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Rights, Rules, and Raich

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RIGHTS, RULES, AND *RAICH*

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I. INTRODUCTION

In 1995, months after the Supreme Court's landmark decision in *United States v. Lopez*,[1] which held that a federal law was outside the reach of Congressional commerce power for the first time in sixty years, one commentator asked whether "Farmer Filburn [could] begin raising marijuana or machine guns on his Ohio farm – as long as he retains the crop for home consumption and as long as the state of Ohio does not object?"[2] Ten years later, the Supreme Court was presented with a close variation of that very question. In *Gonzales v. Raich*,[3] four plaintiffs argued that they should be allowed to grow marijuana for their noncommercial medicinal use without the fear of federal prosecution. By a vote of 6-3, the Supreme Court held that Congress could regulate the *Raich* plaintiffs' activity in a decision that is certain to reignite the debate over another common question from 1995: was *Lopez* an "epochal case" with far-reaching implications for the scope of the Commerce Clause or was it "only a misstep?"[4]

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1 514 U.S. 549 (1995).

2 Deborah Jones Merritt, *COMMERCE!*, 94 MICH. L. REV. 674, 675 (1995).

3 125 S. Ct. 2195, 2200 (2005).

4 *See* United States v. Lopez, 514 U.S. 549, 614-15 (1995) (Souter, J., dissenting); *see also, e.g.*, Louis H. Pollak, Symposium, *Reflections on* United States v. Lopez: *Forward*, 94 MICH. L.

Raich, like *Lopez* and *United States v. Morrison*[5] before it, provides mixed signals about what Congress may regulate under its commerce power. *Raich* does not directly criticize or question *Lopez*, which introduced and applied a four-factor test to hold a federal regulation of possession of a gun in a school zone unconstitutional, or *Morrison*, a 2000 decision that held the Violence Against Women Act unconstitutional by applying the same test. At the same time, however, *Raich* fails to apply, or even mention, the *Lopez* test, and it holds that the federal government can regulate both possession and cultivation of marijuana for personal medicinal use. None of the four opinions in *Raich*—in addition to the majority opinion authored by Justice Stevens, Justice Scalia wrote a concurring opinion and Justices O'Connor and Thomas each wrote dissents—distinguish possession from cultivation in their analysis. Focusing for just a moment on the fact that *Raich* permits federal regulation of simple possession, however, demonstrates how difficult it is to reconcile with *Lopez*. *Lopez* held that the federal government could not regulate possession of a gun in a school zone because possession is not a commercial activity. Thus, *Raich* and *Lopez* considered nearly identical regulations, to the extent that they both regulated the noncommercial activity of possession, but reached opposite results. On what basis, then, should courts in the future decide when federal regulation of noncommercial activity is acceptable under the constitutional and when it isn't?

The *Raich* majority did not directly address this question, or outline a framework for analyzing Commerce Clause issues. Instead, it engaged in a general discussion that appeared to evaluate the case by comparison to the facts of other cases, as opposed to the rules adopted in those cases.[6] This article analyzes *Raich* from the perspective of constitutional rules (or tests) and aims to both critique and make sense of the current state of Commerce Clause jurisprudence. I argue, first, that the *Raich* majority implicitly relied on two different constitutional rules in reaching its result and that these rules will remove the substantive limits *Lopez* sought to place on Congress' commerce power. At the same time, *Raich*'s failure to reconcile the rules it relies on with the test *Lopez* is bound to cause even more confusion in an already convoluted area of the law. The article then focuses on *Raich*'s decision not to apply the *Lopez* test to as-applied challenges. I argue that this approach is inconsistent with the principles in constitutional litigation that govern the use of as-applied and facial challenges. Courts traditionally favor challenges that attack the validity of a statute as-applied to the facts in that case (an as-applied challenge) over challenges that attack the constitutionality of a statute in its entirety (facial challenges). After *Raich*, however, facial challenges appear to be the only type of Commerce Clause challenge that remains viable. Finally, I argue that the Court should

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REV. 533, 553 (1995) (considering whether *Lopez* will have a broad or limited impact and concluding that "there is less in *Lopez* than meets the eye") (emphasis added).

5 529 U.S. 598 (2000).

6 *See infra* Part III (analyzing the *Raich* majority opinion).

adopt a clearer framework for analyzing and propose the "enterprise theory" as an approach that would permit as-applied challenges based on *Lopez* without unduly restricting Congress' power to regulate local activity under the Commerce Clause.

Part II compares the *Lopez* test with the aggregation rule, which was first announced in the famous wheat farmer case *Wickard v. Filburn*.[7] This comparison highlights an underlying tension between the two cases that fueled the dispute in *Raich*. With the *Lopez* and *Wickard* rules in mind, Part III provides an analysis of *Raich* that reveals two doctrinal rules that implicitly served as the foundation for the Court's decision. The first rule is an expanded interpretation of the aggregation doctrine that either eliminates or severely restricts the use of as-applied challenges in Commerce Clause cases. The second rule, which I refer to as the "broader regulatory scheme rule," permits Congress to pass a regulation, such as the regulation of simple marijuana possession, that would otherwise be facially unconstitutional under the *Lopez* test, if the regulation is part of a large regulatory scheme and not a single-subject statute. In Part IV, I argue that *Raich*, through these two rules, significantly undermines the holding in *Lopez* and, at the same time, adds more confusion to an increasingly unclear Commerce Clause jurisprudence.

Part V argues that, in addition to illuminating the internal conflicts within Commerce Clause jurisprudence, these constitutional rules highlight an even more troubling conflict between the Court's approach to commerce cases and its well-established principles of constitutional adjudication. After *Raich*, facial challenges based on the Commerce Clause, in which a litigant contests the validity of a statute in its entirety, are significantly more likely to succeed than as-applied challenges that attack a statute only as it applies to the particular circumstances of a case. This is the polar opposite of the traditional approach to constitutional litigation, in which as-applied challenges are strongly preferred to facial challenges.

Part VI briefly proposes the "enterprise theory" as an alternative approach for analyzing commerce power issues. I contend that the enterprise theory would provide a superior framework, to both the approach adopted by the *Raich* majority and the one advanced by the dissent, for analyzing Commerce Clause questions. Specifically, I argue that this framework would reconcile the different pre-*Raich* rules in a way that would permit as-applied commerce challenges without significantly limiting Congress' Commerce Clause power. Part VII concludes that the Court should either overrule *Raich* and adopt a new coherent framework for analyzing commerce challenges or abandon its effort to place limits on Congress' commerce power and overrule *Lopez* and *Morrison* outright.

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[7] 317 U.S. 111 (1942).

II. THE AGGREGATION RULE AND THE *LOPEZ* RULE

The initial shock of *Lopez* was due almost entirely to the result. Most academics and lower court judges had long assumed that Congressional power under the Commerce Clause was, for all practical purposes, limitless and *Lopez* suddenly and unexpectedly held it was not.[8] Perhaps the most surprising, and surely most confusing part of *Lopez*, however, was that the majority reached its result without claiming to overturn any of the Court's prior cases. After nearly sixty years without a successful commerce challenge,[9] the *Lopez* majority acted as if it were merely following settled Commerce Clause principles despite the outcome, which strongly indicated the Court was adopting a new course.[10] The primary source of confusion in Commerce Clause cases after *Lopez* was due to the Court's failure to address the tension between *Lopez*'s rule that limits commerce power based on the distinction between economic and noneconomic activity, and *Wickard*'s aggregation doctrine.

Before *Lopez*, the aggregation doctrine was the controlling rule for analyzing Commerce Clause issues. The Court first used the aggregation rule in the 1942 case *Wickard v. Filburn*, which famously upheld federal regulation of an Ohio farmer's cultivation of wheat for his personal home use.[11] The rule provided that, even if an individual's actions had an impact on commerce that was "trivial by itself," Congress could regulate them if the "contribution, taken together with that of many others similarly situated," had a substantial affect on interstate commerce.[12] This test left Congress with a seemingly infinite commerce power not just because of its terms, but also because it overturned the prior test that defined the limits of the Commerce Clause, even for as-applied challenges. In other words, after *Wickard* commerce challenges were so unsuc-

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8 *See, e.g.*, Merritt, *supra* note 2, at 674-75 ("When I graduated from law school in 1980, my classmates and I believed that Congress could regulate any act—no matter how local—under the Commerce Clause. . . . [and] I originally dismissed the Fifth Circuit's decision in *United States v. Lopez* as absurd."); Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995) (wondering "why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey-you-can-do-whatever-you-feel-like Clause.'").

9 *See* United States v. Taylor, 226 F.3d 593, 598 (7th Cir. 2000) ("From 1937 to 1995, the Supreme Court consistently upheld federal legislation against claims that Congress had overstepped its authority under the Commerce Clause.").

10 The only aspect of the Court's commerce jurisprudence that the *Lopez* majority acknowledged lacked clarity was whether an activity must "affect" or "substantially affect" interstate commerce in order for Congress to have the power to regulate it. United States v. Lopez, 514 U.S. 549, 559 (1995) ("Within this final category, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce[.]"). This distinction, however, had little to do with the "commercial" versus "noncommercial" standard announced in *Lopez* and the fundamental tension between that distinction and *Wickard*.

11 *See Wickard*, 317 U.S. at 127-29.

12 *Id.* at 127-28 (citing N.L.R.B. v. Fainblatt, 306 U.S. 601, 606 (1939); United States v. Darby, 312 U.S. 100, 123 (1941)).

cessful precisely because there was no standard or constitutional rule upon which a litigant could base a successful commerce challenge.

Wickard's aggregation rule was the culmination of the Court's rejection of its earlier approach to the commerce power.[13] Before *Wickard*, the Court focused on whether the relationship between the regulated activity and interstate commerce was "direct" or "indirect."[14] This test was used to prevent the federal regulation of purely "intrastate" activity by analyzing the nature of the activity's impact on commerce.[15] So, for example, the indirect-direct distinction kept Congress from regulating various aspects of the production of goods for interstate commerce under the theory that "[p]roduction is not commerce; but a step in preparation for commerce."[16] Because the test was concerned with the intrastate character of the regulated activity and the indirect or direct nature of its effect on commerce, the *extent* of the impact and, more importantly, whether the activity was "commercial" or "noncommercial" were irrelevant considerations. As the Court put it, "[t]he distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about."[17]

Examining the relationship between the indirect-direct test and *Wickard*'s aggregation doctrine demonstrates why *Wickard* left no Commerce Clause limits on congressional commerce power. The indirect-direct test circumscribed power under the Commerce Clause based on the local or intrastate nature of a regulated activity and the way in which it affected interstate commerce. *Wickard* held that Congress could regulate the actions of just one individual "even if [they] be local and . . . irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[18] Thus, the aggregation rule did away with the direct-indirect test, thereby removing entirely the previous limits on the commerce power. In the void of the indirect and direct test, the aggregation doctrine instructed courts to consider only whether the actions of an individual, "taken together with [those] of many others similarly situated, [was] far from trivial."[19] If the aggregate impact was "far

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13 *See* Jones v. Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding application of the National Labor Relations Act to a steel producer with facilities across the country that produced goods primarily for sale in interstate commerce); *Darby*, 312 U.S. at 117 (adopting an affects test where activity can be regulated if "it is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it").

14 *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

15 *See id.* at 546 ("In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.").

16 Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936) (citing Chassaniol v. Greenwood, 291 U.S. 584, 587 (1934)).

17 *Id.* at 308.

18 *See* Wickard v. Filburn, 317 U.S. 111, 120, 125 (1942).

19 *Id.* at 127-28 (citing N.L.R.B. v. Fainblatt, 306 U.S. 601, 606 (1939); United States v. Darby, 312 U.S. 100, 123 (1941)).

from trivial," Congress' could regulate even the smallest instance of the activity. As a practical matter, this new rule could always be satisfied;[20] the Supreme Court rejected every commerce challenge it considered under the aggregation rule.[21]

An overlooked aspect of *Wickard*'s shift away from the indirect test is that the aggregation rule functioned largely by eliminating even as-applied Commerce Clause challenges. It was irrelevant whether an individual's actions were local or whether they had any effect on interstate commerce—whether direct or indirect—on their own, so long as her actions, combined with the actions of similarly situated individuals, had even an indirect affect on commerce.[22] In other words, if a litigant attempted to argue that a statute was unconstitutional under the Commerce Clause as-applied to his actions, the court would nevertheless consider the actions of all others engaged in the same activity. At that point, the only remaining requirement was that the activity, taken as a whole, have some impact on commerce. This requirement was, of course, met in every case because every activity impacts commerce if it is generally defined.[23] Thus, the aggregation doctrine left no limit on Congress' commerce power, either as-applied to particular litigants or to statutes as a whole. Because the aggregation doctrine prevented both facial and as-applied commerce challenges from succeeding, the doctrine's treatment of as-applied challenges was itself unexceptional. Following *Lopez*, however, the treatment of as-applied challenges under the aggregation doctrine became an essential, though still largely unnoticed, source of confusion in analyzing commerce challenges.

As already noted, *Lopez* and *Morrison* claimed to remain faithful to post-*Wickard* Commerce Clause jurisprudence and keep the aggregation rule in tact. [24] At the same time, however, the cases adopted and applied an entirely new Commerce Clause rule. The new *Lopez* rule came in the form of a four-part test[25] that considers (1) the economic nature of the regulated activity, (2) whether the statute contains an express jurisdictional element to limit its reach,

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20 *See* United States v. Lopez, 514 U.S. 549, 565 (1995) ("[D]epending on the level of generality, any activity can be looked upon as commercial.").

21 *See supra* note 9.

22 *Wickard*, 317 U.S. at 127-28.

23 *See supra* note 20.

24 *See* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 616-17 (2001) ("With one hand the majority refuses to relinquish the rational basis test, while with the other hand the majority strikes down legislation with standards that clearly are stricter than rational basis.").

25 In addition to the four-part test, the Court appeared to emphasize the "traditional state interest" but did not clarify how the consideration weighed in the new test. *See Lopez*, 514 U.S. at 561 n.3 (noting that states have primary authority over criminal law); *see also id.* at 577 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

(3) whether the statute's legislative history contains congressional findings on the impact of the regulated activity on interstate commerce, and (4) whether the effects of the regulated activity on interstate commerce are attenuated.[26] Of these factors, the test places particular emphasis on the economic (commercial) nature of the activity and whether it has an attenuated relationship with commerce. As the *Lopez* and *Morrison* majority put it, regulation of "economic activity" that "substantially affects interstate commerce . . . will be sustained,"[27] while regulation of noncommercial activity will almost certainly not.[28]

Despite the *Lopez* and *Morrison* majority's statements that the aggregation doctrine remained good law, the new economic-based rule seemed to replace the aggregation doctrine as the controlling method for analyzing Commerce Clause issues, at least in some instances. As the Court put it in *Morrison*, "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[29] Although the *Lopez* rule appeared to limit the reach of the aggregation rule, neither *Lopez* nor *Morrison* provided any discussion of how to reconcile the two rules or guidance on when one or the other would control in a particular case. This presented an especially difficult problem in instances where an individual's actions were noncommercial but the activity regulated by the terms of the statute was commercial. Because *Lopez* and *Morrison* applied the four-part test to strike down statutes in their entirety,[30] neither case directly questioned the aggregation rule's method of precluding as-applied challenges and considering activity only in the aggregate. Indeed, *Lopez* and *Morrison* did not discuss at all whether or how the four-factor test might be used in an as-applied challenge, where a statute regulated commercial activity on its face but the individual's actions that were covered by the statute were noncommercial. Should courts apply the *Lopez* test to the "aggregate" activity or the individual activity?

The Court's only attempt to distinguish the aggregation rule from the new test came in a cryptic statement in *Lopez* that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."[31] That claim is especially curious, however, because *Wickard* itself involved noncommercial activity[32] and applied the ag-

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26 *See* United States v. Morrison, 529 U.S. 598, 610-13 (2000).

27 *Lopez*, 514 U.S. at 560.

28 *See Morrison*, 529 U.S. at 613.

29 *Id.*

30 *Lopez*, 514 U.S. at 549 (holding the Gun Free School Zone Act unconstitutional); *Morrison*, 529 U.S. at 598 (holding the Violence Against Women Act unconstitutional).

31 *Lopez*, 514 U.S. at 560.

32 Indeed, *Wickard* seemed to treat the noncommercial nature of Filburn's actions as an important fact of the case. *See* Wickard v. Filburn, 317 U.S. 111, 118 (1942) ("The question would

gregation doctrine to uphold "marketing quotas [that] not only embrace all that may be sold without penalty but also what may be consumed on the premises."[33] In fact, the *Wickard* Court characterized the regulated activity in that case as something that "may not be regarded as commerce"[34] and noted that the case involved wheat "that is never marketed" and only "supplies a need of the man who grew it."[35] *Lopez* provided only a brief discussion elaborating on its claim that *Wickard* was distinguishable because it "involved economic activity in a way that possession of a gun in a school zone does not" and did not attempt to directly explain the statement.[36] Instead, *Lopez* quickly reviewed the facts of *Wickard* and noted that Filburn sold part of the wheat he had grown and put part of it to personal use.[37] The Court then quoted a passage from *Wickard* on the purpose of the Act and the need to regulate even wheat grown for personal use in order to achieve the goal of price regulation.[38] The discussion ended with a conclusory statement that the GFSZA was "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 [and] is not an *essential part of a larger regulation of economic activity*, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[39]

The Court's failure to adequately explain the relationship between its rule and the aggregation doctrine was the central cause of confusion in lower courts over the scope of congressional power following *Lopez* and *Morrison*, and was the animating force behind the dispute in *Raich*.[40] At its core, *Raich* was about how the fundamental inconsistencies between the *Wickard* and *Lopez* rules should be resolved and, in particular, how the *Lopez* rule should be applied to (1) a noncommercial activity if the statute regulating it covers generally commercial activity and (2) a generally noncommercial activity that is regulated as part of a broad regulatory scheme aimed at commercial activity.

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merit little consideration since our decision in *United States v. Darby*, sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation of production not intended in any part for commerce but wholly for consumption on the farm.").

33 *Id.* at 119.

34 *Id.* at 125.

35 *Id.* at 128.

36 *Lopez*, 514 U.S. at 560.

37 *Id.*

38 *Id.* at 560-61.

39 *Id.* at 561 (emphasis added). *See also id.* ("It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.").

40 *See infra* Part III.

III. MAKING SENSE OF *RAICH*

The facts in *Raich* fell almost perfectly into the area of tension between the *Wickard* and *Lopez* rules. *Raich* involved two medical marijuana patients, Angel McClary Raich and Dianne Monson, and two caregivers,[41] both litigating as John Does.[42] Monson cultivated her own marijuana while the John Does provided Raich, who was unable to grow her own due to the seriousness of her medical condition, with marijuana free of charge.[43] Monson and the John Does all grew their marijuana exclusively using materials from California[44] and all of their activity was lawful under state law, pursuant to California's Compassionate Use Act.[45] After the federal Drug Enforcement Agency (DEA) seized six marijuana plants from Monson's home in 2002, the four plaintiffs filed suit, seeking an injunction to prevent the federal government from enforcing the Controlled Substances Act (CSA) against them for possessing or cultivating marijuana for their personal medical use.[46]

The *Raich* case involved a noncommercial instance of cultivation, which is generally a commercial endeavor, as well as possession, a generally noncommercial activity that the federal government regulated as part of a broad scheme to control the market for marijuana in its entirety. Coincidentally, cultivation and possession were also the activities at issue in *Wickard* and *Lopez* respectively. Thus, *Raich* turned on how to reconcile the *Lopez* test and *Wickard*'s aggregation doctrine, the central question left unanswered in *Lopez* and *Morrison*. Relying on *Lopez* and *Morrison*, the plaintiffs argued that they were engaged in noncommercial, intrastate activity that fell outside the scope of Congress' Commerce Clause power.[47] The government did not dispute that the plaintiff's activity, taken alone, was intrastate and noncommercial.[48] Instead, it

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41 CAL. HEALTH & SAFETY CODE § 11362.5(e) (West Supp. 2005) (defining a medical marijuana caregiver under California's Compassionate Use Act).

42 Gonzales v. Raich, 125 S. Ct. 2195, 2200 (2005).

43 *Id.* For a detailed account of Raich and Monson's medical conditions, see Brief for Respondents at 4-6, Ashcroft v. Raich, 125 S. Ct. 2195 (2005) (No. 03-1454) [hereinafter Brief for Respondents].

44 Brief for Respondents, *supra* note 43, at 6 (noting that the plaintiff's medical "cannabis is grown using only soil, water, nutrients, equipment, supplies, and lumber originating from or manufactured within California").

45 CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005). Passed by California voters in a 1996 ballot initiative, the Compassionate Use Act exempts medical marijuana patients and their caregivers from other state drug laws. *Id.* The exemption is subject to limitations, such as a physician's recommendation. *Id.*

46 Brief for Respondents, *supra* note 43, at 7.

47 *Id.* at 12-34.

48 *See, e.g.*, Brief for Petitioners at 21, Ashcroft v. Raich, 125 S. Ct. 2195 (2005) (No. 03-1454) ("[T]he fact that respondents' conduct is not only intrastate, but also purportedly limited to distribution and possession for personal use, does not eliminate Congress's authority.") [hereinafter Brief for Petitioners].

relied on *Wickard* and argued that the plaintiff's actions could be regulated because the manufacture and possession of marijuana were economic activities in a general sense and the CSA was generally aimed at regulating economic activity.[49]

Throughout the case, the tension between *Lopez* and *Wickard* manifested itself in a dispute over what the proper "class of activity" was for purposes of applying the *Lopez* four-part test. The government argued that the Commerce Clause analysis should be based on the activity regulated by the CSA as a whole,[50] namely all marijuana-related activity. Raich argued that the analysis should focus on a smaller "class of activity"—the noncommercial, intrastate, medical marijuana activity authorized by California law.[51] Under the government's definition, a Court would first consider the CSA as a whole and then ask whether it was reasonable to include the plaintiffs' activity in the broad class of activities regulated by the CSA.[52] Raich's definition, by contrast, would lead a court to apply the four-part *Lopez* test to the narrow class of activity, thereby rendering the other aspects of the CSA irrelevant to the analysis.[53] The Ninth Circuit panel majority sided with Raich and the dissent agreed with the government.[54] The majority found that Raich's conduct constituted a "*separate and distinct class of activities*: 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."[55] It then applied *Lopez*'s test to that class of activity and held that the CSA was unconstitutional as applied to the Raich plaintiffs.[56] The dissent argued that the majority had adopted the wrong definition, noting that "[t]he *Wickard* Court could easily have defined the class of activities as 'the intrastate, noncommercial cultivation of wheat for personal food purposes.'"[57]

While the Ninth Circuit focused on how to define the class of activity for purposes of applying the *Lopez* test, Justice Stevens, writing for the *Raich* majority, did not apply the *Lopez* test, or even mention it at all. Instead, Stevens employed a generalized analysis that did not explicitly adopt any particular test or framework of analysis and touched on the class of activity dispute only in

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49 *See id.* at 21.

50 *See id.* at 13-22.

51 *See* Brief for Respondents, *supra* note 43, at 19.

52 *See* Brief for Petitioners, *supra* note 48, at 37.

53 *See* Brief for Respondents, *supra* note 43, at 23.

54 Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).

55 *Id.* at 1228.

56 *Id.* at 1234 ("[W]e find that the CSA, as applied to the appellants, is likely unconstitutional."). Because *Raich* involved the grant of a preliminary injunction, the question was whether application of the CSA was likely unconstitutional or unconstitutional. This posture, of course, did not impact the central interpretation of law adopted by the Ninth Circuit majority.

57 *Id.* at 1238 (Beam, J., dissenting).

rebutting the Ninth Circuit's approach. Stevens claimed to base his analysis on the overall premise that regulating intrastate marijuana cultivation and possession was "a rational (and commonly utilized) means of regulating commerce in that product."[58] The analysis began with a comparison between *Wickard* and *Raich*, in which Stevens argued that the similarities between the two cases were "striking,"[59] and concluded that, consistent with *Wickard*'s reasoning, Congress could reach the *Raich* plaintiffs activity as part of its effort "to regulate the interstate market in a fungible commodity."[60] After reaching this conclusion, the opinion continued by distinguishing *Lopez* and *Morrison* on the grounds that the "CSA is a statute that directly regulates economic, commercial activity,"[61] while the regulations struck down in *Lopez* and *Morrison* were not part of a statutory scheme that regulated economic activity. Justice Stevens did not explain with precision the relevance of this distinction, acknowledge that Raich's individual actions were noncommercial, or outline the factors future courts should use when determining whether Congress can and cannot regulate noncommercial activity. Indeed, the word "noncommercial" appears only three times in the majority's opinion—each time as part of the same quote from the Ninth Circuit's decision in which it defined, what it believed was the relevant "class of activity" for purposes of the Commerce Clause analysis.[62]

Though Justice Stevens did not address the class of activity question as a central part of his analysis, his brief discussion of the issue as well as his general approach seemed to adopt a view similar to the government's, though not quite as sweeping. His treatment of the class of activities issue came in criticizing the Ninth Circuit's decision. The Ninth Circuit was able to reach its result, he argued, "only by isolating a 'separate and distinct' class of activities that it held beyond the reach of federal power."[63] Stevens concluded that this approach was misguided because "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."[64] Although Justice Stevens did not focus on the class of activities issue in depth, his adoption of a broad view implicitly served as a foundation for his opinion. Justice O'Connor's chief criticism of the majority's approach, which she described as a "problem endemic to the Court's opinion,"[65] was that it "shift[ed the] focus from that activity at issue in this case to the entirety of what the CSA regu-

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58 Gonzales v. Raich, 125 S. Ct. 2195, 2211 (2005).

59 *Id.* at 2206.

60 *Id.* at 2209.

61 *Id.* at 2211.

62 *Id.* at 2201, 2211, 2215. The majority uses the word "noneconomic" only once, when quoting from *Morrison*. *Id.* at 2210.

63 *Id.* at 2211.

64 *Id.*

65 *Id.* at 2224 (O'Connor, J., dissenting).

lates."[66] She argued that the majority "t[ook] its cues from Congress"[67] in defining the relevant conduct at issue in the case and that, by "allowing Congress to set the terms of debate in this way," the Court's holding was "tantamount to removing meaningful limits on the Commerce Clause."[68]

Despite the fundamental role the definition of the class of activity played in *Raich*, none of the Supreme Court Justices viewed the distinction between possession and cultivation as important in isolating the activity to be analyzed.[69] The same was true of both parties and of the lower courts.[70] This is noteworthy because it would seem natural to analyze possession and cultivation differently. After all, if anything about the Commerce Clause was certain before *Raich*, it was that *Wickard* upheld the federal regulation of an individual instance of wheat cultivation[71] and *Lopez* struck down a statute that regulated possession of a gun in a school zone.[72] This is not to say that the Court *should* have resolved the case by allowing the federal government to reach the plaintiff's cultivation but not their possession, but merely that it is odd none of the opinions analyzed or discussed each activity separately. In particular, although the majority mentioned possession and manufacture independent of one another at times, it claimed to uphold regulation of both for the same reason, namely that they could be regulated as part of a broad regulatory scheme because "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product."[73] But, with the different treatment of cultivation in *Wickard* and possession in *Lopez* in mind, a close analysis of the majority's reasoning reveals that it implicitly relied on two distinct sub-rules to uphold regulation of cultivation and possession. First, the majority used *Wickard*'s aggregation doctrine in declining to apply the *Lopez* rule to Raich's individual act of cultivation on the theory that cultivation, in the aggregate, is an economic activity.[74] Second, *Raich* relied on a new rule to permit federal regulation of possession, an activity that is *generally* noneconomic.[75] Both rules fit within the majority's broader reasoning but each has different implications for analyzing Commerce Clause cases in the future and predicting the breadth of Congress' commerce power after *Raich*.

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66 *Id.* (citation omitted).

67 *Id.* at 2222.

68 *Id.*

69 *See* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

70 *See* Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).

71 *See* Wickard v. Filburn, 317 U.S. 111, 128-29 (1942).

72 *See* United States v. Lopez, 514 U.S. 549, 549 (1995).

73 *Raich*, 125 S. Ct. at 2211.

74 *See id.* at 2206-07.

75 *See id.* at 2211-15.

Justice Stevens' application of the aggregation doctrine resolved the question of whether the *Lopez* rule was limited to facial challenges or should also be used in as-applied challenges. Despite *Morrison*'s statement implying that the Court would not aggregate the effects of noncommercial activity,[76] Justice Stevens relied on the aggregation rule to hold that Congress could indeed "regulate purely local activities that are part of an economic 'class of activities.'"[77] In other words, *Raich* held that a plaintiff cannot bring an as-applied challenge based on the rule in *Lopez* because the aggregation doctrine allows Congress to regulate individual instances of noncommercial activity if the activity, in general, is commercial. This interpretation of the aggregation doctrine was sufficient by itself to support the Court's upholding the federal regulation of Raich's cultivation as constitutional, because production is an economic activity generally.[78] Justice Stevens' discussion of the similarities between *Wickard* and *Raich* demonstrates his use of the aggregation doctrine to uphold regulation of Raich's cultivation and implicitly justify his failure to apply the *Lopez* rule. He began the aggregation discussion by noting that "[l]ike the farmer in *Wickard*, respondents are *cultivating*, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."[79] And, after discussing the similar market forces at work, he concluded that in "both cases, the regulation is squarely within Congress' commerce power because *production* of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand of the national market."[80] On this interpretation, an activity must be noncommercial, in the aggregate, in order for the *Lopez* rule to apply. Because cultivation is an economic activity in general, this interpretation meant that Raich could not win on her cultivation claim.

Tellingly, Stevens did not mention possession even once in his comparison of *Raich* to *Wickard*.[81] This is because the aggregation doctrine itself did not provide a sufficient basis for upholding federal regulation of Raich's possession. The aggregation doctrine, as interpreted by *Raich*, functions by precluding

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[76] *See* United States v. Morrison, 529 U.S. 598, 613 (2000) ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld regulation of intrastate activity only where that activity is economic in nature.").

[77] *Raich*, 125 S. Ct. at 2205 (citing Perez v. United States, 402 U.S. 146, 151 (1971); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942)). Although the opinion says "local," the context indicates that the court uses local as shorthand for "noncommercial." This occurs throughout the opinion.

[78] *See id.* at 2211 (defining economics as "'the production, distribution, and consumption of commodities'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Possession is absent from this list.

[79] *Id.* at 2206 (emphasis added). *See also id.* ("*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").

[80] *Id.* at 2207 (emphasis added).

[81] *See id.* at 2206-09.

as-applied challenges based on the *Lopez* rule on the basis that the general regulation is valid. Unlike cultivation, possession is not an economic activity, even generally.[82] Although the Raich plaintiffs did not bring a facial challenge to the CSA's prohibition against marijuana possession[83] the majority could not have upheld the constitutionality of the CSA as-applied to the plaintiffs' possession if the possession provision were unconstitutional on its face. This was a problem in *Raich* because, if simple application of the aggregation doctrine could save a statute that regulated possession, *Lopez* would surely have been decided differently. Justice Stevens did not directly acknowledge this problem but his discussion distinguishing *Lopez* and *Morrison* reveals the rule that he adopted to solve it.[84] Stevens argued that the "Gun-Free School Zones Act of 1990 . . . was a brief, single-subject statute . . . [that] did not regulate any economic activity."[85] The CSA was "at the opposite end of the regulatory spectrum . . . a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'"[86] Thus, "unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990," Stevens concluded that the CSA's provisions were each "'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[87] As noted above, the larger regulatory scheme concept was mentioned in *Lopez* but left entirely undefined.[88] Under the interpretation adopted by Justice Stevens, single-subject regulations that would be vulnerable under the *Lopez* rule, are constitutional if they are part of a larger regulatory scheme and rationally related to achieving the ends of the scheme. Whereas the aggregation doctrine prevents an as-applied challenge if the general activity can be regulated under the Commerce Clause, the broader scheme doctrine concerns the facial validity of a regulation; it prevents even a successful facial challenge to a regulation based on *Lopez* if that regulation is part of a broader regulatory scheme.[89]

Justice Thomas' interpretation of the majority's opinion is consistent with the argument that the *Raich* majority's opinion implicitly rested on these two rules. Thomas observed in dissent that the majority gave three reasons to

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82 *See, e.g., id.* at 2219 (Scalia, J., concurring) (noting that "simple possession is a noneconomic activity" but finding that fact "immaterial to whether it can be prohibited as a necessary part of a larger regulation"); United States v. Lopez, 514 U.S. 549, 549 (1995) (finding possession of a gun in a school zone to be noncommercial activity).

83 *Raich*, 125 S. Ct. at 2204 ("Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority.").

84 *See id.* at 2209.

85 *Id.*

86 *Id.* at 2210.

87 *Id.* (quoting *Lopez*, 514 U.S. at 561).

88 *See generally* Alex Kreit, *Why is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL'Y 169 (2004) (discussing the broader regulatory scheme doctrine).

89 *See infra* Part IV.A (analyzing the broader scheme rule).

support its conclusion: "First, respondent's conduct, taken in the aggregate, may substantially affect interstate commerce; second, regulation of the respondents' conduct is essential to regulating the interstate marijuana market; and, third, regulation of respondents' conduct is incidental to regulating the interstate marijuana market."[90] He did not discuss the implications of each reason separately, or characterize them as distinct rules; the observation was only part of a brief overview of the majority's approach. The reasons identified by Thomas, however, track the two rules identified above. The first reason listed by Justice Thomas mirrors the aggregation doctrine, while the second and third reasons form the "broader scheme" rule. So, although the *Raich* majority did not explicitly identify any rules, or even a general framework, that grounds its approach and, instead, appeared to rely on a generalized argument that Congress can reach noncommercial intrastate activity in connection with its valid purpose of regulating the interstate drug market, these two distinct rules animate this reasoning and will shape its application.

Isolating the two rules used in *Raich* is helpful to understanding the scope of the commerce power, and, similarly, what meaning *Lopez*'s rule against the regulation of noncommercial activity might retain, after *Raich*. The analysis reveals that *Raich* turns *Lopez*'s substantive limitations on what activities Congress can constitutionally regulate into procedural limits that Congress will generally be able to easily overcome. Moreover, *Raich* suffers from a number of unexplained inconsistencies with *Lopez* and *Morrison* that are sure to cause confusion for courts trying to determine what rule to apply in analyzing Commerce Clause questions. Finally, *Raich*'s treatment of the rule announced in *Lopez* and *Morrison* is difficult to reconcile with the Court's basic principles of constitutional adjudication. In particular, the majority's failure to apply *Lopez*'s rule to the particular activity involved in *Raich* conflicts with the rule that as-applied challenges are preferred to facial challenges.

IV. A LIMITLESS COMMERCE POWER

Raich yields a Commerce Clause jurisprudence with three basic overlapping doctrinal rules. First, there is *Lopez*'s four-part test. Although the *Raich* majority did not apply or mention *Lopez*'s test, it treated *Lopez* as established law and did not claim to overrule either *Lopez* or *Morrison*. Second, *Wickard*'s aggregation rule remains good law and, after *Raich*, operates to limit, or perhaps forbid entirely, the use of as-applied commerce challenges. At the very least, *Raich* does not recognize as-applied challenges based on the four-part *Lopez* test. Third, *Raich* creates an entirely new "broader scheme" test, based on language from *Lopez*, which upholds regulations that would fail the *Lopez* test as single-subject regulations, if the regulations are part of a broader regulatory scheme. The second and third rules both significantly limit the reach

90 *Raich*, 125 S. Ct. at 2234 (O'Connor, J., dissenting).

of *Lopez*'s rule, by making it inapplicable in a large number of circumstances. *Raich*'s failure to clearly announce a framework of analysis makes it difficult to predict exactly how the rules will function and interact in the future. But, *Raich*'s use of the aggregation doctrine and the broader scheme rule demonstrates that, at a minimum, *Lopez*'s substantive limits on congressional commerce power are now largely only procedural limits. This is because, after *Raich*, *Lopez*'s test only applies in a very limited circumstance: facial challenges to stand-alone regulations. This section considers the scope of the commerce power after *Raich* and examines what issues are most likely to present close commerce questions in the future. Part A focuses on the broader scheme rule and Part B on the aggregation rule.

A. *The Broader Scheme Doctrine*

The most striking aspect of *Raich*, with respect to its practical implications for the scope of the commerce power, is that it upheld the CSA's regulation of simple possession of marijuana. This is because, under that holding, Congress can regulate *generally* noncommercial activity in some circumstances, even if a straightforward application of the *Lopez* test would have placed the activity outside federal reach. *Raich* does not clearly explain how courts in the future should decide whether a regulation of a noncommercial activity, like possession, is valid under *Raich* or invalid under *Lopez*. But, wherever the line is drawn, the debate in future cases will focus on whether a regulation is an "essential part of a larger regulation of economic activity, in which the regulation would be undercut unless the [noncommercial] activity were regulated."[91] As discussed above, the Court's reliance on the broader scheme concept to distinguish *Lopez* and *Morrison* unmistakably singles it out as the method for determining which congressional regulations of generally noncommercial activity are valid exercises of the commerce power and which are not. An examination of this rule shows that, at a minimum, it significantly limits the reach of *Lopez* and *Morrison* by turning substantive limits on the commerce power into procedural limits and indicates the difficult issues courts will face in determining where *Lopez*'s test ends and the broader scheme rule begins.

At the most basic level, *Raich*'s broader scheme rule permits Congress to overcome *Lopez*'s limits in at least some instances by including regulations that target noncommercial activity within a broad regulatory scheme. This alone removes *Lopez* and *Morrison*'s substantive limits on the commerce power as a practical matter. For example, after *Raich*, Congress could constitutionally pass the exact same regulation struck down in *Lopez* by enacting a broad regulatory scheme aimed at eliminating illegal interstate commerce in guns,[92] criminalizing gun possession as part of the effort and including a penalty enhance-

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91 *Lopez*, 514 U.S. at 561.

92 Putting aside, of course, any Second Amendment concerns.

ment for offenses in a school zone.[93] As Justice O'Connor put it in dissent, *Raich* turns *Lopez* into "little more than a drafting guide"[94] because Congress can circumvent the *Lopez* test by placing regulations that would be unconstitutional on their own in a broad scheme. Thus, the broader scheme doctrine turns the focus of the Commerce Clause away from what Congress may regulate to *how* Congress may regulate. This result conflicts with *Lopez*'s focus on limiting what activities Congress may regulate under the Commerce Clause[95] and might even give Congress a "perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes[.]"[96] It is important to emphasize that the broader scheme rule will have this effect regardless of how any of the questions left unanswered in *Raich* are resolved. This is because, even if the broader scheme is given a very limited interpretation, it is still, at its core, a rule that permits Congress to pass regulations that would be unconstitutional as stand-alone statues by including them in a "broader regulatory scheme."

Although the broader scheme rule will undoubtedly permit Congress to regulate almost any activity so long as it does so in a certain way, the drafting requirements the rule places on Congress are far from clear. First, as Justice O'Connor noted, it is difficult to reconcile *Raich*'s broader scheme rule with *Lopez* because the GFSZA was itself attached to a scheme of gun regulation that targeted the sale of guns to minors. O'Connor argues that "[a]ccording to the Court's and concurrence's logic . . . the *Lopez* court should have reasoned that the prohibition on gun possession in school zones could be an appropriate means of effectuating a related prohibition on 'sell[ing]' or 'deliver[ing]' firearms or ammunition to 'any individual who a licensee knows or has reasonable cause to believe is less than eighteen years of age.'"[97] The majority inexplicably failed to address this point, and Justice O'Connor did not discuss it at length, but it is particularly important to understanding the contours of the broader scheme rule.

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[93] Kreit, *supra* note 88, at 171. *See also* United States v. Adams, 343 F.3d 1024, 1033 n.10 (9th Cir. 2003) (adopting a similar interpretation of the broader scheme doctrine and concluding that "there is little doubt that if Congress had intended to eliminate the interstate market for guns . . . Congress could proscribe the intrastate possession of firearms").

[94] *Raich*, 125 S. Ct. at 2218 (O'Connor, J., dissenting).

[95] *See Lopez*, 514 U.S. at 564 ("Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate"); *see also id.* ("Again, Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial.").

[96] *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting). *See also* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001) (arguing that the broader scheme doctrine creates perverse incentives for Congress to regulate broadly); Kreit, *supra* note 88, at 185 (same).

[97] *See id.* at 2226 (O'Connor, J., dissenting) (quoting 18 U.S.C. § 922(b)(1) (Supp. II 1988)).

In his concurrence, Justice Scalia offered a brief attempt to reconcile *Raich*'s broader scheme rule with the result in *Lopez* in a footnote.[98] Scalia argued that *Lopez* was unlike *Raich* because "it is . . . difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1000 feet of schools (and nowhere else)."[99] More specifically, Scalia contended that Justice O'Connor's argument was unpersuasive because "the relationship between the regulatory scheme . . . [which] require[s] all dealers in firearms that have traveled in interstate commerce to be licensed . . . and the statute at issue in *Lopez* approaches the nonexistent."[100] In other words, according to Scalia, the GFSZA was not saved by the broader scheme rule because it did not have a sufficiently close connection to the scheme's goal of licensing. The problem with this argument is that it mistakenly treats gun licensing as the goal of the scheme when that was not the scheme's purpose at all. The *goal* of the scheme was to regulate and restrict the sale of guns to certain groups of people, such as minors—licensing was merely a means to achieve those ends. So, although the prohibition of gun possession in school zones is not related to effectuating a licensing program, both are rationale means for Congress to "effectuate its objective"[101] of eliminating the interstate market for the sale of guns to minors. In short, Justice Scalia's distinction does not address why the GSFZA was not an "appropriate means of achieving the legitimate end of eradicating [the sale of guns to minors] from interstate commerce."[102]

This fundamental problem raises the question of whether *Lopez* and *Raich* can be reconciled at all. It also highlights the difficulty future courts will face in determining how to apply the broader scheme rule and, in particular, what limits, if any, the rule has. The rule itself implies two considerations or factors courts might use in analyzing broader scheme issues. First, the "larger regulatory scheme" language itself indicates that the breadth of the scheme could play an important role. At the very least, the language seems to mean that a stand-alone regulation will not be protected by the test. But, what about a "scheme" that consists of only two provisions, or three provisions? In other words, if size is an important factor, how should courts determine what constitutes "a larger regulation of economic activity?"[103] The inquiry would almost certainly be an exercise in arbitrary line-drawing. Fortunately, despite the "larger scheme" language, *Raich*'s application of the broader scheme doctrine indicates the schemes' size carries little, if any, weight. Although *Raich* mentions

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98 *Id.* at 2220 n.3 (Scalia, J., concurring).

99 *Id.*

100 *Id.*

101 *Id.* at 2219.

102 *Id.*

103 *Id.* at 2209 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

that the CSA is a "comprehensive"[104] scheme in its discussion and contrasts it with the "brief, single-subject statute"[105] in *Lopez*, its analysis is not based on the CSA's size. Indeed, the size of the statute would seem to be a peculiar basis for deciding whether to uphold or strike down a regulation. If, for example, Congress passed a large regulatory scheme that regulated only noncommercial activity and contained a preamble stating that Congress "recognizes all of the activity regulated by the statute is noncommercial in nature and only tenuously connected to interstate commerce but can properly regulate it in this broad scheme," it seems unlikely that the Court would find it constitutional, even if it had 500 different provisions. In other words, if all of the activity regulated is noncommercial and the purpose behind the regulation is invalid, why should the size of the regulatory scheme make any difference?

Instead of focusing on the size of the CSA, the Court focused on the relationship between the CSA's purpose and its regulation of noncommercial activity. For example, the Court emphasized that "[p]rohibiting the [noncommercial] intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product."[106] In other words, the inquiry underlying the broader scheme doctrine in *Raich* appeared to focus on the importance of the potentially unconstitutional provision to achieving the scheme's "legitimate" purpose.[107] This reasoning is built on the argument that the broader scheme's purpose could be "undercut" if the suspect regulation were removed. Importantly, under this view, a regulation is defined as "essential" in relation to the valid purpose of the scheme. Thus, *Raich* holds that regulating marijuana possession is an essential part of the CSA because it is a "rational (and commonly utilized) means of regulating commerce in [marijuana]."[108] Scalia's attempt at distinguishing *Lopez* from *Raich* also supports this reading of the broader scheme rule as he contended the key difference was that the GFSZA did not have a sufficiently close relationship to the purpose of the broader scheme.

Reading the broader scheme rule as concerned with the relationship between the purpose of the scheme and the suspect regulation seems to be the most sensible interpretation of the doctrine. But, if the key considerations are whether the congressional purpose is legitimate and whether the questionable regulation is closely related to that purpose, why should the existence of a

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104 *Id.* at 2211.

105 *Id.* at 2209.

106 *Id.* at 2211; *see also id.* at 2209. ("Given the . . . concerns about diversion [of marijuana] into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.").

107 *See id.* at 2212 ("The congressional judgment that an exemption for [intrastate noncommercial marijuana activity] would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity.").

108 *Id.* at 2211.

scheme matter at all? One could argue that regulating sale in combination with possession is a more *effective* way to regulate commerce in a product than regulating possession alone. But, Congress' decision not to regulate sale or distribution of a good does not impact the conclusion that regulating possession of a good is a *rational means* of regulating commerce in that good. Thus, the justification for permitting Congress to regulate possession in *Raich* would seem to apply with equal force to a single subject statute that regulates possession, so long as it was enacted to effectuate a legitimate purpose. If, as *Raich* indicates, the broader scheme rule exists to ensure Congress can choose its preferred means to achieve a legitimate end, why should Congress have to choose between a broad scheme that regulates every aspect of a market or nothing? Why shouldn't Congress be able to decide that a statute forbidding gun possession in a school zone is a better way to regulate the interstate market for the sale of guns to minors than a broad scheme that might place additional burdens on legitimate gun sales? This is not to argue that *Raich* will or should permit a single-subject regulation of noncommercial activity, especially since it claims to leave *Lopez* as good law. But the fact that the reasoning underlying the Court's interpretation of the broader scheme doctrine seems to apply with equal force to a stand alone regulation as it does to one included in a broad scheme, highlights a key problem courts are likely to face in attempting to construct a principled limit to the reach of the broader scheme rule. Courts applying the broader scheme rule in the future will have to determine both whether, and to what extent, the breadth of the scheme at issue matters, and the extent to which Congressional purpose can save an otherwise unconstitutional regulation.

B. The Aggregation Doctrine

As discussed above, the scope of the commerce power was so expansive after *Wickard* in large part because the aggregation doctrine eliminated even as-applied Commerce Clause challenges. Before *Wickard*, the controlling Commerce Clause test focused on the intrastate, local character of an activity as a limit on congressional commerce power.[109] *Wickard* held that even the most local, intrastate activity could be regulated so long as the activity, in the aggregate, had an affect of commerce.[110] *Lopez* created a new Commerce Clause test focused on whether the regulated activity was commercial or noncommercial in the context of a facial challenge but did not indicate whether that test would be employed in as-applied challenges or discuss how it related to the aggregation doctrine. This raised the question of whether the *Lopez* rule applied to individual noncommercial activity or only activity that was noncommercial in the ag-

[109] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) ("In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.").

[110] Wickard v. Filburn, 317 U.S. 111, 128 (1942).

gregate? *Raich* resolved this by declining to apply *Lopez*'s rule to as-applied challenges. Instead of applying *Lopez*'s four-part test to the plaintiff's individual actions, or to their limited class of activity, the majority relied on the aggregation doctrine and concluded that the fact that "the [CSA] ensnares some purely [noncommercial] activity is of no moment."[111] Thus, the aggregation rule, as interpreted by *Raich*, prevents courts from singling out an individual's actions and applying the *Lopez* test. Instead, courts must always consider the activity in the aggregate.

Before *Raich*, the overwhelming majority of successful Commerce Clause challenges came in the form of as-applied challenges that analyzed the particular actions, or limited class of activity, in a given case under the four-part *Lopez* test.[112] A comprehensive study of lower court Commerce Clause cases conducted by Professors Brannon P. Denning and Glenn H. Reynolds in 2003 found only one post-*Morrison* case in which a statute was held facially unconstitutional, and that decision was overturned en banc.[113] Likewise, a similar study by the two that was published in 2000 shortly before the Supreme Court's decision in *Morrison*, found only one post-*Lopez* case in which an appeals court had struck down a statute on its face on Commerce Clause grounds and that was *Morrison* itself.[114] By contrast, Denning and Reynolds found nine post-*Morrison* examples of successful as-applied challenges, and there have since been several other such decisions, including *Raich* itself.[115] These courts have sustained as-applied challenges by applying the four-part *Lopez* test to the particular conduct at issue or the "class of activity" within which that conduct falls.[116] *Raich*'s interpretation of the aggregation rule would have lead those courts to hold for the government in each of those cases because it prevents *Lopez*'s test from being used in as-applied challenges. This means, if *Raich* had been decided alongside *Lopez*, even putting aside the broader regulatory scheme rule, the only successful challenge post-*Lopez* would have come in *Morrison*.[117]

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111 *Raich*, 125 S. Ct. at 2209.

112 Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1263 (2003).

113 *See id.*

114 *See id.* at 1254 ("At the time we wrote our article, in fact, though literally hundreds of cases involving a Lopez challenge had been decided between 1995 and 1999, only one appeals court had found a federal statute invalid on its face.").

115 *See, e.g.*, United States v. McCoy 323 F.3d 1114 (9th Cir. 2003); United States v. Stewart 348 F.3d 1132 (9th Cir. 2003); United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004); United States v. Smith, 402 F.3d 1303 (11th Cir. 2005); *but see* United States v. Morales-De Jesus, 372 F.3d 6 (1st Cir. 2004).

116 *See, e.g., Maxwell*, 386 F.3d at 1067 (concluding that "Morrison's four considerations reveals no rational basis for concluding that the conduct for which Maxwell was convicted substantially affects or affected interstate commerce").

117 *See supra* notes 113-14 and accompanying text (noting that only one facial challenge had been successful and a second had succeeded before a panel but was reversed *en banc*). My re-

Thus, *Raich*'s holding that as-applied commerce challenges should not be analyzed under the *Lopez* test will have a dramatic impact on the scope of Congress' commerce power. However, as with the broader scheme rule, the Court's generalized analysis and failure to adopt or discuss a clear framework for analyzing future cases leaves some important issues unanswered.

Although *Raich* will prevent litigants from relying on the application of *Lopez* to their individual actions in bringing a commerce challenge, it does not directly address whether there can ever be a successful as-applied commerce challenge and, if so, what the doctrinal basis for the challenge would be. Indeed, none of the opinions in *Raich* discuss the subject of as-applied challenges in any depth. Justice Stevens' opinion might appear to assume that as-applied Commerce Clause challenges could be appropriate in some circumstances in that he did not expressly adopt the government's view that the *only* relevant activity in commerce analysis was the broad activity defined in the statute by Congress.[118] But, given *Raich*'s interpretation of the aggregation doctrine, can there really ever be a successful as-applied challenge after *Raich* and, if so, on what grounds?

If the aggregation rule does permit as-applied Commerce Clause challenges, one thing is certain--they cannot be based on a straightforward application of the *Lopez* test to the activity or "class of activity" involved in the case. If such as-applied challenges based on *Lopez* were allowed, *Raich*, of course, would have reached the opposite result. As Justice O'Connor noted in *Raich*, "[e]veryone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it."[119] Indeed, it's hard to imagine an activity that is less commercial than growing and possessing a plant for your own medical use. Thus, if there is such a thing as an as-applied Commerce Clause challenge after *Raich*, the *Lopez* test will not play the determinative role in the analysis.

Instead, the only possible basis for an as-applied challenge left open by *Raich* would be to argue that the particular activity, or class of activity, at issue is so unlike the activity regulated by the statute generally that Congress could not have rationally included it in the generally defined activity. In such a scenario, the as-applied challenge could theoretically go forward because the specific (noncommercial) activity would be so different from the general (commercial) activity defined in the statute that they could not be aggregated. Parts of Justice Stevens' opinion indicate this option may remain open after *Raich*. Stevens' brief discussion of the class of activities question, for example, concludes that "Congress acted rationally in determining that none of the characteristics making up the [plaintiff's] purported class, whether viewed individually or in

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search did not reveal any instances of successful facial commerce challenges that have occurred after the Denning and Reynolds article was published.

[118] *See* Legal Theory Blog, http://lsolum.blogspot.com/archives/2005_06_01_lsolum_archive.html#111806792342237189 (June 6, 2005, 06:13:00 P.M.).

[119] Gonzales v. Raich, 125 S. Ct. 2195, 2225 (2005) (O'Connor, J., dissenting).

the aggregate, compelled an exemption from the CSA[.]"[120] This statement, while not a model of clarity for guiding future cases, implies that a case could arise where a characteristic of the activity, or class of activity, is so distinct that it would not be rational to define it as part of the economic activity covered by the statute generally.

On the other hand, other statements in *Raich* suggest the Court will always defer to Congress' definition in applying the aggregation rule, in which case as-applied commerce challenges could never succeed under any circumstances. Specifically, Stevens states that "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce"[121] and that "when Congress decides that the 'total incident' of a practice poses a threat to a national market, *it may regulate the entire class.*"[122] These passages may mean that all commerce challenges will be viewed as facial challenges after *Raich*. Assuming for purposes of this discussion, however, that as-applied commerce challenges are technically still permitted, it is difficult to think of many scenarios in which a litigant could possibly meet the requirements for success.

To succeed in an as-applied commerce challenge after *Raich*, a litigant would have to show, first, that her activity was so distinct as to "*compel*[] an exemption"[123] from the generally defined activity (in other words, that it is not *rational* to include the specific activity in the general definition) and, second, that her activity is itself outside the scope of the commerce power. A 1965 Sixth Circuit case, *United States v. Ohio*,[124] provides an example of the sort of scenario that may support singling out a particular activity from that covered by the statute generally for purposes of applying the aggregation rule. The case, like *Wickard*, involved a claim under the Agricultural Adjustment Act of 1938.[125] The state of Ohio operated state-run wheat farms at its prisons and mental institutions as a "means of occupational training and [was] . . . an integral part of the program for individual therapy and rehabilitation."[126] The institutions harvested wheat above their Agricultural Act allotment and the United States filed suit.[127] Ohio's state constitution provided that nothing produced by prison or mental institution inmates could be "sold, farmed out, contracted, or given away."[128] In addition, all of the wheat produced on the State farms was

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120 *Id.* at 2211.

121 *Id.* at 2205.

122 *Id.* at 2206 (emphasis added).

123 *Id.* at 2211 (emphasis added).

124 354 F.2d 548 (6th Cir. 1965).

125 *Id.* at 551.

126 *Id.*

127 *Id.*

128 *Id.*

used and consumed by State institutions.[129] Ohio argued that its program was outside the scope of the commerce power and the Agricultural Act because its wheat could not possibly have been "held available for marketing."[130] The Sixth Circuit agreed and found that the state-run farms could not be "aggregated" with other wheat production because "it cannot be said that any of the wheat produced on the state-owned farms was in a 'marketable condition' at any time or that wheat grown under such circumstances 'overhangs the market.'"[131] The panel thus decided to adopt a narrow construction of the statute to uphold Ohio's program and avoided ruling on the ultimate Commerce Clause issue. The Supreme Court, however, summarily reversed the Sixth Circuit in a one sentence per curium opinion that cited *Wickard*.[132] Although the Supreme Court's reversal indicates that the aggregation doctrine, and *Raich*'s interpretation of the aggregation doctrine in relation to *Lopez*, might not permit as-applied challenges under any circumstances, the facts in the Sixth Circuit opinion are consistent with the type of program that could arguably be so distinct from the general activity that it could potentially ground a successful as-applied challenge after *Raich*.

A hypothetical medical marijuana example similar to the Ohio program helps demonstrates the argument that one might make in bringing an as-applied commerce challenge after *Raich*. In this hypothetical, a state owns and operates its own medical marijuana clinics. In these clinics, the state grows its own marijuana and provides it to registered patients on site and free of charge. Patients are strictly prohibited from removing any marijuana from the facilities. The clinics do not allow patients to bring bags or backpacks into the rooms where they consume their medicine, and authorities perform pat-down searches of each patient as he is leaving the clinic. [133] In a commerce challenge, the state-run clinic could argue that the CSA cannot constitutionally apply to its activities because its actions cannot rationally be aggregated with typical marijuana-related activity. A few statements in *Raich* would support this argument. For example, Justice Stevens pointed out the possibility of "diversion of homegrown marijuana"[134] into the interstate market as a justification for his interpretation and application of the aggregation rule. Similarly, in explaining why the plain-

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129 *Id.* at 553.

130 *Id.*

131 *Id.* at 555.

132 *See* United States v. Ohio, 385 U.S. 9 (1966).

133 Before *Raich*, I proposed a similar hypothetical and argued that a state-run medical marijuana system would have a better chance of succeeding in an as-applied Commerce Clause challenge to the CSA than the Raich plaintiffs. *See* Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1816-17, 1824-25 (2003). This hypothetical is not meant to imply that a program of this sort could provide patients with the services they need as a practical matter. But, it is a good example for purposes of examining how *Raich* impacts as-applied commerce challenges.

134 Gonzales v. Raich, 125 S. Ct. 2195, 2207 (2005).

tiff's class of activity was indistinguishable from the activity covered by the CSA generally, Justice Stevens argued that the existence of California's law did not help the plaintiffs because "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly one that Congress could have rationally rejected."[135] The clinic, by contrast, could argue that its program is indeed sealed off from the market and that there is no possibility marijuana will be diverted into the market. Thus, the clinic would argue, Congress could not have rationally "conclude[d] that failure to regulate that class of activity [engaged in by the clinic] would undercut the regulation of the interstate market in that commodity."[136]

Although a program of this sort is the most likely candidate to succeed in an as-applied commerce challenge after *Raich*, it would face significant obstacles. The government could rely on passages in *Raich* that indicate the aggregation rule does not allow any activity to be singled out, such as the statement that "[w]hen Congress decides that the 'total incident' of a practice poses a threat to a national market, *it may regulate the entire class.*"[137] In addition, even if there were no danger that the marijuana in the hypothetical would be diverted into interstate commerce, it could still impact the marijuana market by reducing demand for marijuana in the regular market on the part of the patients.[138] Finally, *Raich* also states that "state action cannot circumscribe Congress' plenary commerce power."[139] In any event, whether or not *Raich* leaves open the possibility for an as-applied challenge, its application of the aggregation rule makes clear that courts will not analyze as-applied challenges under the *Lopez* test and that any as-applied challenge would have to be based on distinguishing the individual activity from the activity targeted by the statute. This would be a very difficult standard to meet and could only be useful, if at all, in very limited circumstances. For example, it is hard to conceive how any individual could rely on this as-applied challenge theory. If an individual could bring a successful as-applied challenge by demonstrating that her activity was reliably intrastate and outside of commerce, *Raich* would have been decided differently. Thus, it seems that, assuming as-applied challenges are even allowed at all, only an official state program could sufficiently contain an activity within the state to have a chance of success. Even if as-applied challenges of this sort are permitted in the

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135 *Id.* at 2213.

136 *Id.* at 2206; *see also id.* at 2197 ("Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.").

137 *Id.* at 2206 (emphasis added).

138 *See id.* at 2207 (arguing that regulation was proper because "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions").

139 *Id.* at 2213.

future, *Raich* leaves a Commerce Clause jurisprudence in which as-applied challenges are severely disfavored and facial challenges, despite the broader scheme rule, continue to provide the best opportunity for success. The next section analyzes whether this is consistent with the basic principles of constitutional adjudication and, in particular, the principle that facial challenges should be rare and as-applied challenges the norm.

V. AS-APPLIED CHALLENGES, THE *LOPEZ* RULE, AND PRINCIPLES OF CONSTITUTIONAL ADJUDICATION

Lopez and *Morrison* provoked "a vigorous reexamination of the scope and purpose of the Commerce Clause," [140] but, amidst the discussion about the extent of the Court's renewed commerce power limits, courts and commentators have not considered in depth the fact that *Lopez*'s new test was used in facial challenges.[141] Both *Morrison* and *Lopez* overturned regulations in their entirety based on the four-part test and neither case discussed how the four-part test might be employed in an as-applied challenge. Although the lack of attention to the fact that *Lopez* and *Morrison* both involved facial challenges is somewhat understandable in light of the aggregation doctrine's strict treatment of as-applied commerce challenges,[142] it is odd when one considers that "as-applied challenges are the basic building blocks of constitutional adjudication"[143] and "facial challenges are appropriate, if at all, only in exceptional circumstances."[144]

The Supreme Court most famously discussed its preference for as-applied challenges in *United States v. Salerno*, when it stated that, in order to bring a successful facial challenge outside of the First Amendment context, "the challenger must establish that no set of circumstances exists under which the Act would be valid."[145] *Salerno*'s strict characterization of the preference for as-applied challenges generated a significant amount of commentary and debate about both the practical rules governing the use of facial challenges and the theoretical nature and structure of enforcing constitutional rights.[146] A brief

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[140] Arthur B. Mark, *Currents in Commerce Clause Scholarship Since Lopez: A Survey*, 32 CAP. U. L. REV. 671, 672 (2004).

[141] *See generally id.* (providing a detailed overview of Commerce Clause scholarship none of which focus on this question).

[142] *See supra* Part II.

[143] Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000).

[144] Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 361 (1998).

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

[146] *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN L. REV. 235 (1994); *see also infra* notes 147-57 and accompanying text (discussing the debate over the use of as-applied and facial challenges).

look at the debate is helpful to understanding the meaning behind the Court's preference for as-applied challenges and to determining whether *Raich*'s treatment of as-applied challenges is consistent with the principles of constitutional adjudication.

In one of the most well-known discussions of the structure of constitutional adjudication, Matthew Adler attacked *Salerno* and argued that there was "no such thing as a true as-applied constitutional challenge . . . [because] [t]he concept of unconstitutionality does not attach to the treatment of particular litigants."[147] Adler's theory was based on the proposition that the constitution "protects the rights-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules under which the action falls."[148] For example, someone who has been punished for burning the American flag could successfully bring a First Amendment challenge if she was convicted under a statute that prohibited flag burning but not if she was convicted under an arson statute.[149] From this, Adler concludes that it is a "mistaken . . . notion that rule-applications can be properly described as unconstitutional,"[150] and that all constitutional challenges are facial challenges in the sense that "every constitutional challenge involves the facial scrutiny of rules."[151]

Although Adler's provocative conclusion about as-applied challenges does not describe the current practice of the Supreme Court,[152] his insights into the use of rules in constitutional litigation are vitally important to understanding the difference between as-applied and facial challenges. Richard Fallon, Jr. focused on the importance of rules in a response to Adler that defended as-applied challenges. Fallon argued that "all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her" and that "facial challenges and invalidations are best conceptualized as incidents or outgrowths of as-applied litigation."[153] Importantly, he agreed with Adler that "many constitutional rights are rights against rules (or . . . subrules),"[154] but ar-

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147 Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998).

148 *Id.* at 3.

149 *Id.* at 3-7; *see also* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 859-60 (2004) (discussing this aspect of Adler's argument).

150 Adler, *supra* note 147, at 157.

151 *Id.*

152 Fallon, *supra* note 143, at 1335 (agreeing with Adler's insight into the use of rules in constitutional adjudication but arguing that his "account [of as-applied challenges] is out of touch with the ordinary notions of how courts construe statutes").

153 *Id.* at 1324.

154 *Id.* Fallon did not agree with this proposition entirely, however. He noted that, while "some important rights are rights against rules . . . [a] few rights involve absolute immunities from government coercion[.]" *Id.* at 1365.

gued this principle was "entirely compatible with the familiar understanding that as-applied challenges are the normal mode of constitutional adjudication."[155] This is because "statutes are often best understood as encompassing a number of subrules, which frequently are specified only in the process of statutory application, and that some subrules may be validly applied even if others may not."[156] Thus Fallon concluded, "as-applied challenges-as appropriately characterized-remain the normal and logically primary mode of constitutional attack on a statute[.]"[157]

A detailed look at this debate is beyond the scope of this article. The important point for our purposes is that constitutional litigation is based on constitutional rules. Once a court has found a violation of a constitutional rule, its decision to invalidate the statute as-applied to the circumstances in a case or in its entirety is usually merely a function of the substantive constitutional rule at issue and the rules of severability. As Michael Dorf has put it, "a litigant can prevail on a facial challenge only if she can prevail on an as-applied challenge, and even then she may lose the facial challenge."[158] These principles explain both why *Salerno*'s statements do not restrict the use of facial challenges as tightly as they might seem to at first and why as-applied challenges are the preferred method of constitutional adjudication.[159] Although *Salerno*'s "no set of circumstances" language sounds difficult to satisfy, it is merely "a descriptive claim about a statute whose terms state an invalid rule of law."[160] These "valid rule"[161] facial challenges are a product of substantive constitutional rules and are uncommon only because the principles of severability generally lead to application-specific results.[162] Sometimes, however, every possible application of a statute will be unconstitutional under a particular constitutional rule, in which case *Salerno*'s "no set of circumstances" rule will be satisfied. Alternatively, cases can arise where a court is unable to sever a statute's unconstitutional applications from its constitutional applications and, therefore, must strike down, or alter, the statute in its entirety.

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155 *Id.* at 1329.

156 *Id.* at 1334.

157 *Id.* at 1368.

158 Dorf, *supra* note 146, at 239.

159 *Id.* at 251-83 (noting various areas where the Court has recognized facial challenges and discussing the principles of severability).

160 Isserles, *supra* note 144, at 364.

161 *See generally id.* (discussing the valid rule facial challenge); Henry Paul Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 3 (same).

162 *See* Fallon, *supra* note 143, at 1324 ("[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity."); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 881 (2005) ("[W]hat differentiates facial and as-applied challenges is not the breadth of the challenge, but the nature of the claim being asserted.").

Although the circumstances that give rise to a successful valid rule facial challenge will depend on the unique factors of each statute and constitutional rule, they often fall into general categories.[163] Purpose-based constitutional rules, for example, are one of the most recognizable forms of valid rule facial challenges, in large part because they inherently lead courts to consider the facial validity of a statute.[164] Under a purpose test, a court considers only whether the purpose of the statute is constitutionally defective.[165] Thus, a challenge based on a purpose rule will never depend on the facts of the case. Either the statute will be unconstitutional in every one of its applications, or in none of them.

While rules that focus on a statute's purpose always test the facial validity of a statute, most valid-rule facial challenges are the result of constitutional rules that can be employed in either as-applied and facial challenges. In these situations, a court will decide whether to hold a statute unconstitutional on its face or in a particular application based on the terms of the challenged statute in relation to the constitutional rule and the remedial rules of severability. A constitutional rule refers to a rule or test the Court employs to give meaning to a constitutional provision.[166] A recent series of cases adopting and applying a Sixth Amendment rule protecting the right to a jury trial provides a helpful and timely example of this sort of constitutional rule. The rule, which was established in *Apprendi v. New Jersey*, holds that it is unconstitutional to sentence a defendant to a punishment greater than the maximum sentence authorized by facts found by a jury or admitted to by a defendant.[167] In *Apprendi*, a New Jersey statute provided for imprisonment of between five and ten years for the crime of possession of a firearm with an unlawful purpose.[168] A second statute extended the term of imprisonment to between ten and twenty years if the trial judge found, by a preponderance of the evidence, that "'[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.'"[169] Because the separate statute required a trial judge to make a factual finding that would increase a defendant's sentence above the sentence provided for by the jury, the Court found that "the New Jersey statu-

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163 *See, e.g.*, Isserles, *supra* note 144, at 423-56 (discussing the different types of valid-rule facial challenges and proposing a method for determining when a valid-rule facial challenge is appropriate).

164 *Id.* at 399-400 (discussing purpose based tests in relation to facial challenges).

165 *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1 (1992) (considering legislative purpose).

166 *See* Isserles, *supra* note 144, at 364.

167 *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

168 *Id.* at 469.

169 *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

tory scheme" could not stand "in light of the constitutional rule explained above" and struck the statute down on its face.[170]

The *Apprendi* rule has also been used to sustain as-applied challenges to statutes that are unconstitutional in some, but not all, of its applications. For example, the federal statutory provisions governing minimum and maximum drug sentences provide for overlapping sentencing ranges based on the drug type and quantity involved in the offense. A defendant convicted of possession with intent to distribute an unspecified quantity of a schedule I or II drug[171] can be sentenced to up to twenty years[172] but various threshold quantities for different drugs can raise the sentencing range, first, to between five and forty years imprisonment,[173] and next to between ten years and life.[174] Before *Apprendi*, the practice had been for judges to determine the threshold drug quantity as a sentencing factor,[175] but, based on the new constitutional rule, courts have held that it is unconstitutional for a judge to sentence a defendant to more than twenty years (the base-level maximum sentence) unless the drug quantity necessary to trigger a higher sentencing range is charged in the indictment and proved to a jury beyond a reasonable doubt.[176] In other words, courts have held that the drug sentencing scheme is unconstitutional *as-applied* to individuals who have been sentenced to more than twenty years imprisonment based on a judge's drug quantity determination because those sentences are greater than the maximum authorized by the facts found by the jury's verdict alone.[177] Courts have declined to hold the statute unconstitutional on its face, however, because the statute can be constitutionally applied in many cases.[178]

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[170] *Id.* at 491-92; *see also id.* at 497 ("The New Jersey procedure in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."); Ring v. Ariz., 536 U.S. 584 (2002) (striking down Arizona's death penalty statute which provided a defendant could only be sentenced to death pursuant to factual determinations made by the judge alone).

[171] The Controlled Substances Act regulates drugs according to different "schedules," with Schedule I being the most tightly restricted.

[172] 21 U.S.C. § 841(b)(1)(C) (2000).

[173] 21 U.S.C. § 841(b)(1)(B).

[174] 21 U.S.C. § 841(b)(1)(A).

[175] *See, e.g.*, United States v. Promise, 255 F.3d 150, 156 (4th Cir. 2001) ("Although no legislative history speaks to the question, we have previously held, as three of my colleagues reiterate now, that Congress intended these specific threshold quantities to be sentencing factors rather than elements of aggravated drug trafficking offenses.").

[176] *See, e.g., id.*

[177] *Id.* at 156-57 ("Apprendi dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding, of a specific threshold drug quantity the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense, *i.e.*, charged in the indictment and proved to the jury beyond a reasonable doubt.").

[178] *See, e.g.*, United States v. McAllister, 272 F.3d 228, 232-33 (4th Cir. 2001) (holding that § 841 is not facially unconstitutional).

Finally, *United States v. Booker*[179] is an example of a case in which the rules of severability led the Court to invalidate statutory provisions that have some constitutional applications in their entirety.[180] In *Booker,* the Court applied the *Apprendi* rule to the federal Sentencing Guidelines.[181] Under the Guidelines, the jury's conviction set an initial sentencing range based on the offense, then judges were required to make factual determinations in applying a wide array of "sentencing factors," such as whether the defendant brandished a firearm during the commission of the offense[182] or whether the defendant had committed obstruction of justice.[183] These judicial findings adjusted the sentencing range and could result in a sentence that was higher than the range authorized by the jury's verdict alone. In a splintered opinion, five Justices held that the mandatory guidelines were unconstitutional as-applied to sentences that were above the range authorized by the facts established by a plea or the jury verdict.[184] Sentences that did not involve enhancements, which accounted for 45% of federal sentences,[185] and sentences that involved an enhancement but resulted in a sentence within the range authorized by the jury,[186] however, were constitutional. [187] Thus, "the Guidelines could be constitutionally applied in their entirety, without any modifications, in the 'majority of the cases sentenced under the federal guidelines.'"[188]

A different five Justice majority provided the Court's remedial opinion to the constitutional error.[189] They found that the rules of severability, in particular the need to consider "Congress' basic objectives in enacting the statute,"[190] warranted invalidating the provisions that made the Guidelines mandatory in their entirety in order to create a scheme of "advisory" sentencing guide-

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179 543 U.S. 220 (2005).

180 I do not take a position on the merits of the *Booker* remedy, but note it only as an example of how the Court has applied the rules of severability in relation to a substantive constitutional rule.

181 *Booker*, 543 U.S. at 238.

182 U.S.S.G. § 2B3.1(b)(2)(C).

183 U.S.S.G. § 3C1.1.

184 *Booker*, 543 U.S. at 244.

185 *Id.* at 275 (Stevens, J., dissenting in part).

186 *Id.* at 278. (Stevens, J., dissenting in part). Because the guidelines' ranges overlap, a Judge could make findings of fact that increased the applicable range, and still impose a sentence within the sentencing range based on the facts found by the jury or admitted by the defendant.

187 *Id.* at 244, 278.

188 *Id.* at 276 (Stevens, J., dissenting in part) (internal quotations omitted).

189 *Id.* at 244-67. Only Justice Ginsburg joined both the merits and remedial majorities. The four other Justices that provided the Court's remedy dissented on the merits and argued that the Guidelines were not constitutionally deficient.

190 *Id.* at 259.

lines.[191] Accordingly, despite the fact that the mandatory guidelines could be constitutionally applied in a number of cases, the remedial majority facially invalidated a handful of its provisions based on the rules of severability.

These Sixth Amendment cases demonstrate how a constitutional rule that prevents the government from engaging in a particular action—such as subjecting a defendant to a greater punishment than that authorized by the jury's verdict alone—can serve as the basis for both as-applied and facial challenges. A court's decision to strike down a statute on its face or only in certain applications depends upon whether that statute violates the relevant constitutional rule in all of its applications or whether the rules of severability warrant facial invalidation of a statute that is unconstitutional in some but not all of its applications.[192] In addition to these valid rule facial challenges, the Court also recognizes a significantly more limited type of facial challenge: the overbreadth challenge. In an overbreadth challenge, a litigant argues that a statute that can constitutionally be applied to him should "not be enforced against him, because it [cannot constitutionally] be enforced against someone else."[193] Unlike valid-rule challenges, where facial invalidity exists because a statute would be unconstitutional in each application or because the rules of severability require it, an overbeadth challenge predicates "facial invalidity . . . on the existence of some number of potentially unconstitutional applications of an otherwise valid statutory rule."[194] In *United States v. Sabri*, the Supreme Court explained that "[f]acial challenges of this sort are especially to be discouraged" because they "invite judgments on fact-poor records" and "call for relaxing familiar requirements of standing . . . . Accordingly, we have recognized the validity of facial

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[191] Although the remedial dissenters vigorously objected to the majority's approach, Justice Stevens, in dissent, accepted that severability could sometimes lead to facial invalidation of provisions that had constitutional applications. *See* Metzger, *supra* note 162, at 892 ("As Justice Stevens acknowledged, the unconstitutionality of some parts of a statute may force its invalidation as a whole if those provisions are not severable; the reason for this is of course the valid rule requirement.").

[192] *See* Fallon, *supra* note 143, at 1324 ("[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity.").

[193] Sabri v. United States, 541 U.S. 600, 609 (2004).

[194] Isserles, *supra* note 144, at 370. Some have argued that overbreadth challenges are really valid rule challenges. For example, Monaghan has claimed that the First Amendment overbreadth doctrine is just a way of characterizing the rule that statutes abridging First Amendment interests must employ the least restrictive means to achieve the government's goals. Monaghan, *supra* note 161, at 24-25, 37-39; *but see* Isserles, *supra* note 144, at 411 (arguing that in "[a]n overbreadth facial challenge . . . the Court resolves such a challenge by analyzing the constitutionality of statutory applications against third parties not before the Court" whereas a valid-rule facial challenge addresses "validity of the statutory rule itself when measured against the relevant constitutional doctrine"). Whatever the merits of this claim are, for purposes of this article it is sufficient to note that the Supreme Court continues to distinguish valid-rule facial challenges from overbreadth challenges. *See Sabri*, 541 U.S. at 609 (contrasting overbreadth challenges with valid rule challenges which "in the strictest sense of saying that no application of the statute could be constitutional").

attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence."[195] These settings include, free speech, the right to travel, abortion, and legislation under §5 of the Fourteenth Amendment.[196]

In summary, while debate continues over the precise contours of facial and as-applied challenges, there are basic principles of constitutional adjudication that are well established in the case law. First, as-applied challenges are the preferred means for challenging the constitutionality of a statute and facial challenges are comparatively rare.[197] Second, there are three broad categories of facial challenges: valid rule challenges, overbreadth challenges, and facial invalidations based on the rules of severability. Valid rule challenges occur when a statute is unconstitutional in all of its applications under the relevant constitutional rule or when a statute's unconstitutional and constitutional applications cannot be severed from one another.[198] Overbreadth challenges have been recognized in only a handful of areas of constitutional law and allow a litigant to challenge a statute based on its potential unconstitutional applications to third parties, even though the statute can be constitutionally applied to him.[199] Finally, a court may hold a statute that has constitutional applications unconstitutional on its face if the rules of severability prevent the constitutional applications from being separated from the unconstitutional applications.[200]

A central problem in *Raich* is that its interpretation of the aggregation doctrine leaves a Commerce Clause jurisprudence that is inconsistent with these basic principles of constitutional adjudication. Most facial challenges are "outgrowths of as-applied adjudication"[201] in that, due to the relevant constitutional and severability rules, "some assessments of 'as-applied' challenges necessarily yield the conclusion that a statute is wholly invalid[.]"[202] The exception is an overbreadth challenge, which is based on the claim that a statute that can be constitutionally applied to the litigant bringing the challenge is unconstitutional as-applied to third parties.[203] In other words, all facial challenges are based on some number of unconstitutional *applications* of a statute in relation to the rele-

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195 *Sabri*, 541 U.S. at 609-10.

196 *Id.* at 609.

197 *See* Fallon, *supra* note 143, at 1368 (noting that "as-applied challenges—as appropriately characterized—remain the normal and logically primary mode of constitutional attack on a statute").

198 *See generally* Isserles, *supra* note 144 (discussing the valid rule facial challenge).

199 *Sabri*, 541 U.S. at 609-10.

200 *See* Fallon, *supra* note 143, at 1324 (noting that "facial challenges and invalidations are best conceptualized as incidents or outgrowths of as-applied litigation").

201 Fallon, *supra* note 143, at 1341.

202 *Id.* at 1338.

203 *Sabri*, 541 U.S. at 609-10.

vant constitutional rule. Apart from overbreadth challenges, if a statute has any constitutional applications, a court will employ rules of severability to save those applications to the extent possible, which is why facial challenges are considered rare and as-applied challenges the norm.[204] Thus, at the most basic level, if an application of a statute is inconsistent with a constitutional rule, a Court either will hold the statute unconstitutional as-applied to that circumstance or, in some situations, it will strike down the statute in its entirety. The idea that a Court would uphold an application of a statute that violates a constitutional rule, however, is antithetical to these general principles of constitutional adjudication. Likewise, an area of constitutional law where facial challenges are preferred and as-applied challenges allowed only rarely, if ever, would be very unusual. This is severely problematic for *Raich* because, if the Court had applied the constitutional rule announced in *Lopez* to the individual plaintiff's actions, it would have found the CSA unconstitutional as-applied to them. As Justice O'Connor noted in dissent, "[e]veryone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it."[205] Indeed, even the government did not argue that the individual plaintiff's actions were commercial or had a non-attenuated relationship with commerce.[206]

As discussed above, *Raich* did not apply or even mention the four-part *Lopez* test. Instead, in essence, it upheld application of the CSA to the plaintiffs in *Raich* because the CSA could be constitutionally applied *to others*. Its view was that "because *some* of the CSA's applications are constitutional, they must *all* be constitutional[.]"[207] This approach turns the principles of constitutional adjudication on their head. It is the exact opposite of the way overbreadth or valid-rule severability function. Imagine, for example, if in *Booker*, the Court had held that the Sentencing Guidelines' unconstitutional applications were acceptable because the majority of the Guidelines applications were constitutional; if the Court had concluded that the fact "that the regulation ensnares some [sentences greater than what the jury's verdict has authorized] is of no moment."[208] It sounds absurd in the context of the Sixth Amendment, but that is what the *Raich* majority did by declining to apply the constitutional rule announced in *Lopez* and extending the aggregation doctrine to noncommercial activity.[209] The result is a Commerce Clause jurisprudence in which as-applied challenges are rarely, if ever, allowed, and facial challenges are preferred.

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204 *See* Fallon, *supra* note 143, at 1334.

205 Gonzales v. Raich, 125 S. Ct. 2195, 2225 (2005) (O'Connor, J., dissenting).

206 *See* Brief for Petitioners, *supra* note 48, at 21.

207 *Raich*, 125 S. Ct. at 2238 (O'Connor, J., dissenting); *see also id.* at 2209 ("That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of [the CSA's] larger scheme.").

208 *See id.* at 2209.

209 *Id.* at 2206 ("When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class.").

Although the *Raich* majority did not justify or discuss its approach in relation to the rules of constitutional adjudication, there are a number of potential arguments one might make in its defense. First, one might argue that the *Raich* majority's approach to as-applied challenges is not problematic because it is consistent with *Wickard*. Indeed, the reason the *Raich* majority's approach to as-applied challenges did not seem as unusual as it would have in the context of a different constitutional rule is that it was based on what seemed like a straightforward application of the aggregation doctrine.[210] As discussed above, the scope of the commerce power was so expansive after *Wickard* in large part because the aggregation doctrine eliminated even as-applied Commerce Clause challenges.[211] Before *Wickard*, the Court considered the intrastate, local character of an activity to limit congressional commerce authority[212] and *Wickard* held that even the most local, intrastate activity could be regulated so long as the activity, in the aggregate, had an affect of commerce.[213] The *Raich* majority's reasoning was based on this theory and on language from a number of Commerce Clause cases that supported a broad reading of the aggregation doctrine.[214] *Wickard*, however, does not justify *Raich*'s treatment of as-applied challenges because *Lopez* created an entirely new constitutional rule. Before *Lopez*, the absence of an as-applied commerce challenge was not problematic in terms of the principles of constitutional adjudication, precisely because there was no constitutional rule limiting Congress' commerce power. Before *Lopez*, the commerce power was thought to be limitless.[215] *Lopez* and *Morrison*, of course, created a new Commerce Clause test. If the *Raich* Court found a conflict between the new rule and *Wickard*, it should either have overruled *Lopez* or interpreted the aggregation doctrine to permit as-applied challenges based on the *Lopez* test. Either result would have been consistent with the principles of constitutional adjudication, but *Raich*'s decision to treat *Lopez* as good law and, at the same time, decline to apply the *Lopez* test to the plaintiffs was not.

Second, one might make a related argument that *Raich*'s failure to apply the constitutional rule in *Lopez* to the plaintiffs is justified because recognizing an as-applied *Lopez* challenge would too narrowly limit Congress' commerce

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210 *See supra* Part IV.B.

211 *See supra* Part III.

212 *See* A.L.A. Schechter Corp. v. U.S., 295 U.S. 495, 546 (1935) ("In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.").

213 Wickard v. Filburn, 317 U.S. 111 (1942).

214 *See, e.g.*, United States v. Perez, 402 U.S. 146, 154 (1971) (quoting Md. v. Wirtz, 392 U.S. 183, 193 (1968) ("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.").

215 *See supra* notes 8-9 and accompanying text.

power.[216] After all, even Justice O'Connor's *Raich* dissent did not embrace applying the rule in *Lopez* to an individual's activity: "I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce."[217] Instead, O'Connor argued that courts should engage in a case-by-case analysis to define the relevant "class of activity" for purposes of applying *Lopez*.[218] Despite support from O'Connor's opinion, this argument suffers from two shortcomings. First, it does not address the inconsistencies between *Raich*'s approach to as-applied challenges and the basic principles of constitutional adjudication. Even if there are persuasive policy reasons, or Commerce Clause cases, that support limiting the rule in *Lopez* to facial challenges, they are unrelated to the question of whether that limitation is consistent with the preference for as-applied challenges. In *Booker*, for example, the government could have argued that policy considerations and pre-*Apprendi* cases weighed in favor of ignoring the *Apprendi* rule in applying the Sentencing Guidelines, but those considerations would not have provided a justification as a matter of constitutional adjudication. In short, unless a substantive rule is of a type that can only be employed in a facial challenge—such as a purpose-based test—it should be used in both as-applied and facial challenges, or not at all.

In any event, the fear that applying the rule in *Lopez* to an individual's actions would severely restrict the commerce power is unwarranted. It is true that any litigant could argue his own activity is local or does not substantially affect interstate commerce. But these arguments wouldn't sustain an as-applied challenge under *Lopez*, because *Lopez* limits the commerce power based on whether an activity is commercial or has an attenuated relationship to interstate commerce and *not* on whether it is intrastate or local. The most straightforward resolution of *Lopez* and *Wickard*, it seems, is a framework in which the aggregation doctrine would permit Congress to regulate even the most "local" activity but *Lopez* would constrain that rule by forbidding the regulation of noncommercial activity with an attenuated impact on commerce. It is important to note that the question of whether an activity has an attenuated relationship with commerce is distinct from whether it has a significant impact on commerce. Surely,

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[216] *See* Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge "On its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges* 55 CASE W. RES. L. REV. 161, 164 (2004) (analyzing past cases and arguing that "the structure and text of the Constitution's grant of Commerce Clause authority proscribes as-applied challenges to commerce-based statutes" and permits only facial challenges).

[217] Gonzales v. Raich, 125 S. Ct. 2195, 2223 (2005) (O'Connor, J., dissenting).

[218] *See id.* ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated.").

almost any activity taken in isolation has only a minor impact on interstate commerce, but the vast majority have a nonattenuated relationship with commerce. Thus, this interpretation would allow as-applied challenges based on *Lopez* and maintain the essential holding in *Wickard*.[219] In addition, it would not significantly limit Congress' commerce power because most individual activity has a commercial character.[220]

Third, the Court's approach could be justified by arguing that challenges based on Congress' enumerated powers must take the statute head-on because enumerated powers are concerned with Congress' power to enact a particular statute and not with individual rights. On this view, enumerated powers, such as the Commerce Clause, "state[] a condition for the validity of legislation, rather than stating a test for the validity of the application of Congress's will to particular sets of circumstances."[221] This position might have been persuasive a few years ago, but it is now undermined by the fact that the Court has recognized as-applied challenges in the context of enumerated powers.[222] Indeed, one of the Court's most recent statements on the preference for as-applied challenges to facial challenges came in the Spending Clause case United States v. Sabri.[223] In addition, as Gillian E. Metzger's insightful examination of the use of facial and as-applied challenges in Section 5 jurisprudence discusses, the Court has also recognized as-applied challenges based on Section 5 power limitations. [224] Moreover, when the Court has employed facial challenges in the context of Section 5, it has done so on an overbreadth theory.[225] Thus, applications of a statute that are unconstitutional under the Court's Section 5 jurisprudence are remedied either through facial or as-applied challenges. As already discussed, *Raich* takes precisely the opposite approach by, in essence, holding that a statute's unconstitutional applications can be saved by constitutional applications.[226] Finally, before *Wickard*, the Court recognized both as-applied and

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219 *See infra* Part VI (discussing the enterprise theory for analyzing commerce challenges and arguing that it would help to reconcile *Wickard* and *Lopez*).

220 *See id.* (discussing how many individual actions can be viewed as "commercial" under the enterprise theory).

221 Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1154 (2003). *See also id.* at 1151 (arguing that enumerated powers provisions function as "existence conditions" which require facial challenges and not as "application conditions").

222 Both *United States v. Sabri*, 541 U.S. 600 (2004), and *Tennessee v. Lane*, 541 U.S. 509 (2004), were decided after the publication of Professors Adler and Dorf's article arguing that enumerated powers are examples of existence conditions.

223 541 U.S. at 608-10.

224 *See* Metzger, *supra* note 162, at 877 (arguing that "Section 5 and other congressional power challenges should be subject to the ordinary presumption of severability"); *see also* Tenn. v. Lane, 541 U.S. 509 (2004).

225 *See Sabri*, 541 U.S. at 610 (listing Section 5 as an area of overbreadth challenges).

226 *See* Gonzales v. Raich, 125 S. Ct. 2195, 2215 (2005).

facial challenges in its Commerce Clause jurisprudence.[227] In short, case law demonstrates that the Court's approach to as-applied and facial challenges in the area of congressional power follows the normal rules of constitutional adjudication.[228] The argument that courts should only use facial challenges in the context of the Commerce Clause because enumerated powers condition the validity of statutes and do not grant individual rights does not conform to the established practice of the Supreme Court in enumerated powers cases.

Finally, one might argue that the rule in *Lopez* does not extend to as-applied challenges because the nature of the *Lopez* test requires courts to consider a statute in its entirety when applying the test. Under this theory, the Commerce Clause test would be similar to a purpose-based test, in which the inquiry always focuses on the statute as a whole. To support this argument one might point out that two of the four *Morrison* factors—whether the statute contained an express jurisdictional element to limit its reach and whether the statute's legislative history contained congressional findings on the impact of the regulated activity on interstate commerce—appear related only to the statute as a whole. The jurisdictional hook factor, however, exists to ensure that use of the commerce power is constitutional as-applied to the individual on a case-by-case basis. As the *Lopez* Court explained, "[Section] 922(q) contains no jurisdictional element which would ensure, *through a case-by-case inquiry*, that the firearm possession in question affects interstate commerce."[229] If a statute contains a sufficient jurisdictional hook, both an as-applied and facial challenge would fail because the terms of the statute would guarantee that each application reached only conduct that was within Congressional commerce power. So, although the Court's characterization of the jurisdictional hook factor in *Lopez* and *Morrison* implies it is concerned with a statute on its face, an as-applied inquiry could as-easily account for this concern by asking whether the activity at issue had "an explicit connection with or effect on interstate commerce."[230] Because the jurisdictional hook factor discussed in *Lopez* exists only to ensure a connection to interstate commerce on a case-by-case basis, the jurisdictional

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227 *See* Metzger, *supra* note 162, at 906 ("Some facial invalidations occurred, but in other decisions the Court simply held particular statutory applications in excess of the commerce power. This variation seems best explained, however, as resulting from differences in statutory text, with facial challenges being largely the norm."). *See also* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 542-48 (1935) (holding application of a statute unconstitutional as-applied to the facts of the case because "[s]o far as the poultry here in question is concerned, the flow of interstate commerce had ceased"); United States v. E.C. Knight Co. 156 U.S. 1, 16-18 (1895) (holding the Sherman Act unconstitutional as-applied to the acquisition of monopoly on manufacture of refined sugar).

228 *See generally* Metzger, *supra* note 162.

229 United States v. Lopez, 514 U.S. 549, 561 (1995) (emphasis added).

230 *Id.* at 562.

hook factor does not support the conclusion that the *Lopez* test must analyze a statute on its face.[231]

Although the legislative history analysis undeniably asks courts to look to the actions of Congress, the inquiry is not necessarily limited to considering the legislative history generally. In an as-applied challenge, a court could certainly apply the legislative history factor to determine whether Congress made findings relevant to regulating activity similar to the activity engaged at issue in the case.[232] But, even if the inquiry into legislative history were necessarily limited only to the terms of the statute, this fact would hardly be sufficient to justify declining to follow the *Lopez* rule in as-applied challenges. Indeed, legislative history is one of the factors used in the Court's Section 5 "congruence and proportionality" test, and the Court has employed that test in as-applied challenges.[233] More importantly, the two most important factors in the *Lopez* test—the economic nature of the activity and the nature of its relationship to interstate commerce—naturally lend themselves to use in an as-applied inquiry. These factors are focused directly on conduct as opposed to, for example, congressional purpose[234] or whether the terms of a statute are narrowly tailored. This is similar to *Appendi*'s rule that the imposition of a sentence higher than what was authorized based on the facts found by the jury or admitted to in a plea agreement alone is unconstitutional. The *Apprendi* rule targets a forbidden type of sentence and the court will overturn a sentence of this type as unconstitutional whatever the terms of the statute.[235] Thus, the Court has used the rule in

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231 *Cf.* United States v. Bass, 404 U.S. 336, 347-49 (1971) (employing the doctrine of constitutional avoidance and interpreting a firearm possession statute to require an additional nexus to interstate commerce and overturning a conviction where that nexus had not been shown).

232 *See* Gonzales v. Raich, 125 S. Ct. 2195, 2228 (2005) (O'Connor, J., dissenting) (arguing that the legislative history analysis should focus on the activity at issue in the case and criticizing the CSA because its "declarations are not even specific to marijuana").

233 Tennessee v. Lane, 541 U.S. 509, 530 (2004) (employing the Section 5 test in an as-applied challenge and noting that "nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole"). *See also* Metzger, *supra* note 162, at 913-29 (analyzing the use of severability rules in Section 5 challenges and concluding that "having to determine the constitutionality of Section 5 legislation on an as-applied basis [is] a direct function of the substantive standard the Court has imposed in this context"). This use of as-applied challenges in the context of Section 5 is particularly noteworthy because the other factor in the analysis, whether "Congress' chosen remedy for the pattern of exclusion and discrimination . . . is congruent and proportional to its object[ive]" is more closely tied to the terms of the federal statute than the other factors in the *Lopez* test. *Lane*, 541 U.S. at 531.

234 Indeed, although the broader scheme rule seems to rely in part of the purpose of the scheme, purpose has not traditionally been used in commerce analysis and is not a factor in the *Lopez* test. "[I]n the Commerce Clause context, the Court has long ruled that Congress' actual purpose is irrelevant where Congress is clearly regulating interstate commerce." Metzger, *supra* note 162, at 919.

235 The terms of the statute, of course, are relevant to the question of whether the statute is invalid in all of its applications or to a severability analysis if there are both constitutional and unconstitutional applications. The important point for our purposes is that the test makes certain sentences unconstitutional rather than certain modes of regulation.

both as-applied and facial challenges.[236] Likewise, the rule in *Lopez* targets a particular type of conduct that Congress may not regulate: conduct that is non-commercial and has only an attenuated relationship with commerce. A Court can apply these factors to the facts of a case just as easily as it can to the activity regulated by a statute in its entirety. Determining whether an activity is commercial or noncommercial depends on features of the activity and not on features of the statute. Thus, the terms of the *Lopez* test do not support the argument that the *Lopez* rule applies exclusively to facial challenges. Indeed, they show that the facial challenges in *Lopez* and *Morrison* were valid-rule facial challenges. Both statutes, by their own terms, regulated noncommercial activity that had an attenuated impact on commerce and did not include jurisdictional hooks, thus, under the rule of *Lopez*, the activities regulated by the terms of the statutes failed the *Lopez* test.

VI. THE ENTERPRISE DOCTRINE

The preceding discussion reveals a few significant problems with the Court's decision in *Raich*. The Court's use of both the aggregation and broader scheme rules significantly undermine the rule in *Lopez*, without directly overruling *Lopez* and *Morrison*. The aggregation rule forbids as-applied challenges based on *Lopez*, the only challenges that have had any degree of success in lower courts, in conflict with the norms of constitutional adjudication. The broader scheme rule, meanwhile, permits Congress to regulate even activity that would fail the *Lopez* test in a facial challenge, if the regulations are part of a larger regulatory scheme in which eliminating the suspect provision would undercut the purpose of the scheme.[237] Some observers surely would not view a limitless commerce power as problematic—a debate beyond the scope of this Article—but the problem is more fundamental than the reach of the commerce power after *Raich* as such. Whatever one believes about the proper scope of the commerce power, *Raich*'s limitations of *Lopez* are problematic because they create an increasingly confused and convoluted Commerce Clause jurisprudence, where decisions begin to seem like little more than a series of results rather than a coherent jurisprudence.[238]

After *Raich*, there are three overlapping Commerce Clause rules: the aggregation doctrine, the *Lopez* test, and the broader scheme rule. These rules

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236 *See supra* notes 171-206 and accompanying text (discussing cases applying *Apprendi*).

237 *See supra* Part IV.A (discussing the broader scheme rule).

238 *See, e.g.*, Posting of Mark Tushnet to SCOTUSblog, http://www.scotusblog.com/ movabletype/archives/2005/06/understanding_g.html#trackbacks (June 6, 2005, 02:05 P.M.) ("I suppose that someone truly dedicated to making doctrinal sense of the cases -- or someone who had to do so as a matter of professional obligation -- could come up with something that worked. But a more parsimonious account, I suspect, would be that there are some statutes five or more justices . . . think are more or less good ideas, and others that five or more justices think are more or less bad ideas; and that those justices will go to any (purportedly doctrinal) port in a storm to reach the results they think sensible.").

interact to circumscribe *how* Congress regulates activity, but no longer seem to limit what Congress can regulate in any significant way. If the Court wishes to restore the limitless commerce power Congress enjoyed prior to *Lopez*, it should overturn *Lopez*, rather than adopt new rules that conflict with the old rules and that are bound to create even more confusion in an already uncertain area. Otherwise, the Court should apply the *Lopez* rule consistently to ensure that the substantive and procedural limits on the commerce power are as clear and coherent as possible.[239] A related problem that stems from *Raich*'s treatment of *Lopez* and that is cause for concern whether one believes in an expansive or limited commerce power, is that the treatment of as-applied challenges in the Commerce Clause is now unlike any other area of constitutional law. As long as *Lopez*'s test remains good law, it should be employed in both as-applied and facial challenges consistent with the basic principles of constitutional adjudication.

As already implied, the Court could reconcile the major problems created by *Raich* by simply abandoning the *Lopez* rule altogether. Given that none of the opinions in *Raich* proposed overturning *Lopez*, however, that outcome seems unlikely. This Section briefly proposes an enterprise theory that would reconcile the *Lopez* and *Wickard* rules and provide for as-applied commerce challenges based on *Lopez*. This theory would provide substantive limits on the commerce power consistent with *Lopez*, while still giving Congress broad regulatory authority over most activity under *Wickard*. Although the rule is not consistent with *Raich*, I argue that it provides the best account of pre-*Raich* commerce cases and is superior to both the approach taken by the *Raich* majority and the approach advocated by Justice O'Connor in dissent.

Before outlining the enterprise theory, it is helpful to briefly return to Justice O'Connor's reluctance to extend the *Lopez* test to as-applied challenges. As discussed above, Justice O'Connor did not support applying the *Lopez* test to the facts of the case because, she argued, doing so would allow "individual litigants [to] exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce."[240] Instead, O'Connor argued that the Court should engage in a case-by-case analysis to identify the "relevant conduct" for purposes of analyzing the constitutional claim.[241] Applying this approach to *Raich*, O'Connor relied on a "number of objective markers," including the California medical marijuana law, to conclude that, in order to "ascertain whether Congress' encroachment is constitutionally justified in this case . . . I would

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[239] *Cf.* Posting of Hillel Levin to Prawfs Blawg, http://prawfsblawg.blogs.com/prawfsblawg/2005/06/thought_on_raic.html (June 7, 2005, 02:10 P.M.) (posing the question of whether one of the *Lopez* and *Morrison* dissenters should have voted in *Raich*'s favor because the Court should "not provide Congress with inconsistent rules governing the limits of its power").

[240] Gonzales v. Raich, 125 S. Ct. 2195, 2223 (2005) (O'Connor, J., dissenting).

[241] *Id.* at 2224; *see also id.* at 2223 ("The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated.").

focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes."[242] A central problem with Justice O'Connor's approach is that it does not offer an objective method for defining a "class of activity" across different cases. Under O'Connor's approach, which is similar to the approach advocated by the *Raich* plaintiffs and adopted by the Ninth Circuit majority, courts would be left to define the relevant "class of activity" on a case by case basis, without clear guidelines. And, as with the majority's approach, this framework would raise questions in relation to the principles of constitutional adjudication because it would not allow for a true as-applied commerce challenge.

A more fundamental problem with "class of activity" proposal, however, is that it is premised on a common misunderstanding of the relationship between *Wickard* and *Lopez*. Justice O'Connor adopts the "class of activity" theory to prevent individuals from arguing that their individual actions are outside Congress' reach because they have only a minor impact on commerce.[243] But, this view confuses an as-applied *Lopez* test with elimination of the aggregation rule. The "local" nature of the activity and the extent of its impact are not relevant considerations under the *Lopez* test. So long as the aggregation rule remains good law, it would prevent a litigant from successfully challenging the application of a federal statute based on the fact that his activity is local or itself only has an insignificant *impact* on commerce. An as-applied *Lopez* challenge would only permit a litigant to claim that his actions could not be regulated because they are noneconomic and have only an *attenuated relationship* with commerce. The enterprise theory, similar to one that I have previously advanced elsewhere,[244] would help courts apply this rule in a manner consistent with *Wickard* and other pre-*Lopez* cases.

The central idea of the enterprise theory is that it allows the federal government to regulate every aspect of an economic "enterprise" or endeavor, because every aspect of the enterprise is economic and has a non-attenuated relationship with commerce. The theory would ensure that litigants engaged in an economic endeavor could not avoid federal regulation for various "noncommercial" actions related to the endeavor based on an as-applied *Lopez* challenge. The 1968 Supreme Court case *Maryland v. Wirtz*[245] provides a helpful discussion of the reasoning behind this enterprise concept. *Wirtz* considered the constitutionality of a federal law that extended the Fair Labor Standards Act to cover new categories of employees that had not previously been covered under the Act.[246] While the Act enlarged the number of covered employees, it did "not

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242 *Id.* at 2224.

243 *See id.* at 2223.

244 *See* Kreit, *supra* note 88 (proposing an earlier version of the enterprise theory that concerned facial challenges but did not directly address as-applied challenges).

245 392 U.S. 183 (1968), *overruled on other grounds by* Nat'l League of Cities v. Usury, 426 U.S. 833 (1976).

246 *Id.* at 185-86.

. . . enlarge the class of *employers* subject to the Act."[247] The extension brought employees who were not themselves involved in interstate commerce under the Act.[248] In explaining why this fact did not endanger the Act, the Court relied on the "enterprise concept."[249] The concept is based on the "premise that an 'enterprise' is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees[.]"[250]

Although *Wirtz* pre-dates *Lopez* and, thus, did not discuss the enterprise theory in relation to the *Lopez* test, the enterprise concept can help reconcile *Lopez* and *Wickard* in a logical manner that would not dramatically alter Congress' commerce power but would also provide a clear substantive limit and allow as-applied challenges. The concept recognizes that every aspect of an economic enterprise or endeavor is commercial in nature, even if the specific activity targeted by a given regulation could be seen as noncommercial. The theory is similar to the reasoning adopted by the District of Columbia Circuit in *Rancho Viejo v. Norton*.[251] In *Rancho Viejo*, a company planned to construct a 202-acre housing development in California but the United States Fish and Wildlife Service determined that the development would likely put the existence of the arroyo southwestern toad, which is listed as an endangered species, at risk.[252] In applying the *Lopez* four-part test, the Court determined that the economic prong was satisfied because the development itself constituted an economic enterprise.[253] Likewise, the Court rejected the development's argument that destruction of the toad had only an attenuated link to commerce because the development itself had a non-attenuated link to commerce.[254] As Judge Ginsburg noted in concurrence, this approach would allow Congress to regulate takes of the arroyo toad if the takes themselves met the four-part *Lopez* test.[255] It would not, however, permit federal regulation of "the lone hiker in the woods" because "though he takes the toad, [he] does not affect interstate commerce."[256] Thus, a litigant could bring as-applied challenges under the *Lopez* test, but could only succeed if her noncommercial actions were also unrelated to an economic enterprise.

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247 *Id.* at 188.

248 *Id.* at 186-87.

249 *Id.* at 196 n.27.

250 *Id.* at 197, n.27; *see also id.* at 192 (noting that "there is a basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise.").

251 323 F.3d 1062 (D.C. Cir. 2003).

252 *Id.* at 1064.

253 *Id.* at 1068.

254 *Id.* at 1069.

255 *Id.* at 1080 (Ginsburg, J., concurring).

256 *Id.*

The enterprise theory also has the virtue of being entirely consistent with the result in *Wickard*. The *Wickard* Court focused on the wheat Filburn grew for his own personal use, but Filburn was subject to the Agricultural Adjustment Act's limitations only because he operated a commercial farm.[257] The Agricultural Adjustment Act exempted small producers who grew less than 200 bushels of wheat a year.[258] While it is true, as Justice Stevens noted in *Raich*, that the fact that Filburn was a commercial farmer was not determinative in *Wickard* and the *Wickard* Court did not treat Filburn's personal wheat cultivation "as part of his commercial farming operation,"[259] the enterprise theory of *Lopez* would leave both the central rule of *Wickard* and its result in tact. It would only call into question the *Wickard* Court's treatment of Filburn's personal wheat cultivation separately by justifying the regulation of that activity based on the theory that Filburn's actions could be aggregated because he was engaged in farming as an economic enterprise.

VII. CONCLUSION

Raich leaves Commerce Clause jurisprudence in an increasingly confused state and that should be a cause for concern for everyone interested in the Commerce Clause, regardless of whether one favors a limitless or heavily circumscribed commerce power, or something in between. The Commerce Clause now encompasses three overlapping rules: the aggregation doctrine, the four-part *Lopez* test, and the broader regulatory scheme rule. If *Raich* is applied faithfully, the *Lopez* test will apply in only a very limited number of cases in the future. But, in the absence of a clear framework for choosing between each constitutional rule, it is difficult to know exactly how each test will function and what, if any, activity Congress can not regulate. The confusion that surrounds the tests, also leaves room for future majorities to follow any of the three rules or rationales based solely, or primarily, on a Justice's policy preferences or the ability to cobble together a majority in a particular case. In addition to its internal conflicts, the Commerce Clause now appears to be at odds with the well-settled principles of constitutional adjudication that favor as-applied to facial challenges. Given these problems, the Court should either adopt a clearer, universal standard for limiting Congress' commerce power or consider abandoning its revived limits altogether. Whatever one believes is the ideal interpretation of the Commerce Clause,[260] a clear framework for analyzing cases that is consis-

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257 *See* Wickard v. Filburn, 317 U.S. 111, 114-15 (1942).

258 *Id.* at 130, n.30; *see also* Brief for Respondents, *supra* note 43, at 14 (discussing the exemptions to the Agricultural Adjustment Act).

259 Gonzales v. Raich, 125 S. Ct. 2195, 2207 (2005).

260 *Compare, e.g.*, Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999), *with* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

tent with the basic principles of constitutional adjudication (whether it be a return to *Wickard* in which no challenge can succeed or a revival of *Lopez*) is preferable to a jurisprudence in which it seems as if the most "parsimonious account [is] that there are some statutes five or more justices . . . think are more or less good ideas, and others that five or more justices think are more or less bad ideas; and that those justices will go to any (purportedly doctrinal) port in a storm to reach the results they think sensible."[261]

[261] *See, e.g.*, Tushnet, *supra* note 238.