the Court apparently did in *Lane*, that federal legislation may be divided for purposes of Section 5 review into “subrules” that are differentiated by the constitutional right each subrule purports to enforce and then tested for overbreadth on a subrule-by-subrule basis.<sup>268</sup>

To make the overbreadth approach to Commerce Clause adjudication maximally plausible, imagine a federal statute that simply criminalizes murder. Imagine further that a federal poultry inspector has been killed in the line of duty, and that the killer is charged with violating the general federal murder statute. Congress undoubtedly has the power under the Necessary and Proper

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<sup>262</sup> *Florida Prepaid*, 527 U.S. at 647.

<sup>263</sup> *Kimel*, 528 U.S. at 86.

<sup>264</sup> *Garrett*, 531 U.S. at 372.

<sup>265</sup> *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728-40 (2003); *cf.* Metzger, *supra* note 20, at 896-97 (concluding that *Hibbs* has a facial cast, though denying that the Court’s cases preclude as-applied treatment of Section 5 challenges).

<sup>266</sup> 541 U.S. 509 (2004).

<sup>267</sup> 126 S. Ct. 877 (2006).

<sup>268</sup> 541 U.S. at 530 & n.18 (asserting that the Title II of the ADA need not be considered “as an undifferentiated whole,” but rather that its validity may be assessed insofar as it purports to enforce the constitutional right of access to the courts); *see also Georgia*, 126 S. Ct. at 882 (emphasizing that Title II is valid insofar as it creates a remedy “for conduct that *actually* violates the Fourteenth Amendment”) (emphasis in original); *cf.* Fallon, *As-Applied*, *supra* note 95, at 1357-58. *But see Metzger*, *supra* note 20, at 897 n.114 (dismissing the Court’s attempt in *Lane* to distinguish its facial-review precedents as “not particularly persuasive”).

Clause to protect federal officials in the discharge of their duties by imposing criminal penalties on those who kill them.<sup>269</sup> Yet, on the strength of *Lopez* and *Morrison*, it seems virtually certain that our hypothetical defendant could successfully challenge the facial validity of the general federal murder statute, notwithstanding the fact that he happened to commit a crime that could have been regulated by a more narrowly drawn law.<sup>270</sup>

While an overbreadth understanding of the Commerce Clause is theoretically conceivable, it is hard to maintain that such an understanding provides the soundest explanation for the facial character of the Court's recent decisions. *Lopez* and *Morrison* simply do not read like overbreadth cases. The Court in *Lopez* makes absolutely no inquiry into whether a substantial proportion of the guns carried near schools have traveled in interstate commerce; the Court in *Morrison* pays no attention to whether a substantial proportion of violent acts against women affect interstate commerce. The overbreadth characterization is particularly far-fetched with respect to *Lopez*, since the large majority of guns do in fact travel in interstate commerce, a fact which presumably would have been enough to doom any overbreadth

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<sup>269</sup> Cf. *In re Neagle*, 135 U.S. 1 (1890). The Federal Death Penalty Act of 1994, which is not a general murder statute, does seem to contemplate treating the killing of a federal agency investigator as an aggravating factor in federal death penalty cases. See 18 U. S. C. § 3592(c)(14)(D)(iii); John P. Cunningham, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 956 (1998) (noting that some Members of Congress criticized the inclusion in the 1994 Act of crimes such as murder of a federal poultry inspector).

<sup>270</sup> Interestingly, Justice Scalia came to the same conclusion, albeit in a slightly different context (a challenge asserting that an administrative agency regulation was facially inconsistent with its enabling statute). His discussion is worth quoting at some length:

It is one thing to say that a facial challenge to a regulation that omits statutory element x must be rejected if there is any set of facts on which the statute does not require x. It is something quite different—and unlike any doctrine of “facial challenge” I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element x happens to be present. On this analysis, the only regulation susceptible to facial attack is one that not only is invalid in all its applications, but also does not sweep up any person who could have been held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits “premeditated killing of a human being,” and an implementing regulation that prohibits “killing a human being.” A facial challenge to the regulation would not be rejected on the ground that, after all, it could be applied to a killing that happened to be premeditated. It could not be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires.

*Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting). For an illuminating discussion of facial challenges to the validity of regulations *vis-à-vis* authorizing statutes, see Buck, *supra* note 21.

challenge in that case.<sup>271</sup> The problem with such statutes, in the view of the Court majority, is that they are simply not the kind of law that the Commerce Clause authorizes Congress to enact. Even our hypothetical federal murder statute, though almost certainly invalid under *Lopez* and *Morrison*, would be invalid not because it would sweep too broadly in its applications, but because the Court would not deem a prohibition of murder to be the kind of law that counts as a regulation of interstate commerce.<sup>272</sup> Conversely, the claimants in *Raich* may have demonstrated that their activities, taken alone, could not be made the subject of a narrow, single-subject federal prohibition, but they rightly did not argue that the statute as a whole was unduly overbroad.<sup>273</sup> On the contrary, the breadth of the Controlled Substances Act turned out to be what *saved* it from invalidation; as Justice O'Connor suggested in her dissent, judging from the Court's analysis in *Raich*, the constitutional flaw in the statutes that were struck down in *Lopez* and *Morrison* was one of "underbreadth," not overbreadth.<sup>274</sup> In short, the Court approaches the Commerce Clause from the perspective not of the overbreadth facial challenge but of the valid-rule facial challenge. The next Subpart explains why.

#### **E. The Commerce Clause and the requirement of appropriate legislative purpose.**

Ultimately, a judicial concern with legislative purpose provides the most plausible explanation of the facial character of the Court's recent Commerce Clause cases. To be sure, in the Commerce Clause context, inquiry into legislative purpose is not prominent on the surface of the Court's doctrine. Instead, that inquiry—more specifically, a judicial concern with the

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<sup>271</sup> See *supra* note 58.

<sup>272</sup> Cf. *Cohens v. Virginia*, 19 U.S. 264, 428, 443 (1821) (casting doubt on the notion that Congress has general authority to punish felonies, particularly murder, within the states); *Morrison*, 529 U.S. at 618 (2000) (same).

<sup>273</sup> In addition, if Commerce Clause overbreadth review existed, and the Court applied its threshold rule from First Amendment overbreadth cases, the *Raich* claimants would not be permitted simultaneously to argue that their own conduct was constitutionally unregulable by Congress and that the statute as a whole was unduly overbroad. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

<sup>274</sup> See *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting) ("[T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision."). See generally Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001) [hereinafter Vermeule, *Perverse Effects*] (arguing that the Court's emerging Commerce Clause jurisprudence disserves the values of federalism by encouraging broad federal regulation). I am grateful to Jonathan Masur for alerting me to the "underbreadth" coinage. Cf. *R.A.V.*, 505 U.S. at 402 (White, J., concurring) (accusing the majority of inventing a doctrine of "underbreadth").

ends or aims of the challenged statute as a whole—lies beneath the doctrinal surface, informing the Court’s reasoning and guiding the Court toward facial dispositions in Commerce Clause cases, validations and invalidations alike.

All first-year Constitutional Law students learn that the possibility of a purpose-based approach to congressional power was outlined by Chief Justice Marshall in *McCullough v. Maryland*: “[S]hould Congress, under the pretext of exercising its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”<sup>275</sup> Yet those students soon learn that the prohibition on pretextual Commerce Clause legislation, having been abused by a conservative Supreme Court in cases like *Hammer v. Dagenhart*,<sup>276</sup> was decisively put to rest in the 1941 case of *United States v. Darby*.<sup>277</sup> The *Darby* Court could hardly have been more definitive: “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”<sup>278</sup>

Moreover, the Court’s rejection of a purpose-based approach to Commerce Clause doctrine is consistent with a long tradition of judicial skepticism about inquiring into legislative motivation in constitutional cases. As long ago as *Fletcher v. Peck* in 1810, Chief Justice Marshall warned of the difficulties entailed by judicial investigation of legislative motivation,<sup>279</sup> and the Court has since echoed that warning countless times.<sup>280</sup> The pitfalls of such an approach are by now familiar. First, determining the subjective motivations

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<sup>275</sup> 17 U.S. (4 Wheat.) 316, 423 (1819).

<sup>276</sup> 247 U.S. 251 (1918) (striking down a statute prohibiting the interstate transport of goods produced using child labor, on the ground that the purpose of the statute was to affect the terms and conditions of labor in manufacturing, a subject then deemed outside the scope of interstate commerce).

<sup>277</sup> 312 U.S. 100 (1941).

<sup>278</sup> *Id.* at 115.

<sup>279</sup> 10 U.S. (6 Cranch) 87, 130 (1810) (“It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice.”).

<sup>280</sup> *See, e.g.,* *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (“[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.”); *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”); *Arizona v. California*, 283 U.S. 423, 454-55 (1931).

that impelled a legislator to vote for a particular bill is virtually an impossible task.<sup>281</sup> Second, legislatures are multi-member bodies, so even if a court could somehow ascertain the intention of each legislator, aggregating those manifold intentions into a single “legislative intent” would amount to a fool’s errand.<sup>282</sup> And third, as John Hart Ely powerfully argued, the search for legislative motivation can exacerbate the risk that judges will simply second-guess the legislature’s choices and substitute their own preferences for those of the political branches.<sup>283</sup> Though some scholars in recent years have argued that judicial inquiry into legislative motivation is both more common as a descriptive matter and more desirable as a normative matter than the standard critique would suggest,<sup>284</sup> the critique remains a serious one.

It is not sufficient to derail us here, however, for three reasons. First, the primary burden of this article is to explain, not to justify or defend, the Court’s recent turn toward facial review in Commerce Clause cases. That a judicial inquiry into legislative purpose may be chimerical or unwise does not disqualify it as a positive account of the Court’s preference for facial review if other factors suggest it has explanatory force. Second, the critique of judicial

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<sup>281</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (“[D]iscerning the subjective motivation of those enacting [a] statute is, to be honest, almost always an impossible task.”)

<sup>282</sup> See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”); cf. *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.”).

<sup>283</sup> See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214 (1970) (asserting that “only a hopelessly result-oriented judge would be able to assert that he knew which was ‘the’ motivation or the ‘dominant’ motivation underlying the [anti-draft-card-burning] statute” challenged in *United States v. O’Brien*). Ely also argued that constitutional invalidation on grounds of improper legislative motivation is often futile, because the legislature can respond to such an invalidation by simply re-enacting the same statute accompanied by different—or, worse, less candid—statements of purpose. *Id.* at 1214–15.

<sup>284</sup> See, e.g., Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997) (welcoming the Court’s trend toward increased scrutiny of governmental purposes and offering a framework for such scrutiny); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994) (arguing for a structural conception of rights in which examination of the government’s reasons for acting would become more prominent); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 72 (1997) [hereinafter Fallon, *Foreword*] (“[I]nquiries into purpose are familiar in constitutional law, as they are in the moral assessment of human conduct. In many if not most cases, the relevant questions seem entirely straightforward.”).

inquiry into legislative motivation gains much of its strength from the observation that it is rarely possible to ascribe a single, or even dominant, intention to a particular statute.<sup>285</sup> But this article does not assert that the Court understands the Commerce Clause to impose a requirement of *sole* or *primary* legislative purpose, only that (broadly speaking) the challenged statute have some reasonably plausible commercial purpose. Third, and most important, it is crucial to distinguish between the search for subjective legislative *motivations* (which is indeed highly vulnerable to the critique described above) and the more objective quest for legislative *purposes*, in the sense of the aims or goals at which statutes are directed.<sup>286</sup> The latter inquiry, though not without its own perils, presents a far more familiar and manageable task for judges<sup>287</sup>—and it is the latter that appears to be at work beneath the surface of the Court’s recent Commerce Clause cases.

To be more specific, decisions from *Lopez* onward suggest that the Court views the Constitution as imposing something like the following requirement: A statute enacted pursuant to Congress’s Commerce Clause authority must have, as one of its reasonably plausible aims, a purpose to directly regulate or substantially affect interstate commerce.<sup>288</sup>

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<sup>285</sup> See Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1235 (2003) (“[L]aws tend to have purposes, not a purpose, and to reflect compromises.”).

<sup>286</sup> The discussion here parallels that of Gil Seinfeld’s interesting article, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1302-03 (2003), with an important divergence: Seinfeld advocates judicial inquiry into legislative purpose in Commerce Clause cases as a normatively attractive road not taken, whereas this article asserts as a descriptive matter that a concern with legislative purpose, while not prominent on the surface of the Court’s doctrine, has already driven the Court toward facial review.

<sup>287</sup> See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1410-17 (tent. ed. 1958) (advocating an influential method of statutory interpretation in which courts determine the objective purpose of a statute by examining its text, structure, and history in light of the assumption that statutes are the product of reasonable legislators acting reasonably); *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting) (“It is possible to discern the objective ‘purpose’ of a statute[,] i.e., the public good at which its provisions appear to be directed.”); *Printz*, 521 U.S. at 932 (“[W]here, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, . . . a ‘balancing’ analysis is inappropriate.”); cf. Fallon, *Foreword*, *supra* note 284, at 71-73 (distinguishing between “purpose tests” and “aim tests” in constitutional doctrine); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 71-72 (2006) (describing purpose-based approach to statutory interpretation).

<sup>288</sup> Two notes about this admittedly broad-brush sketch of the Court’s likely understanding of the Commerce Clause. First, by “the Court” here I mean the controlling bloc of Justices in *Lopez* and *Morrison*, particularly Justices Scalia and Kennedy, who tilted the

Traces of such an understanding are reflected in several facets of the Court's recent Commerce Clause doctrine. First, the *Lopez* Court attempted to distinguish *Wickard v. Filburn* by noting that “[o]ne of the primary purposes” of the Agricultural Adjustment Act challenged in *Wickard* was to stabilize the interstate market in wheat by limiting output and increasing price.<sup>289</sup> In contrast, said the Court, the Gun-Free School Zones Act “is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”<sup>290</sup> Similarly, in a passage of his *Lopez* concurrence subsequently quoted by the Court in *Morrison*, Justice Kennedy reasoned that “unlike the earlier cases to come before the Court[,] here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus.”<sup>291</sup> Second, the Court's emphasis in *Lopez*, and to a lesser extent in *Morrison*, on the role of legislative findings concerning the effects of a federally regulated activity on interstate commerce reinforces the conclusion that a concern with legislative purpose is at work in the Court's thinking.<sup>292</sup> After all, requiring (or at least strongly encouraging) the legislature to articulate the connection between its handiwork and interstate commerce is a fairly dependable way for a court to ascertain whether the statute as a whole was designed, at least in part, to “get at” economic activities or effects.<sup>293</sup> Third, perhaps the best evidence that the Court is motivated by an underlying concern with legislative purpose is the fact that it adjudicates Commerce Clause cases as valid-rule facial challenges. As noted in Part II, valid-rule facial challenges are particularly prominent in areas of constitutional law where substantive judicial doctrine directs courts to undertake an examination of legislative purpose.<sup>294</sup>

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balance toward facial validation in *Raich*. As discussed *supra*, text accompanying notes 244-246, the four *Lopez/Morrison* dissenters probably view the commerce power as plenary or judicially unconstrained, and it is too early to pinpoint the views of Chief Justice Roberts and Justice Alito. Second, the phrase “reasonably plausible aims” is meant to exclude commercial purposes that are far-fetched or attenuated, such as the government's theories in *Lopez*, which the Court rejected as requiring the piling of “inference upon inference,” 514 U.S. at 567. A statute's reasonably plausible aim need not be its sole or primary aim.

<sup>289</sup> *Lopez*, 514 U.S. at 560 (quoting *Wickard*, 317 U.S. at 128).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 580 (Kennedy, J., concurring).

<sup>292</sup> *Lopez*, 514 U.S. at 562-63; *Morrison*, 529 U.S. at 615.

<sup>293</sup> *Cf.* Seinfeld, *supra* note 286, at 1324-27 (2003) (advocating a requirement of congressional findings concerning the commercial purposes served by a statute as a normatively attractive way for courts to ensure compliance with the Commerce Clause).

<sup>294</sup> *See supra* text accompanying note 115.

The apparent renewal of interest among the justices in legislative purpose under the Commerce Clause has not gone unnoticed. For example, Mitchell Berman suggests that the results in *Lopez*, *Morrison*, and the little-noticed case of *Pierce County v. Guillen*<sup>295</sup>—one might now add *Raich* to this list—are consistent with an understanding on the part of the Court’s federalism-minded justices that Commerce Clause regulation of intrastate activity must be motivated, at least in part, by commercial purposes.<sup>296</sup> Other scholars have advanced similar views.<sup>297</sup>

Yet this article’s primary claim is not that a concern with legislative purpose is conspicuous on the surface of the Court’s decisions, but rather that such a concern operates beneath the surface of, and helps shape, those decisions. The important and by-now-familiar distinction here is between constitutional *meaning* on the one hand and the *doctrine* used by courts to implement that meaning on the other.<sup>298</sup> To say that a majority of justices harbor an understanding of the meaning of the Commerce Clause that incorporates a requirement of commercial purpose is not to say that judicial doctrine will, or should, incorporate that requirement. There may be very good reasons—institutional, evidentiary, or otherwise—to eschew direct judicial enforcement of that component of the Clause’s meaning.<sup>299</sup> Thus, as Berman has argued, although the concept of commercial purpose has not

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<sup>295</sup> 537 U.S. 129 (2003).

<sup>296</sup> See Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1511-19 (1994) [hereinafter Berman, *Gullibility*].

<sup>297</sup> See, e.g., Schapiro & Buzbee, *supra* note 285, at 1229 (“Recent Commerce Clause cases ... demonstrate a renewed interest in legislative purpose.”); Michael J. Gerhardt, *On Revolution and Wetland Regulations*, 90 Geo. L. J. 2143, 2163 (“[W]hat seems to matter primarily to the Court for purposes of demarcating the scope of congressional authority under the Commerce Clause is the law’s objective, rather than the means by which this objective is achieved.”); cf. Bhagwat, *supra* note 284, at 310 n.43 (speculating “that Congress’ lack of commercial motivation was relevant to the Court’s conclusion” in *Lopez*).

<sup>298</sup> There is a voluminous and growing literature on this topic. For some important examples, see, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988); Fallon, *Foreword*, *supra* note 285; Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943 (2003); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) [hereinafter Berman, *Decision Rules*]; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

<sup>299</sup> Cf. *supra* text accompanying notes 279-284 (describing critique of direct judicial inquiry into legislative motivation).

featured especially prominently in the Court's Commerce Clause doctrine (what Berman calls the Court's "decision rules") it plays a large role in the federalism-minded justices' understanding of the meaning of the Commerce Clause (what Berman calls the "constitutional operative proposition").<sup>300</sup>

An analogy can be made here to two other areas of constitutional law: the Dormant Commerce Clause and the First Amendment. In both of these areas, scholars have persuasively argued that the Court's understanding of the relevant constitutional operative provision incorporates a latent or inchoate requirement of appropriate legislative purpose. Yet in each area, the Court has crafted judicial doctrines that sidestep direct inquiry into the purposes underlying the challenged statute.

With respect to the Dormant Commerce Clause, Donald Regan has argued that the Court's decisions, particularly in cases challenging state statutes that restrict the movement of goods across state lines, are best explained by a principle that outlaws legislation enacted with an impermissible purpose.<sup>301</sup> In Dormant Commerce Clause cases, this forbidden legislative purpose is protectionism, i.e., the desire to improve the competitive position of in-state as compared to out-of-state economic actors.<sup>302</sup> Regan argues that the doctrinal tests used by the Court in this area—including *per se* rules, presumptions, undue burden analyses, and other tests that appear to turn on a balancing of interests or effects rather than on a search for legislative motive—are in fact best explained by the effort to root out and invalidate statutes enacted for protectionist reasons.<sup>303</sup> He concludes that the Court sometimes uses non-purpose-based doctrines, such as balancing tests, as a convenient cover for a purpose inquiry, either because the justices are aware of the practical

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<sup>300</sup> See, e.g., Berman, *Gullibility*, *supra* note 296, at 1512 (speculating that "a majority of the Supreme Court believes (perhaps inchoately) that the Commerce Clause authorizes Congress to regulate intrastate behavior only in order to achieve what I will loosely call 'commercial purposes'—a family of ends including, most centrally, promoting economic growth and also (perhaps) ameliorating the negative externalities that economic growth produces"). For a full exposition and defense of the distinction between constitutional "operative propositions" and doctrinal "decision rules," see Berman, *Decision Rules*, *supra* note 298; Roosevelt, *supra* note 298.

<sup>301</sup> Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). I am grateful to Brad Joondeph for calling the Dormant Commerce Clause parallel to my attention.

<sup>302</sup> *Id.* at 1094-95.

<sup>303</sup> *Id.* at 1206-84. Since the publication of Regan's article, the Court has become more forthright in its use of purposive analysis in Dormant Commerce Clause cases. See, e.g., *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997) (citing Regan's article and noting that "several cases that have purported to apply the undue burden test ... arguably turned in whole or in part on the discriminatory character of the challenged state regulations").

difficulties of purpose inquiries, because they have expressly disavowed such inquiries in the past, or because they do not wish to accuse state officials of harboring improper motives.<sup>304</sup>

Similarly, Elena Kagan has argued that much of First Amendment law, though not explicitly framed in terms of purpose, is designed to identify and invalidate laws that are in fact motivated by impermissible governmental motives.<sup>305</sup> Thus, a wide array of doctrines—including the concept of “low-value speech,” the deferential treatment of incidental burdens, and even the apparent judicial emphasis on the effects of speech regulations—are all in fact designed to flush out and invalidate regulations that are based on the government’s desire to suppress speech because it disagrees with, disapproves of, or is threatened by the ideas espoused by the speaker.<sup>306</sup> This doctrinal sleight of hand—the use of non-purpose-based doctrine to ferret out illicit purposes—is useful because a candidly purpose-based doctrine would confront the twin problems of false negatives and false positives: on the one hand, impermissible governmental motives are notoriously difficult for litigants to prove, and on the other hand, permissible ones are notoriously easy for legislatures to feign.<sup>307</sup> Kagan uses *R.A.V. v. City of St. Paul*<sup>308</sup> as illustrative of this indirect doctrinal concern with governmental purpose in the First Amendment area.<sup>309</sup> The Court’s recent Commerce Clause decisions show a similar legerdemain.

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<sup>304</sup> Regan, *supra* note 301, at 1284-87. Regan goes further and suggests that an inquiry into purpose (which he calls “motive”) may be generally appropriate in cases testing the outer limits of governmental authority. *See id.* at 1144 (“From the point of view of the constitution-writer, who is attempting to define for herself, in abstraction from particular legislative problems, what the legislature ought and ought not to be able to do, it turns out that in some areas motive is precisely the crucial variable.”).

<sup>305</sup> Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 415 (1996).

<sup>306</sup> *Id.* at 428.

<sup>307</sup> *Id.* at 440.

<sup>308</sup> 505 U.S. 377 (1992).

<sup>309</sup> Kagan, *supra* note 305, at 422 (“[H]alf hidden beneath a swirl of doctrinal formulations, the crux of the dispute between the majority and the concurring opinions concerned the proper understanding of St. Paul’s motive in enacting its hate-speech law.”). Similarly, it has been argued (and the Supreme Court has held on more than one occasion) that the narrow-tailoring prong of strict judicial scrutiny under the Equal Protection Clause, which on its face is more concerned with legislative means than legislative ends, in fact serves to “smoke out” illegitimate governmental purposes. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *Johnson v. California*, 125 S. Ct. 1141, 1146 (2005). *See also* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 146 (1980) (“[F]unctionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of ‘flushing

Three objections could be raised to this article's account of the Court's Commerce Clause jurisprudence as reflecting an underlying concern with legislative purpose. The first objection is descriptive in character. According to this objection, the facial cast of the Court's recent cases is not explained by some subterranean concern with legislative purpose, but by concepts that appear on the very surface of the cases themselves: substantial effects, aggregation, and the idea of the comprehensive regulatory scheme, possibly complemented by the Necessary and Proper Clause. Intrastate economic activities may be regulated by Congress if, when aggregated, they have a substantial effect on interstate commerce; intrastate non-economic activities may also be reached if doing so is essential to a comprehensive federal regulatory scheme. The statute at issue in *Wickard* was upheld because it satisfied the first of these criteria, the statute in *Raich* because it satisfied the second, and the statutes in *Lopez* and *Morrison* were struck down because they satisfied neither. End of story.

My first response to this objection is to demur. At the broadest level, a primary objective of this article has been to show that the choice between as-applied and facial review turns on the nature and content of the applicable substantive constitutional doctrine rather than on questions of severability or the framing of the claimant's request for relief. If the reader is convinced that the Court has turned of late to facial review in Commerce Clause cases and that substantive judicial doctrine is responsible for the turn, then that objective has been fulfilled. My second and narrower response, however, is to suggest that the objection is question-begging, and fails to account adequately for the facial character of the Court's Commerce Clause jurisprudence. *Why* did the fact that the prohibition on intrastate, noncommercial medical marijuana use was part of a larger regulatory scheme suffice to thwart an as-applied challenge? More tellingly, *why* was the Gun-Free School Zones Act invalidated on its face, and not merely as applied to Alfonso Lopez? Even if one accepts that Congress cannot regulate noncommercial, intrastate activity where the regulation is not part of a comprehensive scheme, it remains to be explained why such a regulation should be struck down *on its face*. Surely, from the perspective of the values of federalism and judicial restraint, there are sound reasons for favoring an as-applied approach.<sup>310</sup> The answer, I have suggested,

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out' unconstitutional motivation."); *but see* Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427 (1997).

<sup>310</sup> See, e.g., *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting) ("This case exemplifies the role of States as laboratories."); Vermeule, *Perverse Effects*, *supra* note 274; cf. Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005) (criticizing the Court's use of prohibitory limitations in Commerce Clause cases and advocating the essentially as-applied mechanism of the clear statement rule).

is that the Court views Commerce Clause challenges as valid-rule facial challenges, grounded in the notion that the challenged statute *as a whole* must have a permissible regulatory purpose.

The second objection is normative in character. Even if a purpose-based account of the Commerce Clause has some descriptive force in explaining the Court's recent turn to facial review, the objection runs, such an understanding is normatively disastrous.<sup>311</sup> Putting to one side the practical problems of proof and comparative institutional competence associated with a purpose inquiry,<sup>312</sup> the reinvigoration of a purpose-based approach to the Commerce Clause could cast the Civil Rights Act of 1964, the Endangered Species Act, and countless other vital federal regulatory statutes into serious constitutional doubt.<sup>313</sup>

This normative objection is serious. Because this article has primarily descriptive aims, I will address it only briefly here by making three points. First, it is important to bear in mind the distinction between constitutional meaning and constitutional doctrine. This article has shown that a controlling bloc of justices understands the *meaning* of the Commerce Clause to incorporate a legislative purpose component, not that the Court's judicial *doctrine* directly incorporates a requirement of legitimate purpose.<sup>314</sup> Current doctrine, which focuses on the nature and effects of the regulated activity, can accommodate the Civil Rights Act, the Endangered Species Act, and other landmark federal laws with relative ease.<sup>315</sup> Second, even at the level of

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<sup>311</sup> See, e.g., *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1073 (D.C. Cir. 2003) (warning of the disadvantages of an emphasis on purpose in Commerce Clause review).

<sup>312</sup> See *supra* text accompanying notes 279-284.

<sup>313</sup> See, e.g., *Gonzales v. Oregon*, 126 S. Ct. 904, 939 (2006) (Scalia, J., dissenting) ("From an early time in our national history, the Federal Government has used its enumerated powers, such as its power to regulate interstate commerce, for the purpose of protecting public morality..."); Roosevelt, *supra* note 298, at 1694 ("[E]ven when regulated activities clearly did substantially affect interstate commerce, Congress was frequently regulating them for other reasons—something that, if we take *McCulloch's* pretext passage seriously, might be unconstitutional."); Litman & Greenberg, *supra* note 58, at 939-40 (interpreting *Heart of Atlanta Motel* and *McClung* to mean "that the Constitution gives Congress the power to regulate particular subjects or areas, regardless of its aims").

<sup>314</sup> Cf. Berman, *Gullibility*, *supra* note 296, at 1523-27.

<sup>315</sup> See, e.g., *Heart of Atlanta Motel*, 379 U.S. 241 (upholding Civil Rights Act); *McClung*, 379 U.S. 294 (same); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (upholding ESA); *Rancho Viejo*, 323 F.3d 1062 (same); *United States v. Ho*, 311 F.3d 589 (5th Cir. 2002) (upholding Clean Air Act). *But see* *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 617 (2005) (presenting questions concerning the scope of the Commerce Clause with respect to the Clean Water Act).

meaning, this article does not claim that the Court believes the Commerce Clause requires the challenged statute to have the sole or primary aim of regulating interstate commerce, only that it have some reasonably plausible commercial purpose. Again, statutes such as the Civil Rights Act have no difficulty satisfying this looser requirement.<sup>316</sup> Third, even if Congress's interstate commerce power were restricted to enacting statutes with a primarily commercial purpose, a powerful case can be made that federal civil rights statutes prohibiting private acts of discrimination are a valid exercise of Congress's power to enforce the Reconstruction Amendments.<sup>317</sup> This would of course require the Court to overrule its decision to the contrary in *The Civil Rights Cases*,<sup>318</sup> but that seems a small price to pay.

The final objection is theoretical in character. The objection runs as follows: even if Commerce Clause cases call for valid-rule adjudication, such adjudication could in theory address itself to the validity of "subrules," i.e., applications of a statutory rule to subclasses of activities not textually differentiated on the face of the challenged statute. Though this kind of review might be described, formally speaking, as "valid-subrule facial review," in practice it would be indistinguishable from as-applied review.<sup>319</sup> Such review is indeed theoretically possible. In fact, one can read the dissents in *Raich* and the majority opinions in the Section 5 cases of *Lane* and *Georgia* as calling for just such an approach.<sup>320</sup> For present purposes, however, it suffices to note that the Court does not show any inclination toward such "valid-subrule" review in Commerce Clause cases. Indeed, *Raich* appears to stand for the proposition that courts should not entertain Commerce Clause challenges

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<sup>316</sup> See *Heart of Atlanta Motel*, 379 U.S. 241, and *McClung*, 379 U.S. 294 (upholding statutes prohibiting racial and other forms of discrimination in places of public accommodation on the ground that Congress could rationally conclude that such discrimination burdens interstate commerce, notwithstanding that Congress's intent may have been primarily to address moral ills); Seinfeld, *supra* note 286, at 1318-19 (observing that the Civil Rights Act has multiple aims, including promoting interstate commerce by ensuring nondiscriminatory access to it).

<sup>317</sup> Cf., e.g., Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1215 (1998) ("It would be ennobling—even affirming to those who have suffered from discrimination—if the Supreme Court admitted that we now have a national commitment to equality that does not countenance discrimination in any corner of the nation. That commitment, not tangential effects on the economy, explains congressional action to reduce bias.").

<sup>318</sup> 109 U.S. 3 (1883) (reaffirmed in *Morrison*, 529 U.S. at 621-25).

<sup>319</sup> Richard Fallon makes a general argument of this kind in response to Matthew Adler's claim that constitutional rights are "rights against rules." See Fallon, *As-Applied*, *supra* note 95, at 1334-35.

<sup>320</sup> See *supra* text accompanying notes 266-268.

to the constitutionality of textually undifferentiated subrules once Congress has chosen to legislate more broadly. The reason, this article suggests, is that Commerce Clause doctrine is driven by a concern with legislative purpose, and judicial inquiry (direct or indirect) into the purpose underlying such undifferentiated subrules would be difficult at best and incoherent at worst.

### CONCLUSION

This article shows that facial challenges have come to predominate in the Supreme Court's Commerce Clause jurisprudence, and concludes that the soundest explanation for this development lies in an understanding of the meaning of the Clause that incorporates a requirement of permissible legislative purpose. That conclusion, moreover, illustrates two larger lessons about contemporary constitutional law.

First, constitutional meaning is not the same as constitutional doctrine. This article has suggested that in the Commerce Clause area, a conception of constitutional meaning that includes a requirement of commercial purpose has driven the Court toward facial adjudication, but this latent concern with purpose has not (yet) left a substantial imprint on the Court's doctrine. In other areas, such as the Equal Protection Clause and Congress's Fourteenth Amendment enforcement authority, the Court has erred by conflating its decision rules with the Constitution's operative meaning—in short, it has treated doctrine as if it were meaning.<sup>321</sup> It is more important than ever for judges and scholars to bear in mind the difference between the two.

Second, there is often no fixed dividing line to be drawn between substance and procedure in constitutional adjudication. As this article has shown, the choice between facial and as-applied review is not a mere threshold matter of procedure or pleading. Rather, it is inextricably bound up with the nature and functioning of applicable substantive constitutional doctrine. A similar merger of substance and procedure is visible in many other areas of constitutional law. To mention a few examples: hardly anyone believes any longer in a rigid analytic separation between “rights” and “remedies”;<sup>322</sup> it is widely accepted that standing requirements—if they can be understood at all—cannot be understood in isolation from the issues to be adjudicated on the merits;<sup>323</sup> and the state action requirement, at least in difficult cases, cannot be deployed as a workable threshold test absent an inquiry into substantive

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<sup>321</sup> See, e.g., Roosevelt, *supra* note 298.

<sup>322</sup> See, e.g., Levinson, *supra* note 298.

<sup>323</sup> See, e.g., Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37.

constitutional doctrine.<sup>324</sup> The doctrine-dependent quality of the choice between facial and as-applied challenges is just one more instance of the permeability of the supposed boundary between constitutional substance and procedure.

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<sup>324</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1699 (2d ed. 1988) (“The state action requirement fixes a frame of reference. The substantive constitutional right at issue initially determines the parameters of this frame.”).