Turning the Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges

Nathaniel Stewart

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NOTES

TURNING THE COMMERCE CLAUSE CHALLENGE “ON ITS FACE”:

WHY FEDERAL COMMERCE CLAUSE STATUTES DEMAND FACIAL CHALLENGES†

You can paint it any color, so long as it’s black.
— Henry Ford

INTRODUCTION

Thomas Hobson lived in Cambridge, England. A Sixteenth Century stable manager, Hobson was a courier of goods, people, and even the University Post. Upon inheriting his father’s cart and eight horses at the age of twenty-four, he began renting the horses to undergraduate students. His stable soon boasted over forty riding horses and a line of new wagons, but the students, Hobson discovered, tended to request the same few hackney horses again and again. Realizing that his hackneys were overworked, the liveryman settled upon a rotation system whereby he placed only the well-rested horses in the stall nearest the stable door. When a would-be renter arrived, he was shown all the horses in the stable, only to be told that the horse closest to the door was the only horse for rent. Thus, young Hobson ensured that “every Customer was alike well served according to his Chance, and every Horse ridden with the same Justice.” And so is the origin

† Awarded the ninth annual Case Western Reserve Law Review Outstanding Student Note Award, as selected by the Volume 54 Editorial Board.
3 Joseph Addison, THE SPECTATOR, Oct. 14, 1712. The first written reference to the
of the proverbial Hobson's choice—"Where to elect there is but one, 'Tis Hobson's choice: take that or none."\(^4\)

A "Hobson's choice" is a take-it-or-leave-it proposition—"an apparent freedom of choice where there is no real alternative."\(^5\) In certain respects, the Commerce Clause\(^6\) of the United States Constitution, which grants Congress the power to regulate commerce among the States, presents litigants and judges with a Hobson's choice. The structure of the Commerce Clause and the power it grants to Congress leave the courts no choice but to determine the constitutionality of a commerce-based statute "on its face" and preclude judges from invalidating such statutes on an as-applied basis. In effect, courts and petitioners may choose between as-applied and facial challenges to Commerce Clause regulations, so long as they choose the facial one "closest to the door."

Offering the judiciary such a "choice" on Commerce Clause challenges seems at odds with the long-held, traditional notion that "the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge, in which a party argues that a statute cannot be applied to her because its application would violate her personal constitutional rights."\(^7\) Generally, the lower federal courts have adopted this traditional approach when faced with constitutional challenges to Commerce Clause cases and have failed to note how the broad but limited power expressly granted under the Commerce Clause makes the as-applied challenge inappropriate in such cases. But in 1968, the Supreme Court noted in *Maryland v. Wirtz*\(^8\) that its own jurisprudence had established "that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no conse-

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source of the phrase "Hobson's choice" was as follows:

Mr. Hobson kept a Stable of forty good Cattle, always ready and fit for travelling but when a Man came for an Horse, he was led into the Stable, where there was great Choice, but he obliged him to take the Horse which stood next to the Stable-Door: so that every Customer was alike well served according to his Chance, and every Horse ridden with the same Justice: From whence it became a Proverb, when what ought to be your Election was forced upon you, to say, *Hobson's Choice*.

*Id.*


\(^6\) U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").


\(^8\) 392 U.S. 183 (1968).
In 1995, the Supreme Court affirmed this understanding and reiterated in its landmark *United States v. Lopez* decision that the *de minimis* instance of the claimant's activity is irrelevant for determining the constitutionality of a federal statute passed pursuant to the Commerce Clause. Following the *Lopez* decision, defendants challenged a variety of commerce-based statutes both facially and as-applied; but only in the last year have the lower courts begun to take seriously the suggestion that as-applied challenges fail to properly determine the constitutionality of commerce-based statutes. With a pair of 2003 decisions directly addressing this question, the Ninth Circuit has sparked an important discussion likely to be joined by the judiciary at-large.

To be sure, the as-applied challenge is an attractive alternative to striking down a statute on its face. As-applied adjudication allows judges to limit congressional power by essentially ruling that the prosecution misapplied the law in this case, leaving the statute in place for enforcement against other offenders. In these cases, the challenger's peculiar activity is thus sliced away from the otherwise
legitimate exercise of federal power. By contrast, the more severe facial challenge requires the court to “take the statute head on,” and invalidate the unconstitutional law in every case. The one is a whittling knife, the other a broad sword. However attractive the as-applied challenge may be, courts nevertheless lack the power “to excise, as trivial, individual instances falling within a rationally defined class of activities.” This Note contends that the structure and text of the Constitution’s grant of the Commerce Clause authority proscribes as-applied challenges to commerce-based statutes, and requires an essentially two-pronged facial analysis to determine first, whether the class of activity is constitutionally regulable, and second, whether the petitioner is a member of the regulated class.

Part I provides a brief background on Commerce Clause jurisprudence and proposes that the constitutional structure of the Commerce Clause demands facial and not as-applied challenges to commerce-based laws. Part II discusses facial and as-applied challenges generally, while Part III discusses three federal commerce-based statutes and their legal challenges, and proposes a two-pronged test for courts to use in analyzing these claims. In conclusion, Part IV addresses a chief policy concern with adopting the facial test proposed, and suggests a remedy that may alleviate the harsher realities of the Hobson’s choice implicit in Commerce Clause adjudication.

I. A BRIEF HISTORY: FROM FRAMERS TO FARMERS TO FELONS

Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. — Justice Anthony Kennedy

To begin with “first principles,” the Constitution creates a federal government—and a Congress in particular—of limited and enumerated powers. Article I vests in Congress “[a]ll legislative Powers herein granted,” which implies that some legislative powers remain

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16 See McCoy, 323 F.3d at 1133 (Trott, J., dissenting) (noting the difference between taking a statute “head on” and “carv[ing] pieces out of it”).
17 Id.
21 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”); see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824) (noting that the Constitution “contains an enumeration of powers expressly granted by the people to their government”).
beyond Congress's reach,\textsuperscript{23} namely, the general police power, denied to the federal government and reserved for the states.\textsuperscript{24} The Framers designed this constitutional division of State and federal authority to protect our fundamental liberties, much as the separation and independence of the coordinate branches of the Federal Government prevent the accumulation of excessive power in any one branch.\textsuperscript{25} Thus, the Founders "repeatedly rejected unlimited national power and emphasized that the delegated powers of the national government were specifically enumerated in the Constitution," condemning a sweeping congressional police power that they feared would lead again to tyranny.\textsuperscript{26} This was the nature of constitutional federalism.\textsuperscript{27}

The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."\textsuperscript{28} From the beginning of judicial review, the Supreme Court has struggled to define the edges of that power.\textsuperscript{29} In its well-documented history of the Commerce Clause, Lopez made clear that from very early on, the commerce power has been recognized as the power to regulate, or "to prescribe the rule by which commerce is to be governed."\textsuperscript{30} The seminal Gibbons \textit{v. Ogden} decision, expounding on the language of the Commerce Clause, observed that the limits of the power lie within the text, so that "commerce, which is completely internal, which is carried on between man and man in a State,\textsuperscript{23} See \textit{Marbury}, 5 U.S. (1 Cranch) at 176.
\textsuperscript{24} See United States \textit{v. Morrison}, 529 U.S. 598, 618 \& n.8 (2000).
\textsuperscript{25} See \textit{THE FEDERALIST} No. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate powers.").
\textsuperscript{27} \textit{THE FEDERALIST} No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). Madison wrote:
\begin{quote}
In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.
\end{quote}
\textit{Id.}
\textsuperscript{28} U.S. CONST. art. I, \S 8, cl. 3. For a thorough analysis of the original grant of power, see Randy E. Barnett, \textit{The Original Meaning of the Commerce Clause}, 68 U. CHI. L. REV. 101, 146 (2001), where it is argued that the Commerce Clause originally had a narrow meaning under which "Commerce" meant "the trade or exchange of goods," "among the several States" meant "between persons of one state and another," and "To regulate" meant "to specify how an activity may be transacted." \textit{See also} United States \textit{v. Lopez}, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) (arguing that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes").
or between different parts of the same State, and which does not extend to or affect other States,"\(^{31}\) lies beyond the reach of the commerce power. Moreover, *Gibbons* noted that the Clause's "enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."\(^{32}\) That long-held distinction between what is truly national and what is merely local was reviewed in *NLRB v. Jones & Laughlin Steel Corp*,\(^{33}\) in which the Supreme Court broadened Congress's commerce power significantly\(^{34}\) while warning that the power may not extend so far as to "obliterate the distinction between what is national and what is local and create a completely centralized government."\(^{35}\)

As the New Deal-era unfolded, that distinction blurred, and in *United States v. Darby*\(^{36}\) the Court upheld the Fair Labor Standards Act, and in so doing found that Congress's commerce power reached intrastate activities which so affect interstate commerce as to make their regulation an appropriate means of regulating interstate commerce.\(^{37}\) *Wickard v. Filburn*,\(^{38}\) now widely regarded as "the high-water mark of the New Deal's constitutional revolution,"\(^{39}\) followed *Darby* in 1942. In *Wickard*, the Supreme Court unanimously determined that the Agricultural Adjustment Act of 1938 "extend[ed] federal regulation to production not intended in any part for commerce but wholly for consumption on the farm."\(^{40}\) Implementing the aggregation principle, whereby intrastate activity may be "taken together" and thus found to "substantial[ly] influence" market conditions and interstate commerce,\(^{41}\) *Wickard* "helped build a Commerce Clause consensus that emerged over the entire course of the New Deal: 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'"\(^{42}\)

\(^{31}\) *Gibbons*, 22 U.S. (9 Wheat.) at 194.

\(^{32}\) Id. at 195.

\(^{33}\) 301 U.S. 1 (1937).

\(^{34}\) See *Lopez*, 514 U.S. at 556-57 (tracing the expansion of the commerce power).

\(^{35}\) *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

\(^{36}\) 312 U.S. 100 (1941).

\(^{37}\) See id. at 118.

\(^{38}\) 317 U.S. 111 (1942).

\(^{39}\) Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719, 1747 (2003); see also *Lopez*, 514 U.S. at 560 (designating *Wickard v. Filburn* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").

\(^{40}\) *Wickard*, 317 U.S. at 118.

\(^{41}\) See id. at 128.

\(^{42}\) Chen, supra note 39, at 1745 (quoting *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949)).
Despite the historical preference for distinguishing national and local police power, that preference waned during the New Deal-era as commerce forged a national economy and modern transportation created the demand for national regulation. The Supreme Court soon developed a pragmatic perception of the commerce power that seemed to recognize the Commerce Clause as "a complete grant of power" allowing Congress to pass commerce-based criminal and regulatory statutes almost at will. Judicial review of these statutes had become little more than a formality, with the courts treating the Commerce Clause as the "Hey, you-can-do-whatever-you-feel-like Clause," leading Professor David Currie to surmise that, without any judicially enforceable limits on Congress's Commerce Clause power, "constitutional federalism had died."

Having such broad regulatory authority under the Commerce Clause, it became the province of Congress to declare that an entire

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43 See Engle v. Isaac, 456 U.S. 107, 128 (1982) (noting that "[s]tates possess primary authority for defining and enforcing the criminal law"); see also Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion) ("Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."); United States v. Morrison, 529 U.S. 598, 618 (2000). In Morrison, the Court declared: The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. Id. (citations omitted)


48 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 316 (2d ed. 1988).


51 See Lopez, 514 U.S. at 556. The Court noted: Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under [the Commerce] Clause. In part, this was a recognition of the great changes... in the way business was carried on in this country... But
class of activities affects commerce.\textsuperscript{52} Thus, the Supreme Court has explained that the only question for the courts is whether the class is within the federal reach.\textsuperscript{53} Wirtz explained that, in the Commerce Clause context, courts are not empowered to "excise, as trivial, individual instances falling within a rationally defined class of activities."\textsuperscript{54} The Court followed Wirtz three years later in Perez v. United States\textsuperscript{55} with an additional reminder of the judiciary's role in reviewing federal commerce statutes, adding emphasis to note that Darby had decided that "a class of activities was held properly regulated by Congress."\textsuperscript{56} Perez applied Darby to its own criminal prosecution and emphasized that the "[[petitioner is clearly a member of the class . . . as defined by Congress and the description of that class has the required definiteness.\textsuperscript{57} It then explained that in the landmark civil rights decisions, Heart of Atlanta Hotel v. United States and Katzenbach v. McClung, which challenged the constitutional validity of the Civil Rights Act of 1964, "[i]t was the 'class of activities' test which we employed . . . to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests."\textsuperscript{58} Moreover, Justice Douglas wrote, "[i]n emphasis of our position that it was the class of activities regulated that was the measure, we acknowledged that Congress appropriately considered the 'total incidence' of the practice on commerce."\textsuperscript{59} Should any doubt remain, Perez affirmed Wirtz's declaration that "[[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."\textsuperscript{60}

Over twenty years later, Lopez\textsuperscript{61} and Morrison\textsuperscript{62} provided the courts with guiding tests for determining whether a regulated activity 'substantially affects' interstate commerce.\textsuperscript{63} They did not disturb,
however, the underlying principle that the power to regulate commerce is the power to govern a class of activity—and thus, the relative significance of footnote 27 articulated in *Maryland v. Wirtz* and reiterated in *Lopez*.

Because courts cannot excise the trivial and individual instances within a rationally defined and regulated class, those instances remain "of no consequence" to the Court.

In *United States v. Lopez*, the Court departed from its laissez faire interpretation of congressional Commerce Clause jurisdiction and struck down the Gun-Free School Zones Act of 1990, which made it a federal offense for anyone to possess a firearm in a school zone. The Court held that the Act exceeded congressional authority, and that the time had come to restrict Congress’s use of the commerce power.

Writing for the 5-4 majority, Chief Justice Rehnquist recounted the history of Commerce Clause jurisprudence and determined that the Court would not "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States... To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between

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64 See *Lopez*, 514 U.S. at 558 (quoting *Wirtz*, 392 U.S. at 197 n.27).

65 *Wirtz*, 392 U.S. at 197 n.27.

66 See Robert F. Nagel, *The New Federalism After United States v. Lopez: The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 644 (1996) (claiming that *Lopez* was "startling in itself because it was the first decision in some five decades to define any limit to the meaning of the phrase 'commerce among the states'"); see also Brickey, *supra* note 44, at 802-03 (1996) (noting that "the Court accomplished this feat without expressly overruling any Commerce Clause precedent"); 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, 609 (2001) (arguing that "Lopez clearly marked a departure from the modern jurisprudential trend of recognizing a broad grant of power to Congress under the Commerce Clause"). But see Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Caine?*, 2000 Wis. L. REV. 369, 378 (2000) (noting that "Lopez can be interpreted in strong, weak, or symbolic fashion, or it can be dismissed as judicial frolic and detour, 'destined to be a “but see” citation' rather than 'a dramatic shift in Commerce Clause jurisprudence'") [hereinafter *Constitutional Revolution*].


68 See *Lopez*, 514 U.S. at 567-68. The Supreme Court concluded in relevant part: To uphold the Government’s contention here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.

*Id.* (citations omitted).
what is truly national and what is truly local." 69 And this, the Chief Justice concluded, “we are unwilling to do.” 70

Under Lopez, the Court has recognized three broad categories of activity that Congress may regulate under the Commerce Clause. 71 First, Congress may regulate the use of “the channels of interstate commerce,” 72 namely roads, railroads, water routes and airways. Second, Congress is authorized “to regulate and protect the instrumentalities of interstate commerce.” 73 For example, Congress may regulate and protect aircraft, boats and ships, trucks, and other highway vehicles. 74 Finally, congressional commerce authority includes “the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” 75 The Court firmly concluded that this third category requires an analysis of whether the regulated activity substantially affects interstate commerce, 76 thereby requiring a “substantial effect test.” 77 Notable examples of activities that substantially affect interstate commerce included restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, as well as the production and consumption of home-grown wheat. 78

The Court followed Lopez five years later with United States v. Morrison, 79 striking down a provision of the Violence Against Women Act (VAWA), 80 which created a federal tort-based cause of action for violent crime motivated by gender-based animus on the

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69 Id.
70 Id. at 568.
71 Id. at 558.
72 Id. (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 256 (1964) and United States v. Darby, 312 U.S. 100, 114 (1941)).
73 Id. at 558.
74 See Perez, 402 U.S. 146, 150 (1971). Perez offered the following explanation of the three categories of commerce and their respective examples:

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnapped [sic]. Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft, or persons or things in commerce, as for example, thefts from interstate shipments. Third, those activities affecting commerce.

Id. (citations omitted).
75 Lopez, 514 U.S. at 558-59 (citing Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)) (citations omitted).
76 Id. at 559.
77 United States v. Ho, 311 F.3d 589, 598 (5th Cir. 2002), cert. denied, 539 U.S. 914 (2003).
grounds that the Commerce Clause authority did not extend to gender-based violence.\textsuperscript{81} \textit{Morrison} clarified the substantial effect test and articulated what have become the four controlling factors for determining whether a regulated activity substantially affects interstate commerce.\textsuperscript{82} According to \textit{Morrison}, courts will ask: first, whether the statute in question regulates commerce or any sort of economic enterprise;\textsuperscript{83} second, whether the statute contains any express jurisdictional element that might limit its reach to a discrete set of cases;\textsuperscript{84} third, whether the statute or its legislative history contains express congressional findings that the regulated activity affects interstate commerce;\textsuperscript{85} and finally, whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated.\textsuperscript{86} Looking to those four factors, Chief Justice Rehnquist, writing for the majority, struck down VAWA on its face, determining that intrastate, gender-motivated crime does not substantially affect interstate commerce, and rejecting the position that Congress may regulate non-economic "conduct based solely on that conduct's aggregate effect on interstate commerce."\textsuperscript{87} It is important to keep in mind that \textit{Morrison} 's four factors do not provide a bright-line test, and an affirmative or negative answer on any or all of the factors will not guarantee a particular outcome; rather, they are factors the courts should consider in determining whether a class of activity substantially affects interstate commerce.\textsuperscript{88}

Overturning a commerce-based statute for the first time in nearly six decades and revisiting the ground rules for federally regulating interstate commerce did not go unnoticed.\textsuperscript{89} As mentioned, \textit{Lopez} and

\begin{footnotes}
\item[81] See \textit{Morrison}, 529 U.S. at 619. The Supreme Court also refused to uphold VAWA as an exercise of Congress’s remedial power under Section 5 of the Fourteenth Amendment, but this Note is limited to the Court’s Commerce Clause discussion. \textit{Id.} at 619-27.
\item[82] See \textit{United States v. McCoy}, 323 F.3d 1114, 1119 (9th Cir. 2003).
\item[83] \textit{Morrison}, 529 U.S. at 610 (noting that "a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case").
\item[84] \textit{Id.} at 611-12 (noting that "a jurisdictional element may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce").
\item[85] \textit{Id.} at 612 ("[T]he existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.'" (quoting \textit{Lopez}, 514 U.S. at 563) (second and third alterations in original)).
\item[86] \textit{Id.} at 612 (recalling that "our decision in Lopez rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated").
\item[87] \textit{Id.} at 617. "Aggregate effect" considerations will be discussed in Part III, \textit{infra}, of this Note.
\item[88] See, e.g., \textit{id.} at 615 (striking down the statute despite finding that VAWA had a legislative history with congressional findings showing that violence against women substantially affected commerce).
\item[89] As Brannon Denning and Glenn Reynolds noted, "literally hundreds of cases involving a Lopez challenge had been decided between 1995 and 1999." Denning & Reynolds, \textit{supra} note
\end{footnotes}
Morrison prompted a groundswell of litigation challenging an array of federal statutes passed under Commerce Clause jurisdiction, as well as a host of symposia and articles analyzing the Court’s “new” Commerce Clause jurisprudence. Lopez made clear, however, that the Supreme Court’s Commerce Clause jurisprudence would not look to the de minimis and peculiar instances of a petitioner’s actions to determine if her activity was constitutionally regulable. That is, the Court will not hear a truly as-applied challenge to a commerce-based statute, striking it down for the purposes of a single litigant. Thus, petitioners are afforded a Hobson’s choice—make the facial challenge, or make none.

II. FACIAL VS. AS-APPLIED CHALLENGES: HOW TO ATTACK THE LAW

But, unfortunately, law by no means confines itself to its proper functions.

— Frederic Bastiat

Article III of the United States Constitution authorizes the federal judiciary to resolve “cases and controversies” arising under, among other things, the Constitution and federal law. There are two gener-
ally recognized ways to challenge a law within this framework: facially and as-applied. A typical challenge to a federal statute "alleges only that its application to a particular plaintiff, in a particular situation, is unconstitutional." This is the as-applied challenge; and, to be successful, the plaintiff must establish that the statute is unconstitutional with respect, or "as-applied," to him. Upon such a showing, an as-applied challenge typically results in the court ordering the government not to apply the law to the petitioner's conduct. On the other hand, to succeed in a facial attack, "the challenger must establish that no set of circumstances exists under which the Act would be valid"—an onerous burden, making it "the most difficult challenge to mount successfully." As Stuart Buck has framed it, facial challenges allow the court to order the government "not to apply the law to anyone ever again.

As mentioned above, as-applied challenges are the traditional and even preferred challenges to federal statutes, with the facial challenge considered a rare and suspect breed. Hearing most challenges as-applied rather than facially allows the courts to limit the scope of congressional statutes without violating the principle that a "federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." Thus, the Supreme Court has largely regarded facial invalidation as "manifestly strong medicine" that "has been employed by the Court sparingly and only as a last resort."

95 See Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 544-45 (1914) (requiring that a plaintiff show that the alleged constitutional feature injured him in order to strike down a state law as unconstitutional).
96 See Buck, supra note 94, at 430-31.
98 Id.
99 Buck, supra note 94, at 431.
100 See Fallon, supra note 7, at 1321 (recognizing "the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge").
101 Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985). Professor Fallon has argued that "[t]he rationale for allowing statutes to be challenged only as applied resides largely in the notions that statutory meaning frequently emerges best through case-by-case specification." Fallon, supra note 7, at 1344.
There is, however, a second way to constitutionally challenge a statute "on its face." In limited contexts, litigants can argue that a statute is "overbroad," that is, that the statute prohibits such a broad range of constitutionally protected activity that the statute is unconstitutional. The "overbreadth doctrine," as it is customarily called, allows a challenger to demonstrate that the law, as written, cannot be constitutionally applied in a substantial number of instances. In effect, the overbreadth doctrine is an exception to the otherwise firm rule that a petitioner must only assert his or her own rights, and not those of a third party. In the words of the Court, usually "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Significantly, the Supreme Court does not recognize the overbreadth doctrine beyond the limited context of the First Amendment. Thus, absent a First Amendment claim, petitioners will be

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v. Oklahoma, 413 U.S. 601, 613 (1973)). See also, Younger v. Harris, 401 U.S. 37, 52-53 (1971) explaining that

[t]he power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a "case or controversy" sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary.

103 Buck, supra note 94, at 441. Buck has noted that "[t]he overbreadth doctrine can be traced to Thornhill v. Alabama, 310 U.S. 88 (1940), a case involving the free speech rights of picketers. Though the overbreadth doctrine is usually associated with speech cases, it has been used in freedom of association cases as well." Id. at 431 n.16.


105 Buck, supra note 94, at 442.

106 Broadrick, 413 U.S. at 610.

107 United States v. Salerno, 481 U.S. 739, 745 (1987). As Stuart Buck has observed, "[i]f all facial challenges fell into the overbreadth model, then the third-party standing rule would never apply to facial challenges—an even more anomalous result." Buck, supra note 94, at 442. Buck also notes, however, that

[a] doctrine parallel to that of First Amendment overbreadth has emerged in the abortion context as well. In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), a plurality of the Court held that an abortion law is facially unconstitutional if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."

Id. at 432 (second alteration in original).
barred from challenging Commerce Clause regulations on overbreadth grounds, and will be obliged to convince the court that the regulations cannot be enforced constitutionally under any set of circumstances.\textsuperscript{108}

Despite the relatively plain and defined roles of facial and as-applied challenges, Professor Richard Fallon has remarked that "a debate rages over when litigants should be able to challenge statutes as ‘facially’ invalid, rather than merely invalid ‘as applied.’"\textsuperscript{109} For example, Michael Dorf has argued that the facial challenge is far more common than its "rare and scarce" reputation would lead us to believe.\textsuperscript{110} Matthew Adler has gone so far as to suggest that there are no true as-applied constitutional challenges,\textsuperscript{111} while Professor Fallon has declared that the facial versus as-applied distinction is really a false dichotomy, because "[a]ll challenges to statutes arise when a litigant claims that a statute cannot be enforced against her."\textsuperscript{112}

The debate extends to the Supreme Court, with lively exchanges between Justice Stevens and Justice Scalia that have led Professor Fallon to wonder whether "the Justices of the Supreme Court are not only divided, but also conflicted or even confused" about when statutes should be subject to a facial challenge.\textsuperscript{113} Dissenting from the \textit{City of Chicago v. Morales}\textsuperscript{114} plurality, for example, Justice Scalia frowned upon facial challenges altogether, arguing that \textit{Marbury v. Madison}\textsuperscript{115} only allows the courts to review laws as “applied to this

\begin{itemize}
\item \textsuperscript{108} See \textit{Salerno}, 481 U.S. at 745.
\item \textsuperscript{109} Fallon, \textit{supra} note 7, at 1321.
\item \textsuperscript{110} See Michael C. Dorf, \textit{Facial Challenges to State and Federal Statutes}, 46 STAN. L. REV. 235, 269 (1994) (arguing that the overbreadth doctrine generally extends to all "nonlitigation fundamental rights").
\item \textsuperscript{111} Matthew D. Adler, \textit{Rights Against Rules: The Moral Structure of American Constitutional Law}, 97 MICH. L. REV. 1, 157 (1998). Professor Adler argues that [t]here is no such thing as a true as-applied constitutional challenge. The very idea is a mistake. Until we get rid of that idea, our doctrines for adjudicating facial challenges will remain confused. The concept of unconstitutionality does not attach to the treatment of particular litigants; it attaches . . . to the enactment of statutes and other rules. \textit{Salerno} conceives of the facial invalidity of a rule as the limiting point of as-applied invalidity: a rule is facially invalid if, for every application of the rule, that application is constitutionally invalid. Justice O’Connor, in her response to \textit{Salerno}, tries to soften the test somewhat: a rule is facially invalid if, for many applications of the rule, those are constitutionally invalid. But both tests are mistaken, because both trade upon the mistaken, albeit standard, notion that rule-applications can be properly described as unconstitutional.
\item \textsuperscript{112} Fallon, \textit{supra} note 7, at 1321; see also \textit{City of Chicago v. Morales}, 527 U.S. 41, 78 n.1, (1999) (Scalia, J., dissenting) (noting that outside of the First Amendment “overbreadth” cases, “a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge”).
\item \textsuperscript{113} Fallon, \textit{supra} note 7, at 1323 (noting the Justices’ lengthy debate in \textit{Morales}).
\item \textsuperscript{114} 527 U.S. 41(1999).
\item \textsuperscript{115} 5 U.S. (1 Cranch) 137 (1803).
\end{itemize}
party, in the circumstances of this case." Justice Scalia went on to argue:

It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in all applications . . . . I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications? Until recently, this debate had not directly addressed the particular question of whether the as-applied challenge is in fact appropriate for Commerce Clause statutes, or whether, in the Commerce Clause context, the claimant may only choose "the horse closest to the stable doors," and thus, "go for broke."

A proper challenge to a Commerce Clause statute asks the court to determine whether Congress has authority to regulate a class of activity that Congress has already determined substantially affects interstate commerce. This is the classic facial challenge. The as-applied challenger, however, asks the court a different question—namely, is the regulation constitutional as applied to the particular and peculiar facts of my case? An as-applied challenge asks the court to consider the de minimis character of individual instances—a consid-

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116 Morales, 527 U.S. at 74 (Scalia, J., dissenting). The fuller context of Justice Scalia's argument is as follows:

The rationale for our power to review federal legislation for constitutionality, expressed in Marbury v. Madison, was that we had to do so in order to decide the case before us. But that rationale only extends so far as to require us to determine that the statute is unconstitutional as applied to this party, in the circumstances of this case. Id. (citation omitted).

117 Id. at 77 (Scalia, J., dissenting).

118 This debate was taken up directly in United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003) and United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003). See also Rancho Viejo v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) ("The panel's opinion in effect asks whether the challenged regulation substantially affects interstate commerce, rather than whether the activity being regulated does so . . . . Such an approach seems inconsistent with the Supreme Court's holdings in United States v. Lopez and United States v. Morrison.") (citations omitted).

119 See, e.g., Maryland v. Wirtz, 392 U.S. 183, 192 (1968) (noting "[t]he only question for the courts is then whether the class is "within the reach of the federal power"" (emphasis added) (quoting United States v. Darby, 312 U.S. 100, 120-121 (1940)); see also GDF Realty Invs. v. Norton, 326 F.3d 622, 633 (5th Cir. 2003) (noting that "consistent with the Supreme Court's interpretation of the Commerce Clause, we conclude that the scope of inquiry is primarily whether the expressly regulated activity substantially affects interstate commerce").
eration the Supreme Court has said it will not make. But a closer look at the as-applied Commerce Clause challenge reveals that the litigant might actually be asking the court one of two questions which are generally not "as-applied" questions—perhaps without realizing it.

An as-applied litigant in the Commerce Clause context generally asks either whether Congress can in fact constitutionally regulate the litigant’s class of activity; or, whether the particular, de minimis conduct in question falls within the scope of the statute or regulation. The first question, however, is simply another way of asking whether the statute is constitutional on its face; and the second question merely asks whether the statute prohibits the party’s alleged conduct. Neither of these questions should be separately classified as appropriate, “as-applied” constitutional challenges. Instead, either they should be recognized, in the first instance, as mounting a facial challenge to the statute’s constitutionality or, they should be seen in the second instance as raising no constitutional challenge at all, asking merely whether the litigant has violated the statute. Regardless of how the claim is constructed, because the Commerce Clause authorizes Congress to regulate a class of activity from which the de minimis instances are not excluded, a constitutional challenge to congressional Commerce power must ask whether the class of activity Congress has regulated falls within the scope of its authority. To ask any other question is not to bring a proper constitutional challenge; in Hobson’s terms, it seeks to rent a tired horse.

III. APPLYING THE CLASS OF ACTIVITIES TEST:
PORN, GUNS, AND HO

[C]ongressional legislation under the Commerce Clause always will engender “legal uncertainty.”
— Chief Justice William Rehnquist

While a multitude of commerce-based statutes have been constitutionally challenged following the Lopez and Morrison decisions, a closer look at how Lopez approached the facts before it, and then an analysis of three Commerce Clause statutes and their respective litigation, may help illustrate the effect of requiring facial challenges to Commerce Clause laws. This Part considers this proposal in the context of constitutional challenges to child pornography, firearms, and asbestos removal laws.

121 Id. at 566.
A. The Lopez Approach

The Supreme Court's handling of the challenge presented in United States v. Lopez\(^1\) is particularly instructive. Alfonso Lopez provided the Court with an ideal opportunity to take an as-applied approach to a Commerce Clause statute and find the Gun-Free School Zones Act of 1990\(^2\) unconstitutional only as-applied to the petitioner, and thereby avoid the broader constitutional question. Under the respected theory of constitutional avoidance the Court will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case."\(^3\) If the Court could have read the Gun-Free School Zones Act so as to uphold its constitutionality, it would have done so.\(^4\) But the Court approached the Act facially and struck it down—a significant decision given the theory of constitutional avoidance and the Court's presumption that a statute is constitutional until "a plain showing that Congress has exceeded its constitutional bounds."\(^5\)

The facts in Lopez, recounted by the Fifth Circuit on appeal, suggest that if the Supreme Court had considered the de minimis facts of Alfonso Lopez's case relevant to deciding the case, the statute very


\(^{124}\) Burton v. United States, 196 U.S. 283, 295 (1905); see also United States v. Raines, 362 U.S. 17, 21 (1960) (noting that courts typically avoid "a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))).

\(^{125}\) That the Court would have avoided the broader constitutional question in Lopez admittedly presumes that the Justices would have followed Justice Brennan's opinion for a unanimous Court in United States v. Raines:

The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. . . . This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional . . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.


\(^{127}\) Id.
well could have survived the constitutional challenge. The Fifth Circuit summarized the facts in *Lopez* as follows:

On March 10, 1992, . . . Alfonso Lopez, Jr., then a twelfth-grade student attending Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun. Based upon an anonymous tip, school officials confronted Lopez, who admitted that he was carrying the weapon. Although the gun was unloaded, Lopez had five bullets on his person. After being advised of his rights, Lopez stated that "Gilbert" had given him the gun so that he (Lopez) could deliver it after school to "Jason," who planned to use it in a "gang war." Lopez was to receive $40 for his services.

Upon arrest, Lopez was charged with violating the Gun-Free Schools Zone Act, which made it illegal to possess a firearm in a school zone.

Significantly, Alfonso Lopez not only possessed a firearm in a school zone, he was engaged as a courier in the sale of a handgun, and was thus involved in an obviously commercial activity likely considered constitutionally regulable. Of even greater significance, however, is that the Court did not look to the peculiar, *de minimis* character of this gun-running actor; rather, it addressed whether the *class of activity* regulated by the statute was within Congress's commerce power. As the Fifth Circuit explained in *GDF Realty v. Norton*, had Lopez looked at the commercial nature of Alfonso Lopez's gun-trafficking behavior, the facial challenge would have failed.

But *Lopez* looked only to the activity expressly regulated by the statute, and because the class of activity regulated under the Act was gun possession, and not gun trafficking, the fact that Alfonso Lopez was a gun courier involved in a gun sale at the time of his arrest was wholly irrelevant to the Court's consideration. Thus, *Lopez* not only in-

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130 *Lopez*, 2 F.3d at 1345. A "school zone" was defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." United States v. Lopez, 514 U.S. 549, 551 n.1 (1995).
131 See *Lopez*, 514 U.S. at 552 (holding that "the Act exceeds the authority of Congress [t]o regulate Commerce . . . among the several States" and affirming the Fifth Circuit's position that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause") (alterations in original).
132 326 F.3d 622 (5th Cir. 2003).
133 *Id.* at 635.
134 As the Fifth Circuit stated in *Norton*, "[e]ither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity . . . solely because non-regulated conduct . . . by the actor en-
voked the language from Wirtz’s footnote 27 denouncing the *de minimis* characteristics of a case, it also provided a clear example for resolving constitutional challenges to commerce-based statutes: look only to whether the regulated class of activity substantially affects interstate commerce—that is, look to the statute *on its face*—and then determine if the claimant is a member of that class.¹³⁵ Notwithstanding the *Lopez* example, lower courts continue to entertain as-applied challenges to Commerce Clause statutes,¹³⁶ whittling away the *de minimis* activities from the broader, constitutional regulations. Such cases, as discussed below, have included federal child-pornography statutes,¹³⁷ firearms laws,¹³⁸ and the asbestos removal and notice requirements of the Clean Air Act.¹³⁹

**B. Child Pornography: The Protection of Children from Sexual Predators Act**

A recent line of cases has cast doubt on the constitutionality of Congress’s Protection of Children from Sexual Predators Act of 1998 (the “Act”),¹⁴⁰ a federal statute prohibiting the possession of one or more sexually explicit depictions of a minor.¹⁴¹ The statute prohibits anyone from

(B) knowingly possess[ing] 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in inter-state or foreign commerce, or

¹³⁵ *Lopez*, 514 U.S. at 558.
¹⁴¹ See *Kallestad*, 236 F.3d at 226.
which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct. ¹⁴²

In each of these recent cases, the statute was ruled facially constitutional. Yet the Sixth and Ninth Circuits both found it unconstitutional as applied to particular defendants. ¹⁴³ The reasoning in these two cases is particularly salient.

1. United States v. Corp

Patrick Corp, a twenty-three-year-old Michigan man, was arrested after film developers at his local pharmacy became suspicious when he asked them not to view the pictures and allegedly remarked “these are sick” while dropping off the roll of film. ¹⁴⁴ A police investigation revealed that the photographs were pornographic shots of a young girl, Sandra Sauntman, then a seventeen-year-old high school student in Reed City. ¹⁴⁵ The pictures showed Corp’s twenty-six-year-old wife, Heather, engaging in sexual activity with Sandra. ¹⁴⁶ The government did not allege that Corp distributed the photographs, or that he ever invited others to observe the photographs, ¹⁴⁷ moreover, it did “not expect to show that Defendant intended or did distribute the images in question in interstate commerce.” ¹⁴⁸ Indeed, Sandra testified that she posed with Heather voluntarily, ¹⁴⁹ and never expected anyone else to even know about the photographs. ¹⁵⁰ Despite the victim’s testimony and the “strictly personal” use of the photographs, Corp

¹⁴³ See United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001) (choosing “not to declare the Act facially unconstitutional,” but finding “that Corp’s activity was not of a type demonstrated substantially to be connected or related to interstate commerce on the facts of this case”); United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (ignoring the facial challenge and holding only that “[t]he statute is unconstitutional as applied”).
¹⁴⁴ Corp, 236 F.3d at 326.
¹⁴⁵ Id.
¹⁴⁶ Id.
¹⁴⁷ Id.
¹⁴⁸ Id. at 326 n.4 (quoting from the government’s brief opposing defendant’s motion to dismiss).
¹⁴⁹ Id. at 326.
¹⁵⁰ Id. at 326 n.5.
was convicted under the Act and sentenced to five months imprisonment plus supervised release.\textsuperscript{151}

On appeal, Corp argued that the statute was “unconstitutional on its face because it exceeds Congress’s Commerce Clause authority, and it is also unconstitutional as applied in this case because this offense does not have a sufficient nexus with interstate commerce.”\textsuperscript{152} The Sixth Circuit reversed Corp’s conviction, finding the statute unconstitutional as-applied,\textsuperscript{153} and noting that although the Act raised serious, constitutional, Commerce Clause questions, “we choose not to declare the Act facially unconstitutional.”\textsuperscript{154} In overturning the decision below, the Sixth Circuit agreed with the trial court’s observation that “the case is outside the heartland of the statute which is intended to punish people who engage in sexual abuse of minors.”\textsuperscript{155} The court concluded that because Corp was not the typical offender targeted by Congress,\textsuperscript{156} his actions lacked a “sufficient nexus with interstate commerce”\textsuperscript{157} to apply the statute against him.

In effect, the Sixth Circuit determined that in order to be found guilty of violating the Act, the government must prove that the defendant was the “typical offender feared by Congress that would . . . perpetuate the [child pornography] industry via interstate connections.”\textsuperscript{158} How would the government demonstrate such a thing? Corp provided an itemized list of questions for determining, on a case-by-case basis, whether the activity substantially affects interstate commerce.\textsuperscript{159} Remarkably, those questions include: “Were there multiple children so pictured? Were the children otherwise sexually abused?”\textsuperscript{160} The court did not explain how the answers to these questions provide a particularly accurate barometer for measuring the defendant’s activities’ effect on interstate commerce.\textsuperscript{161} What is clear, however, is that Patrick Corp’s conviction was overturned because, in the Sixth Circuit’s estimation, his conduct fell outside the intended scope of the statute. Put another way, Corp did not violate the law.

\textsuperscript{151} Id. at 327.
\textsuperscript{152} Id. at 325.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 332.
\textsuperscript{155} Id. at 327. The Sixth Circuit went so far as to say “Sauntman was not an ‘exploited child’ nor a victim in any real and practical sense in this case.” Id. at 332.
\textsuperscript{156} Id. at 333.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id. It is unclear whether these questions effectively add elements to the offense.
\textsuperscript{161} More helpful for determining “a substantial effect on commerce” would be whether the defendant was in fact involved or intended to be involved in distributing the pictures to others, particularly in other states. The court acknowledges that this was not the case, but then omits these considerations from its list of “relevant” questions. See id. at 332-333.
Thus, in asking whether Corp was a “typical offender” whose activity is sufficiently tied to interstate commerce, the court merely asked whether Corp broke the law. But, as Lopez demonstrated, this question is entirely irrelevant for determining the constitutionality of a commerce-based statute. Asking whether the defendant did anything prohibited by the statute is not a constitutional question. Answering that question is necessary, of course, for sustaining a conviction and applying the weight of the law to the claimant; but mounting a constitutional challenge to a Commerce Clause statute first requires the court to determine “whether the class is ‘within the reach of the federal power.’” Then, where the class of activities is constitutionally regulated, “the courts have no power ‘to excise, as trivial, individual instances’ of the class.” Failing to ask the appropriate question, Corp demonstrates how courts perform just such a surgical excision.

2. United States v. McCoy

As the Ninth Circuit told the story, Rhonda and Jonathan McCoy were at home dying Easter eggs with their ten-year old daughter, Kala, when “[a]t some point during the evening, Rhonda and Kala, partially unclothed, posed side by side for [Jonathan’s] camera, with their genital areas exposed. This pose was captured in one photograph.”

Rhonda McCoy was subsequently charged under the Act for possession of a single piece of child pornography. The district court

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162 Id. at 333.
166 But see Dean C. Seman, Comment, United States v. Corp: Where to Draw the Interstate Line on Congress’ Commerce Clause Authority to Regulate Intrastate Possession of Child Pornography, 9 VILL. SPORTS & ENT. L.J. 181 (2002). Seman agreed with the Sixth Circuit’s analysis and decision, arguing:

The Sixth Circuit, in Corp, reached the correct decision by evaluating the defendant’s behavior and personal impact on the national child pornography market in light of the Lopez factors framework. This approach applies the same judicial review requiring a rational connection between the interstate activity and interstate affect, however does not apply the strict Wickard market theory. Instead, this approach properly focuses on the defendant’s conduct on a “case-by-case basis.” . . . This approach also guarantees the defendant’s conduct falls within the permissible Lopez factors, specifically, a commercial and economic activity.

Id. at 206-07.
167 United States v. McCoy, 323 F.3d 1114, 1115 (9th Cir. 2003).
168 Id. at 1116. According to McCoy:

The government filed an indictment charging both Jonathan and Rhonda with four counts of manufacturing child pornography by a parent using materials transported in
denied her motion to dismiss, and McCoy appealed, arguing that the statute was both "on its face and as applied, . . . an unconstitutional exercise of Congress's Commerce Clause power." 169

On appeal, the Ninth Circuit ruled the statute unconstitutional "as applied to McCoy and others similarly situated." 170 Writing for the majority, Judge Stephen Reinhardt declined to determine whether the statute was facially constitutional, leaving that question for the Circuit's Judge Tallman to answer just six months later. 171 As the Ninth Circuit explained in United States v. Adams, 172 the McCoy panel conducted an as-applied analysis of the Act in determining that "homegrown child pornography intended for personal use did not influence, in any way, the national market for child pornography." 173 Judge Reinhardt's opinion emphasized that McCoy's photograph "never entered in and was never intended for interstate or foreign commerce." 174 The McCoy court held that applying the Act to the intrastate possession of a photograph that "has not been mailed, shipped, or transported interstate and is not intended for interstate distribution or for economic or commercial use . . . cannot be justified under the Commerce Clause." 175

Rhonda McCoy, like Patrick Corp, 176 would seem an ideal candidate for waging an as-applied challenge to the Protection of Children from Sexual Predators Act. She possessed but one compromising photo of her own daughter without any intention of displaying or distributing the picture, and did not exacerbate the growing problem of

interstate commerce, 18 U.S.C. § 2251(b) . . . . Rhonda and Jonathan filed motions to dismiss the indictment, which the district court denied on May 10, 2001. Rhonda then entered plea negotiations with the government, while Jonathan elected to stand trial. He was eventually acquitted by a jury on all counts on June 13, 2001.

Id. at 1116-1117.
169 Id. at 1133.
170 See United States v. Adams, 343 F.3d. 1024, 1026 (9th Cir. 2003), cert. denied, 124 S. Ct. 2871 (2004). The court began:

In United States v. McCoy, we entertained an "as-applied" constitutional challenge to 18 U.S.C. § 2252(a)(4)(B) and held that Congress lacks the power under the Commerce Clause to criminalize the "simple intrastate possession of home-grown child pornography not intended for distribution or exchange." Now we must answer the question left undecided in McCoy: whether 18 U.S.C. § 2252(a)(4)(B), on its face, is an unconstitutional exercise of congressional power. We hold that it is not.

Id. (citations omitted).
171 Id. at 1028-29.
172 McCoy, 323 F.3d at 1132.
173 Id. at 1133.
174 See id. at 1131 (noting that McCoy's circumstances were similar to those in United States v. Corp, 236 F.3d 325 (6th Cir. 2001)).
interstate child pornography trafficking.\textsuperscript{177} Yet an as-applied challenge, even here, was inappropriate.

As Judge Stephen Trott wrote in dissent, by trying to avoid deciding whether § 2252(a)(4)(B) of the Act is facially unconstitutional, the \textit{McCoy} majority “attempted to restrict their holding to McCoy and to others ‘similarly situated,’ but it is not clear . . . that the law permits such a limitation.”\textsuperscript{178} Judge Trott argued, instead, that “the Supreme Court appears . . . to have ruled out ‘as applied’ challenges in Commerce Clause cases,”\textsuperscript{179} so that “if the conduct under review falls within the plain language of the statute, precedent requires us to take the statute head on, not carve pieces out of it.”\textsuperscript{180} In Judge Trott’s view, “[t]he real determinative question is whether the activity generically described in the \textit{statute} has a substantial effect on interstate commerce such that it is subject to criminalization by Congress.”\textsuperscript{181} This perspective is much closer to the “class of activities” test as announced in \textit{Perez}.\textsuperscript{182} In contrast to the significance that Judge Reinhardt afforded McCoy’s singular “home-grown” photograph that was never intended for interstate or foreign commerce,\textsuperscript{183} Judge Trott contended that because Congress has found that an entire class of activity substantially affects interstate commerce, “[t]o the \textit{statute}, it is immaterial that the particular child pornography under scrutiny was not produced for sale or trade.”\textsuperscript{184} What is material, is the determination that “(1) her conduct falls within the purview of the statute, as she has stipulated, and (2) the \textit{statute} itself which covers the activity is valid.”\textsuperscript{185} Thus, Judge Trott argued the as-applied challenge presents an inappropriate inquiry as “it is impossible to read McCoy out of the statute.”\textsuperscript{186}

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\item \textsuperscript{177} \textit{Id.} at 1132.
\item \textsuperscript{178} \textit{Id.} at 1133 (Trott, J., dissenting).
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} \textit{Id.} Judge Trott hinted at this analysis less than a year before \textit{McCoy} in his majority opinion in \textit{United States v. Cortes}: Here we decide whether a class of activity, \textit{i.e.,} carjacking, substantially affects interstate commerce such that Congress may regulate it. Our inquiry closely parallels the Supreme Court’s inquiries in \textit{Lopez} and \textit{Morrison}: whether Congress could regulate certain gun possessions or gender-motivated crimes. Because we decide that carjacking does substantially affect interstate commerce, Congress may regulate it in its entirety. That a particular instance of carjacking may have a \textit{de minimis} effect on interstate commerce is of no consequence.
\item \textsuperscript{181} \textit{McCoy}, 323 F.3d at 1134 (Trott, J., dissenting).
\item \textsuperscript{182} \textit{See} \textit{Perez} v. United States, 402 U.S. 146, 152-54 (1971).
\item \textsuperscript{183} \textit{See} \textit{McCoy}, 323 F.3d at 1132.
\item \textsuperscript{184} \textit{Id.} at 1141 (Trott, J., dissenting).
\item \textsuperscript{185} \textit{Id.} at 1135 (Trott, J., dissenting).
\item \textsuperscript{186} \textit{Id.} at 1140 (Trott, J., dissenting).
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Of greater significance, however, is Judge Trott’s analysis of the as-applied challenge at work in McCoy. As discussed above, Judge Trott regarded “[t]he upshot of condemning the statute ‘as applied’ . . . [as] either (1) tantamount to condemning the statute, *hic sepultus*, on its face as overbroad, or (2) construing the statute as . . . not covering intrastate non-commercial possession.”187 That is to say, the as-applied challenge is either a facial challenge thinly guised, or it merely asks if the defendant breached the terms of the statute.

Judge Reinhardt argued that he did not decide the case “on the idiosyncratic facts of an individual instance of *de minimis* character.”188 Instead, wrote Judge Reinhardt, the majority interpreted the statute “as applied to McCoy’s conduct as it falls within a class of activity that § 2252(a)(4)(B) purports to reach: intrastate possession of a non-commercial and non-economic character.”189 Asking, however, whether Congress may regulate a “class of activity” is, in fact, the essence of a facial challenge.190 So, to the extent that McCoy looked to the class of activity proscribed by the statute, it looked to whether the statute was constitutional on its face. Any attempt to restrict the finding of that inquiry to a particular defendant and others similarly situated, has, as Judge Trott said, “exceeded what the law permits.”191

Notwithstanding their claims to the contrary, both the Sixth and Ninth Circuits in Corp and McCoy attempted to restrict their findings to the *de minimis* facts of a peculiar case. In the first instance, Corp found only that Patrick Corp’s behavior did not make him a feared and typical offender—hardly a constitutional question.192 In the second case, McCoy held that Rhonda McCoy’s conduct fell within a class of activity lying beyond Congress’s reach—a finding that should have invalidated the statute.193 Neither case framed the Commerce Clause analysis properly.

### C. Firearms Possession in United States v. Stewart

Within months of deciding McCoy, the Ninth Circuit again heard a constitutional challenge to Congress’s commerce power in *United
Robert Stewart appealed his conviction under 18 U.S.C. § 922(o), which proscribes the transfer or possession of a machinegun by a felon. Stewart sold parts kits for manufacturing and assembling .50 caliber rifles. After discovering that he had a prior felony conviction for possession and transfer of a machinegun, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) investigated Stewart’s business and a warranted search of Stewart’s residence revealed thirty-one firearms, including five machineguns. Of particular interest to the court, however, was the fact that these machineguns were “entirely homemade.” As the Ninth Circuit explained, “[c]ontrary to [the] assumption that an unlawful transfer [of firearms] must precede unlawful possession, Stewart did not acquire his machineguns from someone else: He fabricated them himself.” The guns being “genuinely homemade,” the court determined that Stewart’s machineguns had not been in the channels of interstate commerce, and found no “inherent link to interstate commerce” by which Congress could prohibit his possession. The court therefore vacated the conviction under § 922(o), finding the statute unconstitutional as-applied to Stewart.
The difficulty with Stewart’s as-applied ruling is that it fails to account for the question the Commerce Clause presents: whether “an entire class of activities affects commerce” and is therefore regulable by Congress. Without providing “any jurisdictional requirement that the machinegun has traveled in or substantially affected interstate commerce,” § 922(o) makes it illegal for a felon to “transfer or possess a machinegun.” Thus, the class of activity at issue in Stewart was a felon’s possession (or transfer) of a machinegun. Judge Alex Kozinski, however, writing for the majority, set out to “decide whether Congress can, under its Commerce Clause power, prohibit the mere possession of homemade machineguns,” and “whether this statute, as applied to Stewart, offends the Commerce Clause.”

Finding the statute unconstitutional only as-applied to Stewart, and upholding it on its face, Judge Kozinski failed to follow the Lopez/Wirtz example, and ruled on the obviously de minimis characteristics of Stewart’s peculiar position, rather than deciding whether Congress can constitutionally regulate the class of activity reached by the statute. The class of activity described by the statute is without question the “transfer or possess[ion] of a machinegun.” The proper constitutional inquiry, then, was whether the Commerce Clause grants Congress the authority to proscribe the transfer or possession of machineguns by felons, and not whether Stewart’s “genuinely homemade” machineguns were regulable.

Because Stewart was a felon possessing machineguns, he clearly fell within the statute’s expressly regulated class of activity. Thus, he could not, and did not, claim that his behavior fell outside the defined scope of the statute. Instead, he was compelled to challenge the validity of Congress’s regulation of machinegun possession; a challenge that can only be described as facial. Understood this way, if the court found that Congress can regulate the class of activity (i.e., a felon’s machinegun possession), then, because Stewart was a member of the

of firearms by a felon).

203 Id. at 1140. Stewart’s Second Amendment challenge was rejected by the court, and his conviction was reversed only because § 922 was “an unlawful extension of Congress’s commerce power.” Id. at 1142.
205 Stewart, 348 F.3d at 1134.
206 Id. (quoting 18 U.S.C. § 922(o)).
207 Id. at 1133 (emphasis added).
208 Id. at 1134.
209 Id. at 1140 (“We therefore conclude that section 922(o) is unconstitutional as applied to Stewart.”).
211 Stewart, 348 F.3d at 1136.
designated class, the *de minimis* nature of his homemade machinegun should have been irrelevant to the court's consideration. If, on the other hand, the court determined that Congress can *not* regulate the machinegun-possessing class because Congress failed to make the required jurisdictional showings, under *Lopez* and *Morrison*, linking possession to interstate commerce, then Congress exceeded its constitutional commerce power and the statute should have been struck down on its face, and not merely as applied to a particular defendant.

Judge Kozinski, however, took neither of these approaches.²¹² Instead, he agreed with Stewart's argument that despite being a member of a statutorily defined class²¹³ of machinegun-holders, Stewart's particular type of machinegun somehow exempted him from that regulated class. Thus, Judge Kozinski effectively recognized a sub-class of machinegun-holders mentioned nowhere in the statute, and he improperly parsed the statute, "excis[ing], as trivial"²¹⁴ petitioner Stewart's individual instance from a "rationally defined class of activities."²¹⁵

Following *McCoy*'s discussion of the as-applied versus facial Commerce Clause challenge by only a few months, Judge Kozinski took up the *McCoy* debate in Part 3 of his opinion and directly addressed Judge Trott's dissenting and "superficially plausible arguments"²¹⁶ in *McCoy*. Judge Kozinski began his critique of the *McCoy*

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²¹² The final language in the part of the *Stewart* opinion that summarizes the court's holding as to the defendant may in fact be imprecise and worth clarifying. Part 2 of the opinion concludes: "Based on the four-factor *Morrison* test, section 922(o) cannot be viewed as having a substantial effect on interstate commerce. We therefore conclude that section 922(o) is unconstitutional as applied to Stewart." United States v. Stewart, 348 F.3d 1132, 1134 (9th Cir. 2003).

²¹³ Recall the language in *Perez v. United States*: "[I]f the petitioner is clearly a member of the class... as defined by Congress and the description of that class has the required definiteness," then "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. 402 U.S. 146, 153-54 (1971).


²¹⁵ *Id.*

²¹⁶ *Stewart*, 348 F.3d at 1140 (noting that "because the *McCoy* majority did not address the dissent's superficially plausible arguments, we do so here").
dissent by suggesting that the dissent’s assertion that “as-applied challenges cannot be brought under the Commerce Clause” relied solely on a single sentence that Lopez borrowed from Wirtz: “where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.”

It is not the case, however, that a line plucked from Lopez is the only support for the idea that as-applied challenges are inappropriate for commerce-based statutes. The Supreme Court explained in detail in Perez v. United States that the “class of activities” test controlling interstate commerce cases was articulated in United States v. Darby. “[i]n passing on the validity of [Commerce Clause] legislation,” and was then used in Heart of Atlanta Motel v. United States “to sustain an Act of Congress . . . declar[ing] that ‘any inn, hotel, motel, or other establishment which provides lodging to transient guests’ affects commerce per se.” As Perez further explained, the “class of activities” test was employed again in Katzenbach v. McClung where, “[i]n emphasis of our position that it was the class of activities regulated that was the measure, we acknowledged that Congress appropriately considered the ‘total incidence’ of the practice on commerce.”

While Stewart failed to acknowledge the Perez analysis affirming the “class of activities test” for Commerce Clause adjudication, it did reference Heart of Atlanta, Katzenbach, and finally Wickard v. Filburn as examples of cases in which the Supreme Court had “entertained as-applied challenges under the Commerce Clause.” Judge Kozinski argued that

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217 United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (Trott, J., dissenting).
218 Stewart, 348 F.3d at 1140.
220 402 U.S. 146 (1971) (holding that Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891, is a permissible exercise of the Commerce power). Perez followed Wirtz by only three years.
221 Perez, 402 U.S. at 153.
222 312 U.S. 100, 120-21 (1941) (“In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.”).
224 Perez, 402 U.S. at 153 (quoting Heart of Atlanta, 379 U.S. at 247).
226 Perez, 402 U.S. at 154.
227 Stewart does not cite to Perez in its discussion of the “lack of support” for the dissent’s position in McCoy.
228 Stewart, 348 F.3d at 1141 (noting that Heart of Atlanta found Title II of the Civil Rights Act of 1964 valid “as applied . . . to a motel which concededly serves interstate travelers” (alteration in original)).
[i]f the dissent in McCoy were right, we would have only needed one case to say Title II is valid, period. There would have been no need to consider—as the Court did—whether a single hotel or restaurant had a sufficient nexus to interstate commerce, and could thus be federally regulated.\textsuperscript{229}

There are several responses to this observation. First, Stewart was right to note that the language in both Heart of Atlanta and Katzenbach suggest that the Supreme Court had conducted an as-applied review. Heart of Atlanta plainly reads: "[t]he sole question posed [in this case] is . . . the constitutionality of the Civil Rights Act of 1964 as applied to these facts."\textsuperscript{230} Likewise, Katzenbach states: "[t]he sole question . . . narrows down to whether Title II, as applied to [Ollie's Barbecue] restaurant . . . is a valid exercise of the power of Congress."\textsuperscript{231}

While the Court rightly applied the statutory language to Ollie's Barbecue and the Heart of Atlanta Motel, it was required to do so. Recall that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."\textsuperscript{232} Since the Court has not recognized the overbreadth doctrine outside of the limited confines of the First Amendment,\textsuperscript{233} petitioners must present the Court with the facts of their case and contend—as they did in Heart of Atlanta—that "Congress in passing this Act exceeded its power to regulate commerce under Art. I, § 8, cl. 3, of the Constitution of the United States."\textsuperscript{234} Thus, the Court's application of the general statute to the facts at hand in Heart of Atlanta and Katzenbach was both expected and unremarkable.\textsuperscript{235} In distinguishing the Supreme Court's approach in these cases from the approach taken in the Ninth Circuit, it is important to note that in neither Heart of Atlanta nor Katzenbach did the Supreme Court engage in the sort of surgical excision of trivial instances from an otherwise rationally defined class of regulated activ-

\textsuperscript{229} Id. at 1141-42.
\textsuperscript{230} Heart of Atlanta Motel v. United States, 379 U.S. 241, 249 (1964) (emphasis added).
\textsuperscript{231} Katzenbach v. McClung, 379 U.S. 294, 298-99 (1964) (emphasis added) (noting that Ollie's Barbecue only received about $70,000 worth of food which had moved in interstate commerce).
\textsuperscript{234} Heart of Atlanta, 379 U.S. at 243-44. This, of course, is the essence of the facial challenge.
\textsuperscript{235} Judge Kozinski was right to point out that "whether a given statute can constitutionally be applied to a claimant is an inquiry that occurs in every constitutional case." United States v. Stewart, 348 F.3d 1132, 1142 (9th Cir. 2003).
ity as was performed in McCoy and Stewart. 236 This, indeed, the Supreme Court has never done.

More significant than the Court applying the statute to the facts before it, however, is the Court’s analysis and the test it applied for determining the constitutionality of the law. 237 In Heart of Atlanta, it was “admitted that the operation of the motel brings it within the provisions of § 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color.” 238 Thus, the Court recognized that in deciding the constitutionality of the statute the determinative test of the Commerce Clause power was simply whether the regulated activity is “‘commerce which concerns more States than one’ and has real and substantial relation to the national interest.” 239

The Court then explained in Heart of Atlanta that it would apply a “rational basis” test when reviewing Congress's commerce-based statutes:

The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no “right” to select its guests as it sees fit, free from governmental regulation. 240

Significantly, the Court made no mention of whether the peculiar activities of one Georgia motel could be exempted from the general provisions of the statute. The only two-fold inquiry the Court made was whether the petitioner was a member of the regulated class, and whether that class of activity was constitutionally regulable.

The class of activities test and its standard of judicial review were then followed and crystallized in Katzenbach v. McClung:

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236 Heart of Atlanta and Katzenbach do not parse their respective statutes by exempting certain kinds of de minimis activities from a general statutory class. Both cases uphold the statutes in their entirety, finding that the activity at issue is indeed part of the regulable class. Heart of Atlanta, 379 U.S. at 241; Katzenbach, 379 U.S. at 294.

237 Merely because the Court takes measure of the facts of the case does not mean it has abandoned the facial inquiry for the as-applied. See, for example, United States v. Lopez, 514 U.S. 549, 551-52 (1995), in which the Court took account of the facts at issue.

238 Heart of Atlanta, 379 U.S. at 249.

239 Id. at 255.

240 Id. at 258-59.
Turning the Commerce Clause Challenge "on Its Face" 193

[T]he mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question . . . is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.241

Again, the Court sought only to determine first if Congress can regulate the general class of activity,242 and then whether the petitioner was a member of the class. If Congress was barred from regulating the class, the challenge would have been sustained, and the statute struck down. If the petitioner was found not to be a member of the statutorily defined class, the statute would have remained good law, and the petitioner found simply not to have violated it. Despite the reference to an "as-applied" challenge, this was precisely the analysis employed in both Heart of Atlanta and Katzenbach—the facial analysis.

Having first cited to Heart of Atlanta and Katzenbach, Judge Kozinski then suggested that Wickard v. Filburn243 presented an as-applied challenge as well.244 "Had the Court deemed regulation of the business of agriculture a sufficient basis for upholding the application of the Agricultural Adjustment Act to Filburn," he reasoned, "there would have been no need for it to analyze how his particular activities affected interstate commerce."245 Wickard, however, did not seek to determine whether Congress could regulate the "business of agriculture." Indeed, the Court suggested that Roscoe Filburn's contention that the Agricultural Adjustment Act exceeded Congress's commerce power246 "would merit little consideration since . . . United States v. Darby sustaine[d] the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regula-

241 Katzenbach, 379 U.S. at 303-04.
242 Following Lopez and Morrison the circuit courts have generally applied Lopez's three-pronged view of regulable commerce, and have adopted Morrison's four-factor test for determining if a class of activity "substantially affects" commerce.
244 United States v. Stewart, 348 F.3d 1132, 1142 (9th Cir. 2003).
245 Id.
246 Wickard, 317 U.S. at 118 (noting that "[i]t is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise").
tion to production not intended in any part for commerce but wholly for consumption on the farm.”

The class of activity at issue in Wickard was the intrastate disposal of wheat “by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of.” Thus, the class at issue was not as broad as the “business of agriculture,” but was nonetheless a general and rationally defined class of activity. To determine whether Congress could constitutionally regulate this class of activity, the Court traced the history of Commerce Clause jurisprudence and concluded that it would consider “the actual effects of the activity in question upon interstate commerce.”

Importantly, however, the “actual effects of the activity in question” did not refer to an Ohio farmer’s personal wheat crop. The “activity in question” was framed at the outset of the opinion’s Commerce Clause discussion as the “production [of wheat] . . . intended . . . wholly for consumption on the farm.” Thus, the Court looked at whether the local activity “exerts a substantial economic effect on interstate commerce” and found that “[i]t can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions” and, by extension, interstate commerce.

It is upon this finding—and not anything peculiar to Filburn’s extra 12 acres of wheat—that the Court ruled the activities reached by the Agricultural Adjustment Act may be constitutionally regulated under the commerce power. To reach this conclusion, Wickard looked to the aggregated effect of Filburn and all his fellow farmers

247 Id. (citation omitted).
248 Id. at 118–19 (quoting 7 U.S.C. § 1301(b)(6)(A), (B)).
249 Id. at 119.
250 Id. at 120.
251 Id. at 118.
252 Id. at 125.
253 Id. at 128. This particular point, along with the Court’s more famous excerpt acknowledging that Filburn’s “own contribution to the demand of wheat may be trivial by itself is not enough to remove him from the scope of federal regulation” because “his contribution, taken together with that of many others similarly situated, is far from trivial,” suggests, contrary to Judge Kozinski’s assertion, that the Court was not conducting an as-applied analysis. Id. at 127–28.
254 Id. at 128 (noting that “[h]ome-grown wheat in this sense competes with wheat in commerce”).
255 See id. at 114–15 (noting that the government quota allotted 11.1 acres of wheat yielding 20.1 bushels of wheat per acre, and Filburn planted 23 acres of wheat, harvesting an excess of 239 bushels).
“similarly situated”—that is, it considered the effect of a class of farmers. From there the Court needed only to determine that farmer Filbum was a member of that class of activity regulated under the Act, and having done so, the Court found him subject to the statute’s demands. This, in effect, completed the two-pronged approach of a facial challenge—determine if the class is regulable and then whether the actor is in the class. It was not, in fact, an as-applied analysis at all, as Judge Kozinski suggested.

As a final measure of support for his position that the Court is unlikely to "ever eliminate as-applied challenges for one particular area of constitutional law," Judge Kozinski referenced Professor Fallon’s observation that “as-applied challenges are the basic building blocks of constitutional adjudication." Professor Fallon went on to argue, and Judge Kozinski quoted:

[W]hen holding that a statute cannot be enforced against a particular litigant, a court will typically apply a general norm or test and, in doing so, may engage in reasoning that marks the statute as unenforceable in its totality. In a practical sense, doctrinal tests of constitutional validity can thus produce what are effectively facial challenges. Nonetheless, determinations that statutes are facially invalid properly occur only as logical outgrowths of rulings on whether statutes may be applied to particular litigants on particular facts.

Professor Fallon’s point as adopted by Judge Kozinski is certainly well-taken—in so far as it goes. As discussed above, a petitioner must present the facts of her own case and not attack a Commerce Clause statute under a strict overbreadth theory by which she alleges that while the statute does not unjustly affect her own situation, it improperly reaches and affects third parties. Since the litigant must always be a member of the affected class, the challenge will always include and thus apply to her case. The question is not whether the court should refrain from applying its ruling to the litigant at bar, but whether the ruling should apply only to the litigant at bar. Thus, Judge Kozinski was right to employ Professor Fallon’s preliminary observation that all challenges initially arise at the as-applied level.

256 Id. at 127-28.
257 Id. at 114.
258 Id. at 133.
259 United States v. Stewart, 348 F.3d 1132, 1142 (9th Cir. 2003).
260 Id. (quoting Fallon, supra note 7, at 1328).
261 Id. (quoting Fallon, supra note 7, at 1327-28) (alteration in original).
262 Fallon, supra note 7, at 1326.
Professor Fallon's more significant claim, however, was that "there is no single distinctive category of facial, as opposed to as-applied, litigation," as illustrated by his suggestion that the as-applied attack always underlies the facial challenge. Examining Professor Fallon's position in full lies beyond the capacity of this Note, but it is important to recognize his point, as Judge Kozinski did, that in deciding as-applied cases courts employ doctrinal tests for determining a law's constitutional validity. Those doctrinal tests are often applied in ways that determine whether "a statute is invalid in whole or in part, and not merely as applied." Thus, in Professor Fallon's estimation, "the availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity." The properly conceived doctrinal test to be applied in Commerce Clause cases should be the class of activities test, and this test, once applied, demands that the statute be found valid or invalid "in whole or in part, and not merely as applied."

Professor Fallon ultimately seems likely to disagree with this position, arguing instead that "once a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases. Nor is there a distinctive class of 'facial challenge' cases in which the court is required to do so." But the Supreme Court has invariably abstained from invalidating Commerce Clause statutes on an as-applied basis. That is, the Court has engaged in the facial analysis of determining whether the class of activity at issue is a constitutionally regulable class, and then whether the petitioner was a member of that class. Indeed, the Court's unanimous *Jones v. United States* decision in 2000 effectively applied the very class of activities test this Note proposes. *Jones* ruled that the petitioner did not violate the arson provisions of the Omnibus Crime Control Act of 1970 because the property he ignited was not

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263 *Id.* at 1324.
264 *Id.* at 1327-28.
265 See *id.* at 1324. Professor Fallon describes the following recurring kinds of tests: "Purpose" tests identify statutes as invalid if enacted for constitutionally forbidden motives. If a bad motive infects one statutory subrule, it typically will infect all others. "Suspect-content" tests, under which statutes that regulate on certain bases must be justified as narrowly tailored to advance a compelling state interest, have similar effects. A statute that fails a suspect-content test is invalid in whole.
266 *Id.* at 1338.
267 *Id.* at 1324.
268 *Id.*
269 *Id.* at 1339.
270 529 U.S. 848 (2000).
271 18 U.S.C. § 844(i) (2000) (making it a federal crime to damage or destroy, "by means
covered by the express provisions of the Act. In analyzing whether Jones could be convicted under the federal arson statute, "[t]he proper inquiry," wrote Justice Ginsburg, "is into the function of the building itself, and then a determination of whether that function affects inter-state commerce." That is, was the building in the regulated class, and was the class regulable? The Supreme Court, unlike the courts in Stewart and McCoy, has never ruled that a Commerce Clause statute is facially constitutional, that the petitioner violated the statute, but that the petitioner's particular activity nevertheless lies beyond Congress's reach. Moreover, the limited grant of the broad congressional power to regulate commerce among the States has in fact drawn a "categorical line" requiring courts to examine classes of activity, and not de minimis instances. The Constitution, in these cases, provides a simple Hobson's choice.

D. The Clean Air Act in United States v. Ho

Federal prosecutors convicted Eric Ho in 2002 for violating multiple sections of the Clean Air Act (the "Act"). Ho, a naturalized émigré from the Republic of China, failed to comply with the Act's asbestos work practice standards, and failed to give notice of his intent to remove asbestos. A Houston-area entrepreneur, Ho purchased the abandoned Alief General Hospital with "extensive asbestos in the hospital's fireproofing." Ho renovated the hospital...
himself, in direct violation of health and safety codes, until an unfortunate gas line explosion "blew a hole in the exterior wall of the hospital" and prompted an OSHA enforcement action against Ho.

Appealing his two-count conviction for violating the Clean Air Act's asbestos work practice and notice requirements, Ho argued that these provisions exceeded congressional authority under the Commerce Clause. The Fifth Circuit stressed the limited holding of its opinion in Ho, noting that it did "not confront a facial challenge to the Clean Air Act, but only an as-applied challenge to the work practice standard provision and the reporting provision of the CAA." Although this language hints at an as-applied analysis, it is important to recognize that the court heard the as-applied attack to a specific statutory provision, and not to specific, de minimis facts—a distinction more fully discussed below.

Recall that a Commerce Clause facial challenge, whether aimed at the entire Clean Air Act or merely one of its many provisions, should proceed along the two-part analysis. The court should determine if the class of activity sufficiently relates to interstate commerce in order that Congress may regulate it, then determine if the petitioner is indeed a member of the regulated class. A negative answer to the first inquiry should result in the court finding the statute facially invalid. A negative answer to the second question shows only that the petitioner did not violate the law, and the statute remains unaffected by the challenge. Positive answers to both questions, however, should result in a conviction under a facially constitutional regulation. Thus, under no circumstances may the court uphold the commerce-

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280 Id.

281 The court described the asbestos removal as follows: Against customary asbestos abatement practices, the workers used no water as they removed the fireproofing, but only scraped off the fireproofing, which produced large amounts of asbestos-containing dust inside the hospital. As the workers removed the fireproofing, they placed it in plastic bags . . . . The hospital remained unsealed throughout, with several open doors and windows and a large hole in the second floor exterior wall. None of these practices complied with asbestos work practice standards.

Id. at 592 (emphasis omitted).

283 Id. at 594. Subsequent laboratory analysis of the fireproofing indicated two to twenty percent chrysotile asbestos; any material with more than one percent is subject to federal and state regulations.

282 Id. at 592-93.

284 Id. (citations omitted).
based statute as facially constitutional, while striking it down as-applied to a particular litigant. The court has only Hobson's choice.

In Ho, the second piece of the facial analysis was uncontested and easily resolved. As the court explained, "Section 113, 42 U.S.C. § 7413, contains administrative, civil, and criminal enforcement mechanisms for the asbestos work practice standard and the notice requirement. Ho was convicted under two of these criminal enforcement provisions." The court noted that neither party disputed that the hospital contained the regulated kind and amount of asbestos or, therefore, that the work practice standard covered the hospital. Judge Smith summarized the regulatory framework and the legal duties that Ho allegedly violated as (1) the failure to follow proper work practice standards while removing asbestos, and (2) the failure to notify the EPA of his intent to remove asbestos. After a detailed account of the asbestos work practice standard regulations and the notification requirements governing asbestos removal in renovation sites, the court concluded that Ho had admitted that he complied with neither of these provisions. Thus, the only remaining question was whether asbestos removal was a general class of activity, rationally defined by Congress, with a sufficient connection to interstate commerce so as to bring it under the regulatory purview of the federal government.

The court restated the three broad categories of constitutionally regulable Commerce Clause activity as described in Lopez, and determined that the asbestos removal and notification requirements at issue fell within the third category—an activity that substantially affects interstate commerce. The court explained that the only theory

285 Id. at 595-96.
286 Id. at 595.
287 Id.
288 Id.
289 Id.
290 The court recounted the following asbestos work practice standard regulations:
For example, material containing asbestos must be wetted during removal, kept sufficiently wet after removal to prevent the release of asbestos fibers, and stored in leak-tight containers until properly disposed. A foreman or management-level officer, trained in complying with these work practice standards, must be present at any site before workers may handle material containing asbestos.
Id.
291 See 42 U.S.C. §§ 7412(h), 7413(c)(1), 7413(c)(2), 7414(a) (2000).
292 The court noted that 'Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." Ho, 311 F.3d at 598 (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)).
293 Id. at 596-602.
294 Id. at 602 (noting that the removal and notification standards do "not regulate the . . . in-
by which the government could argue that asbestos removal substantially affected interstate commerce[295] was the aggregation principle as announced in *Wickard* and explained in *Lopez* and *Morrison*.296

Under the aggregation principle, the petitioner’s contribution to interstate commerce, taken on its own, would likely be insufficient to justify federal regulation; but, his contribution combined with that of others similarly situated would have a substantial influence on interstate commerce.297 *Ho* effectively illustrates this principle. The government did not argue that “Ho’s isolated violation of the work practice standard at a single renovation site could, by itself, have a substantial effect on interstate commerce. Instead, the government argued, that similar violations, when aggregated, could substantially affect the interstate market for asbestos removal services.”298 For Judge Smith, the limited question presented concerned only whether the aggregation principle extended to violations of the asbestos removal standards.299

The court answered that question affirmatively, analyzing the characteristics of asbestos removal as a class of activity in order to determine first whether it was a commercial activity, and then whether that activity substantially affected interstate commerce.300 Noting that asbestos removal is a “booming industry” whereby many businesses “exist solely to remove asbestos from contaminated buildings,”301 the court called attention to asbestos removal’s licensing schemes, and speculated that virtually all asbestos removal projects have a commercial purpose.302 More importantly, the court reasoned, a national market exists for asbestos removal, and the nexus between that market and interstate commerce is “not attenuated, but direct and apparent.”303 Such a direct and substantial affect on a national, commercial market, noted the court, justified using the aggregation principle.304

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terstate shipment of a good or commodity through these channels. Nor does it seek to protect the instrumentalities of or a thing or person in interstate commerce.”).

295 Id. (noting that “the government concedes that the asbestos work practice standard can satisfy the substantial effect test only through the aggregation principle”).


298 *Ho*, 311 F.3d at 602.

299 Id.

300 Id. at 602-03.

301 Id. at 602.

302 Id.

303 Id. at 603.

304 Id. Judge Smith’s application of that principle was as follows:
But the aggregation principle would appear to be nothing more than a glorified as-applied challenge which, as discussed above, should not be used to invalidate mere portions of a Commerce Clause regulation. Aggregation, after all, looks specifically at the *de minimis* instance of the petitioner’s activity and then imagines that activity repeated on a broad or even national scale before determining that the activity substantially affects commerce. For example, an as-applied challenger in a case like *Wickard v. Filburn* might ask the court to consider only the effect of his 12 extra acres of wheat, or in *Ho*, only the asbestos in a small, Houston hospital. But in applying the aggregation principle, the court takes a petitioner’s request for a particularized inquiry and instead of answering the question on the basis of that particular *de minimis* instance, the court views the action as a class of activity—private wheat production, or private asbestos removal—and the constitutionality of the statute is evaluated as applied to the whole class of that activity. Thus, for example, instead of looking only at farmer Filburn’s wheat, the court looks at small farm, non-commercial wheat production, and then asks whether that broader class of activity falls within the scope of an otherwise constitutional statute.

The question becomes whether the court’s aggregation creates a new class of activity not considered or regulated by Congress or whether, in fact, that aggregated class of activity was simply a subclass of the larger regulatory scheme that Congress has authority to regulate. In either case, however, the court considers a *class of activity* and not a mere instance. The court must therefore apply the two-pronged, class of activity analysis to determine if the class is constitutionally regulable, and then if the petitioner falls within that class. If

By violating the asbestos work practice standard, which imposes costly duties on persons and businesses engaged in asbestos removal, Ho gained a commercial advantage on licensed abatement companies. Whereas these companies must spend hundreds of thousands of dollars on projects like Ho’s, Ho was able to scrape by—literally and figuratively—at a cut rate of barely more than $20,000 plus supplies. His activities also deprived licensed abatement companies of a promising business opportunity... Moreover, once aggregated, Ho’s activities posed an [sic] threat to the interstate commercial real estate market. His illicit asbestos removal project likely would reduce the number of companies providing asbestos removal services. Fewer companies means that conscientious property owners would have more trouble locating licensed abatement companies and likely would have to pay higher prices for the services of remaining companies. Furthermore, Ho would gain a commercial advantage over conscientious property owners who must pay these higher prices for asbestos removal.

*Id.* at 603-04.
the court finds the class of activity regulable, the statute survives the challenge; and if the petitioner is not considered a member of the class, he has simply not violated the law, presenting no constitutional grounds for invalidating the statute. Part IV more fully discusses whether Congress or the courts are best suited to define the class of regulated activity, but even under the aggregation principle, the court will strike down or uphold a commerce-based statute on its face, and not as applied to a particular litigant.

In Ho, the court applied Wickard's aggregation principle to the class of private asbestos removal and found the class to satisfy the substantial effect test clarified in United States v. Morrison. Following Morrison's four-factored analysis that informs the substantial effect test, Ho considered (1) whether the conduct was economic or commercial in nature; (2) whether the asbestos work practice standard contained a jurisdictional element restricting the EPA's authority to activities tied to interstate commerce; (3) whether Congress included congressional findings on the effects of asbestos removal on interstate commerce; and (4) whether the link between asbestos removal services and interstate commerce was too attenuated. Finding asbestos removal to be a commercial activity regulated by a statute that contained no jurisdictional element or congressional findings concerning the activity's link to commerce, but finding instead that the link was direct and not attenuated, the Fifth Circuit upheld the asbestos work practice standard as a valid regulation of a commercial activity.

As described thus far, Ho's analysis followed a facial, class of activities test analysis. The court took seriously the task of determining if the class of activity—asbestos removal—was constitutionally regulable under the Commerce Clause, applying the four-factored substantial effect test, and determined that the petitioner was indeed a member of the class already having stipulated to removing asbestos without following the statutory prescriptions. But Ho then upheld the

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305 Ho did not apply the aggregation principle without pause, but recognized the following: Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, thereby turning that clause into what it most certainly is not, a general police power.

Id. at 599.

306 Id. at 604.


308 Ho, 311 F.3d at 602-04.

309 Id. at 601-04.
statute as a constitutional regulation only, in its words, as an "as-applied challenge" to the work standard and reporting provisions.\textsuperscript{310} Indeed, the court carefully repeated its position that it expressed "no opinion on the constitutionality of other sections of the [Clean Air Act] or their implementing regulations, or, for that matter, of other environmental laws,"\textsuperscript{311} and therefore had avoided "a facial challenge to the Clean Air Act."\textsuperscript{312} This language misrepresents as-applied and facial challenges.

In limiting its holding to the statutory provisions under which Eric Ho was convicted, the court ruled on the constitutionality of the only Clean Air Act provisions that it rightly could. The Clean Air Act in its entirety was never the subject of Ho's constitutional challenge.\textsuperscript{313} Only the Act's notification and work practice standards requirements of the asbestos removal sections were scrutinized, and to have struck down or upheld any other sections of the Clean Air Act would have moved beyond the question presented.\textsuperscript{314} So it is not, as the court suggested, that the challenge was heard as-applied to a peculiar set of circumstances, but simply that the court confronted a relatively minor provision of a very large Act. In the end, despite its assertions to the contrary, the court conducted a facial analysis of the challenged statute and found that the statute constitutionally regulated an entire class of asbestos removal, and that Eric Ho violated that statute. The court chose "the horse nearest the door," and the challenge rightly failed.

In summary, courts have been reluctant to strike down a Commerce Clause statute on its face. To avoid the graver constitutional questions, courts have instead redefined classes or sub-classes of activity to be excised as trivial instances beyond congressional reach. While seemingly consistent with the theory of constitutional avoidance, this approach fails to recognize that the case and controversy at issue in a Commerce Clause challenge is a facial one, namely, whether Congress has the authority to regulate the class of activity. The above discussion has demonstrated how courts have analyzed Congress's commerce power, the endemic problems with that analysis, and has proposed a method for analyzing that power correctly.

\textsuperscript{310}Id. at 594.
\textsuperscript{311}Id. at 604. Recognizing the limited scope of its opinion, the court stated: "We thus have neither occasion nor authority to rule on the constitutionality of other provisions of the CAA or other implementing regulations, which we must leave for another day when they are properly presented." Id. at 594.
\textsuperscript{312}Id. at 594.
\textsuperscript{313}See id. (noting that "Ho contends that the laws under which he was convicted exceed Congress's authority under the Commerce Clause").
\textsuperscript{314}See id.
IV. ILLS & REMEDIES: ATTACK OF THE "AD HOC NULLIFICATION MACHINE" AND THE RELATIVE IMPORTANCE OF JURISDICTIONAL ELEMENTS

Was this the face that launched a thousand ships
And burnt the topless towers of Ilium?
— Christopher Marlowe, Dr. Faustus

It would be misleading to ignore the difficulties presented by this Note's Hobson-like proposal. This Part addresses some of the likely resistance to hearing only facial challenges to the commerce power. First, it attempts to calm the fear that trading-in the judge's as-applied whittling knife for the facial broad sword in Commerce Clause cases will be more than our delicate system of checks-and-balances can bear. Second, it explains why Congress, and not the courts, is responsible for outlining the classes of regulated activity. And finally, this Part considers Congress's use of the "jurisdictional element" in its statutory language as a means of avoiding facial invalidation. This discussion, intended to summarize rather than propel this Note, will be more cursory than comprehensive in resolving the difficulties and objections raised by the "class of activities" test.

A chief concern in requiring facial challenges to Commerce Clause provisions may be that the courts will seize upon the U.S. Code like an "ad hoc nullification machine," to borrow a phrase from Justice Scalia, striking down whole statutes passed pursuant to the wisdom of the elected branches of government. Recall that facial invalidation is considered "manifestly, strong medicine" to be prescribed sparingly. Thus, as a policy concern, it may be feared that requiring courts to uphold or invalidate whole provisions will embolden the judiciary to abuse its authority to "say what the law is." Underlying this concern is the premonition that expanding the facial challenge's use will diminish the judiciary's "[d]ue respect for the deci-

315 CHRISTOPHER MARLOWE, DR. FAUSTUS SC. 12, II. 80-81.
316 See Madsen v. Women's Health Ctr. Inc., 512 U.S. 753, 785 (1994) (Scalia, J., concurring in judgment in part and dissenting in part) (discussing the Supreme Court's role in the context of abortion laws: "Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim . . . ."); see also Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (discussing the Court's role in adjudicating an abortion statute: "[I]t therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.").
318 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
sions of a coordinate branch of Government," thereby upsetting the balance of separated powers.

This is a reasonable fear. After all, the facial attack certainly strikes a broader, deadlier blow to federal statutes than does the as-applied challenge. It is not clear, however, that the "ad hoc nullification machine" will operate any more recklessly under the proposed class of activities test than it allegedly already does. In examining the lower courts' treatment of Commerce Clause statutes in the wake of Lopez and Morrison, Professors Denning and Reynolds discovered that "in nearly two years following Morrison, only one statute has been held unconstitutional on its face, and that decision did not survive en banc review." Conceding that the judiciary has been "marginally more comfortable sustaining as applied challenges" to commerce-based laws, Denning and Reynolds concluded that "[e]ven here the courts have been circumspect," finding "only nine cases in which a defendant's conviction was overturned." Rather than abuse or even widely exercise its post-Morrison discretion to inval-

319 United States v. Morrison, 529 U.S. 598, 607 (2000); see also Jones v. United States, 529 U.S. 848, 857 (2000) (reiterating the "guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter'") (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

320 See Buck, supra note 94, at 431 (noting that facial challenges allow the court to order the government "not to apply the law to anyone ever again").

321 See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-22 (Amy Gutmann ed., 1997) (discussing the dangers of using legislative history and intent as a means of statutory interpretation). Justice Scalia has warned that courts focusing on legislative histories instead of statutory language results in the judiciary substituting what the law should say for what it actually says—a process not too dissimilar from statutory nullification:

When you are told to decide, not on the basis of what the legislature said, but on the basis of what it meant, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant; and that will surely bring you to the conclusion that the law means what you think it ought to mean—which is precisely how judges decide things under the common law . . . .

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. . . It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.

Id. at 18, 22.


323 Id.

324 Id.

325 Id. at 1262 & n.62 (citing the following cases: United States v. Lynch, 265 F.3d 758 (9th Cir. 2001); United States v. Odom, 252 F.3d 1289 (11th Cir. 2001); United States v. Johnson, 246 F.3d 749 (5th Cir. 2001) (per curiam); United States v. Peterson, 236 F.3d 848 (7th Cir. 2001); United States v. Corp, 236 F.3d 325 (6th Cir. 2001); United States v. Ryan, 227 F.3d 1058 (8th Cir. 2000); United States v. Wang, 222 F.3d 234 (6th Cir. 2000); United States v. Ramey, No. 98-7069, 2000 U.S. App. LEXIS 14316 (4th Cir. June 20, 2000); United States v. Rayborn, 138 F.Supp. 2d 1029 (W.D. Tenn. 2001)).
date Commerce Clause legislation, the judiciary has largely "declined to read *Morrison* to require that earlier cases be overruled or even seriously reexamined." Moreover, Denning and Reynolds have found courts "quick to invoke circuit rules against overruling circuit precedent and the rules against anticipatory overruling of Supreme Court cases," and have argued that "[s]uch a 'desk clearing mentality' makes it difficult to credit the predictions of *Lopez* and *Morrison*'s harshest critics: that they will result in courts striking down all manner of federal statutes."

By contrast, it is worth noting, the *as-applied* challenge runs the risk of nullifying legislative action in precisely the sort of ad hoc fashion that Justice Scalia has urged courts to avoid. Indeed, creating exemptions, excising instances, and withholding the effect of certain laws to certain litigants threaten a far more ad hoc approach than employing a doctrinal "class of activities" test to assess a law's constitutional validity. One need only look to the cases discussed above to see the as-applied challenge substituting the judge's preference for the language of the text. In *United States v. Corp*, for example, the Sixth Circuit opted for a "case-by-case" analysis in which it effectively added elements to the offense in order to determine if

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326 *Id.* at 1263.
327 *Id.* at 1264-65.
328 See *United States v. McCoy*, 323 F.3d 1114, 1133 (9th Cir. 2003) (Trott, J., dissenting).
329 Describing the majority's as-applied approach in *McCoy*, Judge Trott argued:

> They have attempted to restrict their holding to McCoy and to others "similarly situated," but it is not clear to me that the law permits such a limitation. I so conclude because McCoy's conduct clearly falls within the language of the statute, and because the Supreme Court appears under such circumstances to have ruled out "as applied" challenges in *Commerce Clause* cases. In my view, if the conduct under review falls within the plain language of the statute, precedent requires us to take the statute head on, not carve out pieces of it.

*Id.* (emphasis added).

330 Voicing a similar concern in the context of Due Process adjudication, then-Justice Rehnquist, in dissent from *Cleveland Bd. of Educ. v. Loudermill*, advocated a "principled" rather than an "ad hoc" approach in balancing the costs and benefits of procedural due process. This customary "balancing" inquiry conducted by the Court in these [Due Process] cases reaches a result that is quite unobjectionable, but it seems to me that it is devoid of any principles which will either instruct or endure. The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake. The results in previous cases and in these cases have been quite unpredictable . . . . The lack of any principled standards in this area means that these procedural due process cases will recur time and again.


330 See *SCALIA*, supra note 321, at 14 (arguing that approaching statutes and statutory interpretation with "the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation."). Justice Scalia further contends that the Court's "usurpation," by which unelected judges decide that laws mean whatever they ought to mean, is "simply not compatible with democratic theory." *Id.* at 22.
the petitioner violated the statute. The court considered the following factors in making its decision:

Was the activity in this case related to explicit graphic pictures of children engaged in sexual activity . . . for commercial or exploitive purposes? Were there multiple children so pictured? Were the children otherwise sexually abused? Was there a record that defendant repeatedly engaged in such conduct or other sexually abusive conduct with children?

Only the first question involves an actual element of the offense as described in the statute. How the number of children, their "otherwise abuse," and the record of the repeated conduct establishes whether Patrick Corp fell within the "heartland" of the statute is unclear. Similarly, in United States v. Stewart, Judge Kozinski recognized a sub-class of machinegun-holders, effectively inserting the word "homemade" into the statutory language, and thus carved an exception from an otherwise rationally and legislatively defined class of activity. In these cases, affording the courts the as-applied challenge did not spare us ad hoc nullities; nor did it ensure, as Justice Scalia has championed, that it is only the law that binds us.

The availability of the as-applied ruling in the Commerce Clause context, rather than limiting the judiciary's intrusion upon the law, may actually fuel the ad hoc nullification machine. Granting courts the authority to scrape away at the surface of the law's text instead of "taking it head on," allows for a gentler erosion of the law, but erosion nonetheless. Thus, while striking down a provision on its face

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331 See United States v. Corp, 236 F.3d 325, 333 (6th Cir. 2001).
332 Id. at 333.
   knowingly [possess] 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped . . . in interstate or foreign commerce . . . if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct.
   Id.
334 See Corp, 236 F.3d at 327 (noting that the prosecution stipulated that "the circumstances of the case were outside the "heartland" of cases involving § 2252(a)(4)(B)).
335 See United States v. Stewart, 348 F.3d 1132, 1133 (9th Cir. 2003).
336 In addition to those just discussed, see United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (holding that "[l]ike the Sixth Circuit [in Corp], we agree that there are some categories of conduct which, whether or not literally covered by a statute on its face, cannot be said to 'substantially affect' interstate commerce").
337 See SCALIA, supra note 321, at 17 (arguing that "[i]t is the law that governs, not the intent of the lawgiver . . . . Men may intend what they will; but it is only the laws that they enact which bind us"); see also id. at 22 ("The text is the law, and it is the text that must be observed.")).
may be "strong medicine," demanding that litigants "go for broke," it may in fact reduce the court's ad hoc style of adjudication by forcing the court to confront the law with a doctrinal test and a more thorough scrutiny of whether the statute Congress passed satisfies the requirements of *Lopez* and *Morrison*.

This discussion, and Justice Scalia's underlying concern, begs the question of why Congress, and not the courts, is responsible for outlining the classes of regulated activity. Why, for example, should the courts be barred from declaring, as Judge Reinhardt did in *McCoy*, that the statute is invalid as applied to the claimant and "others similarly situated"? As argued above, by adding "others similarly situated" to Rhonda McCoy, Judge Reinhardt effectively conducted a facial analysis that defined a new class of activity, namely, "intrastate possession of a non-commercial and non-economic character." There are indeed contexts in which it is perfectly acceptable for the judiciary to classify activities and draw the necessary distinctions between those classes—the Commerce Clause context is not one of them. The power to regulate "Commerce . . . among the several States" is the power "to prescribe the rule by which commerce is to be governed," which, in turn, is the power to define and govern classes of activity. That power, according to the Constitution and the Supreme Court, vests only in Congress. Thus, engaging in an analysis whereby courts recognize new classes or sub-classes of activity, distinct from the classes prescribed by the congressional statute, is flawed and illegitimate. As the Sixth Circuit has opined, while it may be "tempting" to construe a statute narrowly so as to save it from a petitioner's challenge, "it would require [the] court to take out its blue pencil to add an exception . . . to the [statutory] definition. This kind of modification is reserved for the legislature." Whereas it may be

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339 *McCoy*, 323 F.3d at 1133 (ruling that "as applied to McCoy and others similarly situated, § 2252(a)(4)(B) cannot be upheld as a valid exercises of the Commerce Clause power" (emphasis in original)).
340 Id. at 1132.
341 See, for example, antitrust law, where Congress has deferred to the court's almost exclusive classification of trusts and monopolies.
342 U.S. CONST. art. I, § 8, cl. 3.
344 See *Perez v. United States*, 402 U.S. 146, 151 (1971) (noting that the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce" (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942))).
345 See U.S. CONST. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 553.
the peculiar province of the court to "say what the law is," it is left to Congress to define for itself the classes of commercial activity it intends to govern. The only question for the courts to answer is whether those classes are within reach of the federal grasp.

The final point to consider is whether Congress can employ a more effective method for exercising its commerce power, and thereby defend its Commerce Clause regulations against facial attack. Including an "express jurisdictional element" may provide a limited, but effective defense. A jurisdictional element limits the statute's reach "to a discrete set of [regulated intrastate activities] that additionally have an explicit connection with or effect on interstate commerce." Morrison explained that "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." That is, it demonstrates Congress's view that the activity in question falls within one of the three broad categories of regulable activity. Including an express jurisdictional element effectively binds the regulated activity to interstate commerce, and thus requires the prosecution (in a criminal context) to show the connection between the defendant's class of activity and interstate commerce. That showing then becomes part of the underlying offense—an element to be proved at trial.

Despite one district court's observation that "[a]fter Lopez, courts have 'repeatedly found the inclusion of [a] jurisdictional element . . . sufficient to overcome Commerce Clause challenges," the jurisdictional element does not insulate the statute from judicial review, nor guarantee that the courts will find it constitutional.

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347 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (declaring that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

348 Perez, 402 U.S. at 152 (quoting United States v. Darby, 312 U.S. 100, 120-21 (1941)).


351 See United States v. Ho, 311 F.3d 589, 600 n.11 (5th Cir. 2002) (observing that in addition to the substantial-effect category, "[a] jurisdictional element also may establish that a statute comes within the first or second category of Commerce Clause regulation identified in Lopez").

352 See, e.g., United States v. McCoy, 323 F.3d 1114, 1116 (9th Cir. 2003). The McCoy court noted that 18 U.S.C. § 2252(a)(4)(B) outlawed child-pornography "which was produced using material which have been mailed or so shipped or transported," and thus that "federal jurisdiction was premised upon the place of manufacture of the camera and film used to take the pictures." Id. (emphasis omitted). Therefore, the prosecution needed to establish that the materials used to create the illicit photographs were produced out of state. Id.


the Fifth Circuit has made clear, a "jurisdictional element is not alone sufficient to render [a challenged statute] constitutional." Rather, the jurisdictional element will guide courts in conducting the appropriate facial analysis. That is, by making the jurisdictional element an essential element of the prosecution’s case, the court can then properly rule that the statute is constitutional on its face, thereby preserving the statute, while still determining whether the petitioner did or did not violate the statute’s terms. In this way, the court can avoid improperly finding the statute unconstitutional as-applied to the challenger and "others similarly situated," and make the Hobson’s choice.

The Supreme Court’s unanimous decision in *Jones v. United States* illustrates precisely how the jurisdictional element allows this scenario to unfold. The federal arson statute under review criminalized damaging or destroying "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." As mentioned above, *Jones* applied the proposed class of activities analysis and determined that although petitioner Dewey Jones did in fact toss a Molotov cocktail through the window of an Indiana home, he did not violate the relevant provisions of the Organized Crime Control Act of 1970. The Court focused on the nature of the property Jones destroyed and found it beyond the express jurisdictional terms of the Act:

**see also** United States v. Stewart, 348 F.3d 1132, 1135 (9th Cir. 2003) ("At some level, of course, everything we own is composed of something that once traveled in commerce. This cannot mean that everything is subject to federal regulation under the Commerce Clause, else that constitutional limitation would be entirely meaningless.").

*Ho*, 311 F.3d at 600 (quoting *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000)) (alteration in original). For a contrasting view, see *United States v. Singletary*, 268 F.3d 196, 204 (3d Cir. 2001), which held that a commerce-based statute with a jurisdictional hook will always survive a facial challenge.

In its interpretation of *Morrison*’s jurisdictional element factor, the Fifth Circuit warned Congress, to "not add the words ‘interstate commerce’ to every statute and expect the courts meekly to comply." *Ho*, 311 F.3d at 600. Exercising the commerce power still requires the necessary nexus between the regulated class of activity and interstate commerce as explained in *Lopez* and *Morrison*.

*529 U.S. 848 (2000).*

*Id.* at 850 (quoting 18 U.S.C. § 844(i)).

*See id.* at 854-55 (noting that "the proper inquiry . . . is into the function of the building itself, and then a determination of whether that function affects interstate commerce" (quoting *United States v. Ryan*, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part))).

*Id.* at 851.

*See id.* at 852-59 (holding that defendant did not violate the relevant provisions of the Organized Crime Control Act of 1970).
The Government correctly observes that § 844(i) excludes no particular type of building (it covers "any building"); the provision does, however, require that the building be "used" in an activity affecting commerce. That qualification is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce.

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... The Government does not allege that the Indiana residence involved in this case served as a home office or the locus of any commercial undertaking.\(^{362}\)

Thus, because the damaged property was not "used in" interstate commerce, the Supreme Court vacated Jones' conviction\(^ {363}\) and left the statute wholly in place.\(^ {364}\) Such analysis, guided by the inclusion of an express jurisdictional element, will ensure that the broad blade of the facial challenge does not unduly strike at the federal law, while also sheathing the court's as-applied pocket knife that would otherwise carve from the law its own *de minimis* exclusions.

**CONCLUSION**

*For now we see through a glass, darkly; but then face to face...*

—I Corinthians 13:12

In the context of the Commerce Clause, litigants and judges have only a Hobson's choice—they may assess cases facially, or not at all. The structure of the Commerce Clause and the power it grants to Congress allows the legislature to regulate classes of activity that Congress has found to substantially affect interstate commerce. It is that structure that in turn requires a petitioner to challenge a commerce-based statute on its face—to argue that it is invalid for all members of the class or for none. As a corollary, the as-applied challenge is therefore inappropriate for Commerce Clause adjudication.

\(^{362}\) *Id.* at 855-56.

\(^{363}\) *See id.* at 859.

\(^{364}\) *Id.* at 859. The Court held:

[T]he provision covers only property currently used in commerce or in an activity affecting commerce. The home owned and occupied by petitioner Jones's cousin was not so used—it was a dwelling place used for everyday family living. As we read § 844(i), Congress left cases of this genre to the law enforcement authorities of the States.

*Id.*
By looking to the *de minimis* instances of a petitioner’s regulated activity, the successful as-applied challenge exempts that activity from the statute’s otherwise constitutional reach. In Commerce Clause cases, such considerations have been rejected repeatedly by the Supreme Court, and no Supreme Court decision has ever purported to carve a singular litigant’s activity from an otherwise rationally and constitutionally defined class.

In keeping with the Supreme Court’s jurisprudence, the courts should employ a two-pronged doctrinal test when analyzing a petitioner’s Commerce Clause challenge. This “class of activities” test should seek to determine first, whether Congress may constitutionally regulate the class of activity in question—a consideration that looks to the tests given in *United States v. Lopez* and *United States v. Morrison*—and second, whether the petitioner is indeed a member of that class of activity, as in *Jones v. United States*. In this way, Commerce Clause statutes will be adjudicated facially, and not as applied only to the peculiar facts of the claimant’s case.

As a final measure, this Note has recognized that the classic facial challenge traditionally has been viewed as a dose of “strong medicine” administered sparingly so as to respect the wisdom and prerogatives of the legislative branch. The understandable concern that broadening the use of the facial challenge will empower the judiciary beyond the safeguards of our neatly balanced federalist structure requires Congress to take seriously its law-crafting task and make clear its intentions with plainly stated jurisdictional elements. The courts can then review congressional enactments appropriately, determining whether Congress has adequately shown the class of activity to affect interstate commerce, and whether the prosecution has convincingly placed the petitioner within that class. Within this analytical framework, the courts must refrain from an ad hoc, as-applied approach that invalidates congressional action piece-by-piece. Instead, the judiciary must be prepared to confront the law face to face and according to the structural demands of the Constitution and its Commerce Clause.

Thus, the courts have been afforded a “choice.” Thomas Hobson would be proud.

NATHANIEL STEWART†

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