

ESSAY

FACIAL CHALLENGES AND FEDERALISM

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This Essay addresses the question of whether challenges to legislation as exceeding Congress' powers should be assessed on a facial or an as-applied basis, a question that rose to the fore in the Supreme Court's recent decision in Tennessee v. Lane. The Essay begins by arguing that what distinguishes a facial challenge is that it involves an attack on some general rule embodied in the statute. Such challenges can take a broader or narrower form, and thus the terms "facial" and "as-applied" are best understood as encompassing a range of possible challenges rather than as mutually exclusive terms. The Court's current definition of facial challenges as targeting all or most of a statute's applications not only exaggerates the difference between facial and as-applied challenges, it also obscures the important roles that severability and substantive constitutional law play in the Court's treatment of facial challenges. The real question raised by Lane is whether in the Section 5 and other federalism contexts the Court should apply its ordinary severability rules. The Essay then turns to examining the Court's precedent and the congruence-and-proportionality test that now governs Section 5 analysis. It argues that notwithstanding the facial cast of much of the Court's recent Section 5 and Commerce Clause precedent, the Court is not deviating from ordinary severability rules in these decisions. The Essay concludes by observing that neither the substantive content of the congruence-and-proportionality test nor instrumental arguments justify imposition of a special nonseverability presumption in Section 5 or in other federalism contexts.

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INTRODUCTION

*Tennessee v. Lane*¹ is the Supreme Court's latest installment in the Section 5 wars. The case arose from a lawsuit brought by two paraplegics who maintained that the wheelchair inaccessibility of some Tennessee courthouses violated Title II of the Americans with Disabilities Act (ADA).² One plaintiff, George Lane, alleged that he was forced to answer criminal charges in a courthouse without an elevator. As a result, he had to crawl up two flights of stairs to attend his first hearing and was arrested when he failed to attend subsequent hearings. The other plaintiff, Beverly Jones, claimed that she lost work as a court stenographer because she was unable to gain access to courtrooms.³ The plaintiffs sought monetary as well as injunctive relief, and thus *Lane* presented the question of whether Congress could validly abrogate states' Eleventh Amendment immunity for private damage actions under Title II. In a five-to-four decision, the Court ruled that the statute represented a congruent

1. 124 S. Ct. 1978 (2004).

2. Title II prohibits public entities from excluding disabled individuals from public programs and services. See 42 U.S.C. § 12132 (2000) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

3. See *Lane*, 124 S. Ct. at 1982–83. The Court did not independently discuss Beverly Jones' claims or discuss whether the right of court access extends to employment in a courthouse.

and proportional response to a pattern of the states unconstitutionally denying disabled individuals the fundamental right of access to the courts. Title II therefore fell within Congress' powers under Section 5 of the Fourteenth Amendment, and its waiver of Eleventh Amendment immunity was constitutional.⁴

Much of the Court's recent Section 5 jurisprudence has been highly contentious, and *Lane* was no exception. Notwithstanding Justice Scalia's characterization of the congruence-and-proportionality standard as a "flabby test" that invited "judicial arbitrariness and policy-driven decision-making,"⁵ the rest of the Court concurred that it represented the proper inquiry if legislation falls within the Section 5 power. They also agreed on its substantive formulation: To determine whether challenged legislation "exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'"⁶ the Court "identif[ies] the constitutional right . . . that Congress sought to enforce," assesses whether Congress acted in light of a pattern of state violations of this right, and then determines whether the legislation "is an appropriate response to [that] history and pattern of unequal treatment."⁷ But beyond this, they were deeply divided. Chief Justice Rehnquist, writing for three dissenters, accused the majority of paying only "lip-service to the 'congruence and proportionality' test" by upholding Title II despite "[t]he near-total lack of actual constitutional violations in the congressional record."⁸ In an opinion by Justice Stevens, the majority responded that the dissent's complaints were "puzzling, to say the least," because "the record of constitutional violations in this case . . . far exceeds the record in [*Nevada Department of Human Resources v. Hibbs*],"⁹ a 2003 decision written by the Chief Justice that had sustained the family leave provisions of the Family and Medical Leave Act (FMLA) as valid Section 5 legislation.¹⁰

The dispute between the majority and dissent in *Lane*, however, went beyond disagreement over matters relating to the congruence-and-proportionality test in a particular case. Instead, it centered on the general form that Section 5 analysis should take, specifically whether a court should assess the constitutionality of Section 5 legislation on a facial or on an as-applied basis. Justice Stevens insisted that the appropriate approach was as-applied. He rejected the petitioner's invitation to "ex-

4. *Id.* at 1994.

5. *Id.* at 2008–09 (Scalia, J., dissenting).

6. *Id.* at 1986 (opinion of the Court) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)); *id.* at 1998 (Rehnquist, C.J., dissenting).

7. *Id.* at 1988, 1992 (opinion of the Court); *id.* at 1998–99 (Rehnquist, C.J., dissenting) (citations omitted).

8. *Id.* at 1998, 2002 (Rehnquist, C.J., dissenting).

9. *Id.* at 1991–92, 1991 n.16 (opinion of the Court) (discussing *Nev. Dep.'t of Human Res. v. Hibbs*, 538 U.S. 721 (2003)).

10. See *Hibbs*, 538 U.S. at 729–35.

amine the broad range of Title II's applications all at once."¹¹ For him, the only judicially relevant question was "whether Congress had the power under [Section] 5 to enforce the constitutional right of access to the courts" through Title II, not whether Title II was valid in all its potential applications.¹² Chief Justice Rehnquist, by contrast, insisted that an as-applied approach was inappropriate. In his view, the purpose of "the congruence-and-proportionality test . . . [is to determine] whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment."¹³ Addressing Title II only as applied to the narrow issue of access to state courts simply "rig[ged] the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right."¹⁴ Accordingly, he maintained that determining whether Title II represents appropriate Section 5 legislation required that the Court examine Title II as a whole, in all its applications.

Whether the constitutionality of Section 5 legislation should be assessed on a facial or an as-applied basis is the focus of this Essay. While the Court frequently states that "facial" challenges are disfavored, such challenges in fact are common in many areas of constitutional law. As several scholars have noted,¹⁵ the debate regarding the availability of facial challenges, in particular facial overbreadth challenges, is really a debate about statutory severability—that is, whether unconstitutional text or applications of a statute¹⁶ should be presumed severable or nonseverable in a given context. *Lane* presents an opportunity to consider what the rule should be on facial challenges and severability in the Section 5 context, as well as in federalism-based challenges more generally. Interestingly, in *Sabri v. United States*, an opinion issued on the same day as *Lane*, the Court also expressly rejected a facial challenge to Spending Clause legislation, but it did so with far less fanfare.¹⁷ More surprisingly still, *Sabri* referred to Section 5 as an area where facial overbreadth challenges are appropriate. Adding to the confusion is that many of the Court's recent Section 5 decisions appear (at least at first glance) to invalidate the statutes there challenged on facial grounds. So do two recent Commerce Clause decisions, *United States v. Lopez*¹⁸ and *United States v. Morrison*.¹⁹

11. *Lane*, 124 S. Ct. at 1192–93.

12. *Id.* at 1993.

13. *Id.* at 2005 (Rehnquist, C.J., dissenting).

14. *Id.*

15. See *infra* notes 59–62.

16. This point is not limited to the context of facial challenges to statutes, but applies to any facial challenge to a governing rule. However, as the Section 5 debate focuses on federal legislation, the discussion here will refer only to statutes.

17. 124 S. Ct. 1941, 1948–49 (2004); see also *id.* at 1949 (Kennedy, J., concurring in part) (refusing to join the part of the Court's opinion disapproving of facial challenges but noting only that the Court was not questioning the ability of litigants generally to challenge legislation as outside of Congress' constitutional powers).

18. 514 U.S. 549 (1995).

19. 529 U.S. 598 (2000).

These conflicting messages not only raise the question of how the Court should approach Section 5 challenges, but also whether distinct procedural rules should govern in federalism contexts, and if so, why?

The position advanced here is that Section 5 and other congressional power challenges should be subject to the ordinary presumption of severability. At the same time, however, it is important to be clear about what precisely constitutes a facial challenge and how the presumption of severability operates. Often the substantive law applicable to a congressional power challenge requires a court to go beyond the facts before it and assess the targeted legislation on a more general basis. Such a challenge, I argue, is “facial,” but that does not mean that a court must assess all of a statute’s applications to determine its constitutionality. Instead, once it determines that a challenged statute is constitutional in some circumstances, including the case at hand, a court can presume any alleged unconstitutional additional applications are severable absent evidence to the contrary.

Part I begins with a discussion of the nature of facial challenges and the importance of severability to the availability of such challenges. The Court’s current “no valid application” definition of facial challenges is of recent vintage and unduly obscurant. What really distinguishes a facial challenge is not its breadth, but that it involves an attack on the general rule embodied in a statute. As a result, “facial” and “as-applied” are best understood as encompassing a range of possible challenges rather than as mutually exclusive terms. Recognition of the range of forms a facial challenge can take is important in highlighting the roles severability and substantive constitutional law play in the Court’s treatment of facial challenges.

Part II reviews the Court’s approach to facial challenges and severability in the context of claims that Congress has exceeded its enumerated powers. Inconsistency emerges as the dominant theme. Notably, however, this examination reveals that notwithstanding the facial cast of much of the Court’s recent Section 5 and Commerce Clause precedent, the Court is not deviating from ordinary severability rules in these decisions.

Part III of the Essay then evaluates and rejects the contention that, precedent aside, a special doctrine of nonseverability should govern in the Section 5 context. The substantive content of the congruence-and-proportionality test does not require formulation of a special nonseverability doctrine, nor does such a doctrine follow from the general nature of challenges to congressional power. Instrumental arguments against severability—such as ensuring that states are not chilled from asserting their constitutional prerogatives by the need to engage in piecemeal litigation, that Congress takes federalism limits on its powers seriously, and that the federal courts are protected from excessive and inappropriate burdens—are equally unavailing to justify departure from settled severability principles. Indeed, an analysis of these arguments demonstrates

that a nonseverability presumption and concomitant insistence on assessing the constitutionality of a Section 5 statute based on all its applications would represent a greater move to judicial supremacy than even the Court's recent Section 5 decisions appear to countenance. The Essay concludes with consideration of whether federalism concerns justify a departure from ordinary practice in other congressional power contexts.

I. FACIAL CHALLENGES AND SEVERABILITY

A. *The Meaning of "Facial" Challenges*

The Supreme Court frequently states its disapproval of facial constitutional challenges, but it voices this disapproval with varying degrees of intensity. *United States v. Salerno's* well-known pronouncement is the most extreme version: A facial challenge is "the most difficult challenge to mount successfully" and to succeed "the challenger must establish that no set of circumstances exists under which the Act would be valid."²⁰ More recently, in its *Sabri* decision last Term, the Court did not invoke the *Salerno* standard but agreed that "facial challenges are best when infrequent," and that facial overbreadth challenges in particular "are especially to be discouraged."²¹ This dislike of facial challenges is rooted in institutional concerns: According to the Court, "[f]acial adjudication carries too much promise of premature interpretation of statutes on the basis of factually bare-bones records,"²² thereby risking "unnecessary pronouncement on constitutional issues"²³ and thus also unnecessary intrusion on federal and state legislatures.

As several scholars and even some Justices have noted, however, in practice the Court accepts facial challenges far more frequently than its stated doctrine suggests.²⁴ First Amendment overbreadth doctrine, ac-

20. 481 U.S. 739, 745 (1987); see also *United States v. Booker*, No. 04-104, 2005 WL 50108, at *31, *32-33 (U.S. Jan. 12, 2005) (Stevens, J., dissenting in part) ("A facial challenge may succeed if a legislative scheme is unconstitutional in all or nearly all of its applications."); *id.* at *51 (Thomas, J., dissenting in part). For a discussion of the *Salerno* standard, see Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235, 236-42 (1994); see also Richard H. Fallon, Jr., *Commentary, As-Applied and Facial Challenges and Third-Party Standing*, 113 *Harv. L. Rev.* 1321, 1322-23 (2000) [hereinafter Fallon, *As-Applied*] (detailing the Court's ongoing struggle with the *Salerno* standard).

21. 124 S. Ct. at 1948; see also *United States v. Raines*, 362 U.S. 17, 21 (1960) (invoking general 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" to reject a facial challenge to civil rights statute).

22. *Sabri*, 124 S. Ct. at 1948 (internal quotation marks, alterations, and citations omitted).

23. *Raines*, 362 U.S. at 22.

24. See Dorf, *supra* note 20, at 236; Fallon, *As-Applied*, *supra* note 20, at 1323; see also Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 *Harv. L. Rev.* 1371, 1390 (2000) [hereinafter Adler, *Response*]. But see Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the*

knowledge in *Salerno* itself, is often cited as the prime example,²⁵ but it is far from the only one.²⁶ Michael Dorf has identified several other contexts where the courts regularly apply facial analysis to constitutional challenges, including when litigants assert that a statute is unconstitutionally underinclusive, was motivated by a forbidden purpose, or infringes on fundamental rights.²⁷ Some scholars have taken the point even further; Matthew Adler in particular has gone so far as to contend that all constitutional challenges are in some sense facial challenges.²⁸ Although arguing that, on the contrary, all constitutional challenges “are in an important sense as-applied,” Richard Fallon similarly concurs in the assessment that facial challenges are much more frequent than the Court admits.²⁹

Why this divide between the Court’s stated rule and actual practice regarding facial challenges? Part of the disconnect no doubt reflects differences in jurisprudential ideologies. Justices who are advocates of facial challenges in cases raising individual rights claims—such as claims against abortion regulations—have often rejected facial challenges in cases claiming that federal legislation exceeds Congress’ enumerated powers,

Valid Rule Requirement, 48 Am. U. L. Rev. 359, 395–421 (1998) (arguing that the *Salerno* standard is not as inconsistent with Supreme Court practice as critics claim). For discussions of varying standards applied to facial challenges by Supreme Court Justices, compare *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (Stevens, J.) (plurality opinion) (stating *Salerno* is not the governing standard for facial challenges), with *id.* at 74–83 (Scalia, J., dissenting) (asserting that *Salerno* is the appropriate standard).

25. See, e.g., *Sabri*, 124 S. Ct. at 1948 (identifying free speech context as one area where facial challenges are accepted); *Salerno*, 481 U.S. at 745 (arguing that the overbreadth doctrine has been limited to the First Amendment context).

26. What is traditionally referred to as overbreadth doctrine refers to the ability of a litigant to claim that a statute is unconstitutional even though it potentially could be constitutionally applied to her, because it prohibits a substantial amount of other constitutionally protected conduct. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003). In addition to overbreadth, the Court has also been receptive to other types of First Amendment facial challenges, such as those alleging vagueness, see *Morales*, 527 U.S. at 52 (Stevens, J.) (plurality opinion), and delegation of standardless discretionary power, see *City of Lakewood v. Plain Dealer Co.*, 486 U.S. 750, 755–62 (1988).

27. See Dorf, *supra* note 20, at 271–76, 279–81; see also Henry Paul Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 4 (noting that overbreadth analysis should be applicable whenever courts apply a heightened standard of review). In the abortion context, for example, the reigning standard for availability of facial challenges appears not to be *Salerno*’s no-valid-applications test, but rather the same substantive standard applicable to a challenge on the merits: An abortion regulation is invalid if it will create a substantial obstacle to access to previability abortions in a “large fraction” of the cases where it is relevant. See *Stenberg v. Carhart*, 530 U.S. 914, 944–45 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 874, 895 (1992) (setting out undue burden standard as substantive standard for reviewing abortion regulations and invalidating husband notification requirement under this standard); see also *Tucson Woman’s Clinic v. Eden*, 371 F.3d 1173, 1181 (9th Cir. 2004) (holding substantive abortion standard governs availability of facial challenges).

28. See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 Mich. L. Rev. 1, 125–32, 157 (1998) [hereinafter Adler, *Rights Against Rules*].

29. See Fallon, *As-Applied*, *supra* note 20, at 1335–41.

and vice versa.³⁰ It also seems likely that the Justices are less concerned with consistency of practice than with results in particular cases.³¹ One explanation of the majority's insistence on an as-applied approach in *Lane*, for example, is that upholding the constitutionality of Title II only with respect to access-to-the-court claims was necessary to obtain Justice O'Connor's vote; the skepticism displayed by the other Justices in the majority toward the Court's recent Section 5 jurisprudence suggests they might have been willing to uphold Title II across the board.³²

Perhaps more fundamentally, however, the disconnect also seems caused by confusion about what constitutes a facial challenge. The distinction between facial and as-applied challenges is more illusory than the ready familiarity of the terms suggests.³³ The nature of a "facial" challenge is rarely explored in the case law; when a description is provided it usually is only the unhelpful description that such a challenge targets a statute "on its face."³⁴ Instead, facial and as-applied challenges are more commonly differentiated by their effects. A successful facial challenge means that the "state may not enforce [a statute] under any circumstances, unless an appropriate court narrows its application" so as to

30. Compare *Tennessee v. Lane*, 124 S. Ct. 1978, 1992–93 (2004) (Stevens, J.) (rejecting facial approach in Section 5 context), with *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175–76 (1996) (mem.) (Stevens, J.) (arguing for facial challenges in the abortion context), denying cert. to 63 F.3d 1452 (8th Cir. 1995); compare *Nevada Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) (stating that facial challenges are proper in the Section 5 context), with *Ada v. Guam Soc'y. of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011–12 (1992) (Scalia, J., dissenting from denial of cert.) (rejecting facial challenges to abortion statutes), denying cert. to 962 F.2d 1366 (9th Cir. 1992), and *Morales*, 527 U.S. at 77 (Scalia, J., dissenting) (arguing that it seems "fundamentally incompatible with [the role of the federal courts in the constitutional 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."). Professor Fallon notes this variation in the Justices' stance on facial challenges. Fallon, *As-Applied*, supra note 20, at 1322–23 & n.22.

31. For example, as-applied language sometimes appears when the Court wants to limit the sweep of its holdings on contentious questions. See, e.g., *United States v. Guest*, 383 U.S. 745, 755–56 & n.9 (1966).

32. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 376–89 (2000) (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (arguing that Title I of the ADA was a valid exercise of Congress' Section 5 power). This impression of some of the Court's Section 5 jurisprudence as essentially results-driven is reinforced by *Lane*'s emphasis on the paucity of evidence of unconstitutional gender discrimination underlying the Family and Medical Leave Act (FMLA), see 124 S. Ct. at 1992, coming as it did just one year after all five of the Justices in the *Lane* majority signed onto the opinion in *Hibbs* describing this evidence as sufficient to sustain that Act's constitutionality, see 538 U.S. at 735.

33. Richard Fallon has argued that "facial challenges are less categorically distinct from as-applied challenges than is often thought." Fallon, *As-Applied*, supra note 20, at 1341; see also Dorf, supra note 20, at 294 (stating that "[t]he distinction between as-applied and facial challenges may confuse more than it illuminates" and that given Article III's case-and-controversy requirements, "[i]n some sense, any constitutional challenge to a statute is both as-applied and facial").

34. See, e.g., *Morales*, 527 U.S. at 52.

render it constitutional; a successful as-applied challenge still allows the state to “enforce the statute in different circumstances.”³⁵ In fact, ordinary rules of preclusion and stare decisis make this contrast in effects far less stark: The preclusive effect of a successful facial challenge will depend on the level of court that issues the decision, and stare decisis means successful as-applied challenges often generate results that are not specific to a particular challenger.³⁶

Despite the Court’s failure to clarify what it means by a facial challenge, a definition can be inferred from *Salerno’s* “no valid application” requirement. This requirement indicates that in the Court’s view a facial challenge must target a statute’s constitutionality in all its applications, whereas as-applied challenges are those that simply target the statute’s application in a particular context.³⁷ Yet no logical reason exists why a litigant could not make a partial facial challenge—that is, allege that part of a statutory provision is unconstitutional or that a statute is unconstitutional in a particular range of applications, even if not unconstitutional in all or most.³⁸ On this view, what differentiates facial and as-applied challenges is not the breadth of the challenge, but the nature of the claim being asserted: A facial challenge is one that “puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves the facts only insofar as it is necessary to establish that the rule served as a basis of decision.”³⁹

35. Dorf, *supra* note 20, at 236; see also *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (“The showing that a law punishes a substantial amount of protected free speech . . . suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” (citations omitted)).

36. See Fallon, *As-Applied*, *supra* note 20, at 1336–41.

37. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that to make out a successful facial challenge “the challenger must establish that no set of circumstances exists under which the Act would be valid”); see also *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004) (describing facial challenges “in the strictest sense” as ones where “no application of the statute could be constitutional”); *Brockett v. Spokane Arcades*, 472 U.S. 491, 501–06 (1985) (holding partial invalidation rather than facial invalidation is appropriate where parties challenging statute seek to engage in very speech that statute is overbroad for prohibiting and partial invalidation accords with state law).

38. See Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 Hofstra L. Rev. 647, 648–52 (2001) (noting instances where the Court has invalidated part of a statute or particular applications on facial challenge).

39. Paul M. Bator et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 662 (3d ed. 1988) [hereinafter *Hart & Wechsler, Third Edition*]; see also *Reno v. Flores*, 507 U.S. 292, 300–01 (1993) (“[T]his is a facial challenge . . . Respondents do not challenge its application in a particular instance . . . We have only the regulation itself and the statement of basis and purpose that accompanied its promulgation”); Adler, *Rights Against Rules*, *supra* note 28, at 157 n.541 (describing facial challenges as ones which focus exclusively on the predicate and history of a statutory rule, as contrasted with as-applied “adjudication that depends, in part, on facts about the claimant”); Monaghan, *supra* note 27, at 8 (“[A] challenge to the content of the rule applied is independent of the specific facts of the litigant’s predicament. Rather, it speaks to the relationship between

Notably, until *Salerno* uprooted the traditional orthodoxy, facial challenges were understood to include such context-specific challenges to general rules because as-applied challenges were defined in fairly narrow terms synonymous with claims of privilege. The third edition of Hart and Wechsler's Federal Courts casebook provides a good example. After offering the foregoing definition of a facial challenge, the third edition stated that "[c]hallenges to the validity of a statute as applied to specific facts, on the other hand, turn necessarily on a determination of what the adjudicative facts were . . . [and] can always be rephrased simply as an assertion of a federal right or immunity with respect to the operative facts."⁴⁰ Both definitions are absent from the current fifth edition, which instead discusses the *Salerno* standard for facial challenges.⁴¹ *United States v. Carolene Products*,⁴² most famous, of course, for its footnote four, also displays this view of as-applied challenges. There, the Court upheld a federal statute prohibiting shipment of filled milk against a facial challenge while noting that an as-applied challenge might lie: "[W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason"⁴³ This as-applied challenge the Court left open is really a fact-based claim of privilege or immunity—that congressional regulation of a particular article or activity is not rational given its specific characteristics—as opposed to a challenge to the general rule embodied in the congressional regulation in question.

The net effect of the current *Salerno* approach is that facial challenges now operate solely at the wholesale level, encompassing only across-the-board claims of unconstitutionality, while as-applied challenges include more limited attacks on a statute as unconstitutional in a particular range of cases as well as fact-based claims based on a specific application. Nothing precludes this approach in principle, provided it is then recognized that both facial and as-applied challenges can involve attacks on the constitutionality of some general rule. But the Court's restrictive definition of facial challenges sows confusion, precisely because this crucial proviso is often overlooked. As the ensuing examination of congressional power cases reveals, the applicable substantive law may at times necessitate looking beyond the facts of the case at hand. This does not mean, however, that the Court must consider all applications or dimen-

the facial content of the rule being applied to the facts and applicable constitutional law").

40. Hart & Wechsler, Third Edition, *supra* note 39, at 662; see also Monaghan, *supra* note 27, at 5. While as-applied challenges were thus viewed as largely the equivalent of claims of privilege or immunity, how such challenges were stylized did affect the availability of review in the Supreme Court as of right; such review was available only for as-applied challenges. See *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921).

41. See Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and The Federal System 194–96 (5th ed. 2003) [hereinafter Hart & Wechsler, Fifth Edition].

42. 304 U.S. 144 (1938).

43. *Id.* at 153–54.

sions of a statute to determine if Congress exceeded its powers. Rather, a range of challenges are possible, with *Salerno*-style facial challenges and privileged-based as-applied challenges representing polar extremes instead of mutually exclusive categories.⁴⁴

Take *Lane* as an example. The Court there was not restricted to a choice between considering the constitutionality of Title II in its entirety or only as applied to enforcing the fundamental right of access to the courts. It could instead have assessed the constitutionality of Title II as applied to enforcing fundamental rights generally. Alternatively, it could have addressed Title II only as a means of enforcing specifically the rights of access of criminal defendants or court employees; indeed, Chief Justice Rehnquist faulted the majority for viewing the right of court access in too general terms.⁴⁵ While the latter approach would be more tied to the facts of *Lane* itself, the challenge would still be “facial,” in that the contours of the claims at issue are not unique to the plaintiffs in the case—the question is still the statute’s constitutionality viewed in general terms. Some of these lines might seem more or less plausible, but in theory all are available unless the Court were to conclude that Title II could not be severed in such a fashion.

B. *The Role of Severability*

Defining facial challenges *Salerno*-style as leading to total invalidation—that is, no valid applications—not only exaggerates the difference between facial and as-applied challenges, it also obscures the crucial role played by severability doctrine. The claim that a statute is unconstitutional in all its applications is usually quite implausible; a little imagination suffices to produce at least one potentially constitutional application; indeed often it produces a fair number of constitutional applications.⁴⁶ What underlies a litigant’s claim that a statute cannot be constitutionally

44. See David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 *Cornell L. Rev.* 808, 884–86 (2004) (discussing “continuum [that] exists between pure as-applied challenges and facial challenges that ask a court to strike down rules in their entirety”); see also Fallon, *As-Applied*, *supra* note 20, at 1334–35 (emphasizing availability of partial challenges to statutory rules).

45. See *Tennessee v. Lane*, 124 S. Ct. 1978, 1999–2002 (2004). Dispute over how precisely the constitutional rights at issue must be identified also surfaced in *Hibbs*. Compare *Nevada Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721, 729–34 (2003) (detailing evidence of state gender discrimination in employment), with *id.* at 745–46, 749 (Kennedy, J., dissenting) (arguing that the Court “sets the contours of the inquiry at too high a level of abstraction” and that the real question was “whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination . . . in the provision of family leave benefits”).

46. See *Dorf*, *supra* note 20, at 239–41; see also *City of Chicago v. Morales*, 527 U.S. 41, 81–82 (1999) (Scalia, J., dissenting) (arguing that the government should be able to defeat a facial challenge “by conjuring up a single valid application of the law” and providing such an example based on the musical *West Side Story* (emphasis omitted)).

applied is therefore the argument that the unconstitutional and constitutional aspects of a statute cannot be severed.

1. *Ordinary Severability Doctrine.* — Although not always applied consistently, the standard rules governing severability are fairly well established.⁴⁷ Courts ordinarily apply a presumption of severability and sever any unconstitutional provisions or applications of a statute rather than hold it facially invalid.⁴⁸ Of course, a court will “impose a limiting construction on a statute only if it is ‘readily susceptible’ to such a construction.”⁴⁹ Severability in regard to federal statutes is ostensibly a question of congressional intent and functionality: Would Congress have enacted the remaining provisions without the severed portions, and can the remaining portions function independently?⁵⁰ But severability doctrine

47. Compare, e.g., *United States v. Grace*, 461 U.S. 171, 172–73, 183–84 (1983) (holding statute prohibiting display of flags, banners, or devices in the “Supreme Court building and on its grounds” unconstitutional only as applied to public sidewalks surrounding the Court), with *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 477–79 & n.26 (1995) (enjoining enforcement of broad honoraria ban covering all federal employees only as applied to executive branch employees below grade GS-16 but refusing to only enjoin enforcement insofar as employee speech did not bear a nexus to each employee’s job, due to a concern that imposing a nexus requirement not in the statute would represent a “serious invasion of the legislative domain”), with *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) (refusing to sever potential constitutional application of Oklahoma statute notwithstanding statute’s severability clause which under state law created a presumption of severability, because severability clause authorized severing “any part or provision . . . held void,” and did not refer to severing unconstitutional applications). For a discussion of the Court’s inconsistency regarding severability, see Michael D. Shumsky, *Severability, Inseparability, and the Rule of Law*, 41 *Harv. J. on Legis.* 227, 232–45 (2004). See generally Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 *Harv. L. Rev.* 76 (1937) (describing severability decisions in the period after the Civil War through the early New Deal).

48. See *United States v. Sabri*, 124 S. Ct. 1941, 1948 (2004); *Brockett v. Spokane Arcades*, 472 U.S. 491, 501–03 (1985); *United States v. Raines*, 362 U.S. 17, 21 (1960). Although the full Court has not expressly adopted such a presumption, it lies implicit in the Court’s approach to severability and facial challenges. See John Copeland Nagle, *Severability*, 72 *N.C. L. Rev.* 203, 218–25 (1993) (discussing presumptions of severability); *infra* text accompanying notes 62–64; see also *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion) (adopting presumption of severability); *Champlin Refining Co. v. Corp. Comm’n*, 286 U.S. 210, 234 (1932) (“Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”).

49. *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (citation omitted). Such susceptibility may turn on the availability of a “clear line” supported by statutory text or legislative intent that the Court could use to trim a statute to constitutional confines. *Id.*; see also *Morales*, 527 U.S. at 55 (plurality opinion) (finding severability impossible where “vagueness permeates the text of [a criminal] law”). It is also dependent on the substantive constitutional requirements that a statute must meet. See *infra* notes 64–66 and accompanying text.

50. See Hart & Wechsler, *Fifth Edition*, *supra* note 41, at 182–84 (describing severability doctrine as applied to federal statutes); see also *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–86 (1987) (setting out rules governing severability of federal statutes). In regard to state statutes, severability is a question of state law; while the federal courts also apply a presumption of severability and focus on legislative intent if no authoritative

also contains an important yet little-noticed judicial feature: Legislative intent to the side, can the court formulate a satisfying limiting principle to constrain the statute? If not, severing unconstitutional applications is not an option and the court will resort to full invalidation.

Severability is often conceived of as a measure of the feasibility of separating some linguistically distinct statutory text from other parts of the provision as a whole.⁵¹ But frequently the question instead will be one of application severability: whether a court can sever unconstitutional applications of a single statutory provision.⁵² Intuitively, application severability may seem a judicial endeavor of more dubious legitimacy than text severability, as a court must draw lines not found in the statute's language. In fact, however, severing unconstitutional applications is functionally equivalent to the well-established judicial practice of narrowly construing statutory provisions to avoid constitutional problems.⁵³

state construction exists, rulings on severability by a state's highest court are binding. See Hart & Wechsler, Fifth Edition, *supra* note 41, at 182–84; see also *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*) (noting whether provisions in state statute are severable is question of state law).

51. See, e.g., *Reno*, 521 U.S. at 882–83 (severing term “or indecent” from statute regulating “any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent” (citations omitted)).

52. See, e.g., *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912) (presuming severability of application of statutory settlement requirement to frivolous claims and thus upholding statute against constitutional challenge); Adrian Vermeule, *Saving Constructions*, 85 *Geo. L.J.* 1945, 1950 n.26 (1997) (noting the similarities between text and application severability); see also *United States v. Booker*, No. 04-104, 2005 WL 50108, at *51, *54 (U.S. Jan 12, 2005) (Thomas, J., dissenting in part) (“The severability issue may arise when a court strikes either a provision of a statute or an application of a provision.”). But see *id.* at *31, *36 n.6 (Stevens, J., dissenting in part) (rejecting claim that courts “must engage in severability analysis if a statute is unconstitutional in only some of its applications” and characterizing cases that sever unconstitutional applications as actually “about constitutional avoidance”). The Court's recent *Booker* decision is discussed in greater detail at *infra* Part I.B.3.

53. The modern progenitor of this practice, referred to as the canon of constitutional avoidance, is Justice Brandeis' concurrence in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936). Viewed theoretically, the practices of severability and avoidance differ somewhat. In severing, a court first rules definitively on whether an application of a statute is constitutional, implicitly if not explicitly concluding that the statute should be read to apply in the challenged fashion. It then asks whether the legislature would have intended the constitutional part of the statute to stand on its own. In construing a statute narrowly, a court does not definitively rule that a particular application is unconstitutional. Rather, it finds that because such an application would raise serious constitutional doubts and an alternative plausible interpretation is available, the statute should not be read as including the questionable application. See Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 *Utah L. Rev.* 381, 391–95, 400–04 (describing distinction between modern doctrines of severability and avoidance). In terms of their effects on the legislation in question, however, the two practices are functionally the same.

That said, this distinction between severability and avoidance may affect the frequency with which courts limit a statute's application, as courts may be more willing to find that a statute raises serious constitutional doubts than that it is in fact unconstitutional. See

Moreover, excising express text that Congress has intentionally included in a statute could be seen as far more of an intrusion into the legislative sphere than excising a particular application that Congress may not have considered at all.

In any event, the case law does not support drawing a strict distinction between text severability and application severability.⁵⁴ The Court has applied severability in both contexts, and its inquiry in both is the same: Is severability consistent with legislative intent? In *United States v. National Treasury Employees Union*, for example, the Court relied on its assessment of congressional intent to enjoin a ban on receiving honoraria only as applied to lower-level executive branch employees, notwithstanding that no such distinction among types of employees was contained in the text of the statute.⁵⁵ The difference between these two forms of severability, to the extent there is one, is that a court may be more confident in finding that the legislature intended statutory text to be severed and thus that it can craft a constitutional construction without overstepping its judicial role, than in finding that it can sever particular applications of a single statutory term.⁵⁶ Indeed, it is fair to say that an almost automatic

Vermeule, *supra* note 52, at 1955–63. Another potential divergence, highlighted by the Court’s recent decision in *Clark v. Suarez Martinez*, No. 03-7434, 2005 WL 50099 (U.S. Jan. 12, 2005), is that the route of constitutional avoidance may have greater implications for other statutory challenges than does severance. In *Clark*, the Court held that its prior reading of the Immigration and Naturalization Act’s removal provision as only authorizing “reasonably necessary” detention of admitted aliens, presumptively a period of six months, required as a matter of statutory construction that it read the provision similarly in regard to inadmissible aliens. See *id.* at *4–*6. The Court had adopted this interpretation in *Zadvydas v. Davis* out of concern that reading the removal provision as authorizing indefinite detention of admitted aliens would raise serious due process concerns. 533 U.S. 678, 690–96 (2001). If, instead, the Court had read the provision as authorizing such indefinite detention and severed its application in regard to admitted aliens, it might have remained open for the Court in *Clark* to uphold the availability of indefinite detention in regard to inadmissible aliens. “Might” is a key qualifier, however, because the Court would first have had to hold that this aspect of the provision’s application to admitted aliens was severable.

54. See Hart & Wechsler, Fifth Edition, *supra* note 41, at 182 (discussing both text and application severability).

55. 513 U.S. 454, 477–79 (1995); see also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501–06 (1985) (partially invalidating state obscenity statute “only insofar as the word ‘lust’ is taken to include normal interest in sex” after determining that such partial invalidation accorded with state legislature’s intent); *United States v. Grace*, 461 U.S. 171, 172–73, 183–84 (1983) (invalidating statute prohibiting display of flags, banners, or devices in the “Supreme Court building and on its grounds” only as applied to public sidewalks surrounding the Court, even though provision made no separate mention of sidewalks).

56. See, e.g., *Reno*, 521 U.S. at 882–84 (severing constitutional portion of statute that “enjoy[ed] a [separate] textual manifestation” but refusing to narrowly construe remainder of statute to avoid unconstitutional applications because “open-ended character of the [statute] provides no guidance whatever for limiting its coverage” in accordance with congressional intent); *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) (refusing to sever potentially constitutional applications of a state statute on grounds that doing so

rule of severability applies in many text severability contexts; to give an extreme example, it goes without saying that invalidation of one statute, even a statute the various provisions of which are held inseparable from each other, does not invalidate separately enacted or unrelated sections of the U.S. Code.⁵⁷

2. *Severability and the Availability of Facial Challenges.* — Although the Court rarely acknowledges the role severability plays in its assessment of constitutional challenges,⁵⁸ existing scholarship generally agrees that the debate regarding the availability of facial challenges is, at bottom, fundamentally a debate about severability.⁵⁹ Severability's centrality follows from the basic (though rarely acknowledged) proposition that "a litigant . . . always ha[s] the right to be judged in accordance with a constitutionally valid rule of law," whether or not her own conduct is constitutionally privileged.⁶⁰ If unconstitutional applications are not severed, the

would transform the statute into "a fundamentally different piece of legislation" and emphasizing that "it is clearly not this Court's province to rewrite a state statute").

57. I thank Mike Dorf for this point.

58. Instead, it simply notes in rejecting a facial challenge that an as-applied challenge might still lie. *Hiibel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451 (2004) provides a recent example. There, the Court rejected the petitioner's Fourth and Fifth Amendment challenges to a Nevada law requiring that individuals identify themselves when stopped under a reasonable suspicion of having engaged in criminal activity. *Id.* at 2457–61. But the Court qualified its rejection of the Fifth Amendment self-incrimination claim by noting that "a case may arise where there is a substantial allegation that furnishing identity at the time of a stop" would be incriminating, and concluded—without mentioning severability by name—that in such a case, "the court can then consider whether the [Fifth Amendment] privilege applies." *Id.* at 2461.

59. See Monaghan, *supra* note 27, at 3–6; see also Dorf, *supra* note 20, at 249–51; Fallon, *As-Applied*, *supra* note 20, at 1331–33. Marc Isserles argues that severability is only relevant to analysis of a facial overbreadth challenge, and not to what he terms "a valid rule facial challenge," which "seeks to show that, *under the statute as it is currently written and authoritatively construed*, the underlying substantive constitutional doctrine dictates that there is 'no set of circumstances' in which the statute can be constitutionally applied." Isserles, *supra* note 24, at 387 (citation omitted). Severability in his view is irrelevant here "because a statute with no constitutional applications cannot be saved from invalidity by severing the unconstitutional applications." *Id.* But insofar as a court in construing a statute either severs or refuses to sever unconstitutional applications, its actions may well determine whether such a challenge will succeed. The Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000) is a good case in point. The Court held that Nebraska's "partial birth" abortion ban was facially invalid in part because it imposed a substantial burden on women's availability to obtain a previability abortion by covering dilation and evacuation procedures. See *id.* at 938–39. However, the Court's decision suggests that this constitutional infirmity might have been cured if the statute could have been read as applying only to dilation and extraction procedures. See *id.* at 938–45.

60. Monaghan, *supra* note 27, at 3. Scholars generally agree that the valid rule requirement is a basic constitutional principle. See, e.g., Dorf, *supra* note 20, at 242–44, 246–49 (accepting the valid rule requirement and offering justification for it based on *Marbury v. Madison*'s theory of judicial review and resultant concept of the rule of law, as well as the Supremacy Clause); Fallon, *As-Applied*, *supra* note 20, at 1331–33 (arguing that the "valid rule requirement is fundamental" and while "it is hard to identify direct judicial affirmations of the valid rule requirement . . . a doctrinal home could easily be found in

statute cannot be applied to any litigant, even one making no claim of constitutional protection for her conduct.⁶¹ On the other hand, if unconstitutional applications of a statute can be severed, refusing to apply the statute to conduct that is not constitutionally protected becomes unjustified.⁶² Viewed through the lens of the valid rule requirement, therefore, the Court's reluctance to entertain facial challenges is justifiable only if seen as embodying a presumption of severability—in the case of *Salerno*, as Michael Dorf has argued, a nearly irrebuttable presumption.⁶³

Scholars also agree that, given the role played by severability, the availability of facial challenges ultimately turns on the substantive constitutional doctrines that govern in a particular area. Many doctrines are compatible with the presumption of severability. But in some areas the applicable substantive law makes narrowing a statute to fit constitutional limits a more difficult task. When the standard of constitutional review is heightened—as occurs, for example, with application of a least restrictive means requirement—the likelihood increases that a statute will be unconstitutional in a significant number of its applications, and accordingly that attempts to sever these invalid applications will render the statute

the Due Process Clause”); see also Isserles, *supra* note 24, at 389–95 (disagreeing with Monaghan's characterization of overbreadth challenges as personal challenges based on the valid rule requirement rather than third-party challenges, but agreeing that valid rule challenges represent a basic category of facial challenges).

The most prominent attack on the valid rule requirement has come from Matthew Adler, who argues both that the valid rule requirement is not reflected in Supreme Court doctrine and that it wrongly views constitutional rights as personal rights rather than as rights against rules. See Adler, *Response*, *supra* note 24, at 1395–1406. However, the conflict between Adler's view and the valid rule requirement appears more theoretical than real. Adler acknowledges that courts may respond to an invalid rule by either facial or partial invalidation. See Adler, *Rights Against Rules*, *supra* note 28, at 125–32, 158. If a court invalidates the rule, then in keeping with the valid rule requirement, it will not be applied to an individual; if on the other hand, a court responds by severing the rule's unconstitutional applications, the “amended” rule is valid and thus its application, even retrospectively, does not necessarily violate the valid rule requirement. See Adler, *Response*, *supra* note 24, at 1405; see also Monaghan, *supra* note 27, at 3, 8–10 (arguing that while a rule with unconstitutional applications is invalid in regard to any litigant, it can be applied to those engaging in unprotected conduct if it can be narrowed to fit constitutional requirements). In any event, Adler agrees on the importance of severability to facial challenges. See Adler, *Rights Against Rules*, *supra* note 28, at 158 (“Facial challenge doctrine . . . is a doctrine that answers the question: Where a rule is constitutionally invalid, should the reviewing court *repeal* the invalid rule, or should the court instead *amend* the rule in some way?”).

61. Cf. *Clark v. Suarez Martinez*, No. 03-878, 2005 WL 50099, at *6 (U.S. Jan. 12, 2005) (arguing that a litigant invoking the canon of constitutional avoidance in defense of a statutory interpretation is “not attempting to vindicate the constitutional rights of others . . . [but] his own *statutory* rights,” even if the constitutional problems he articulates relate to the statute's application to individuals not before the court).

62. See Monaghan, *supra* note 27, at 6 n.22, 9, 17 (noting fair warning and vagueness concerns may still preclude application).

63. See Dorf, *supra* note 20, at 238, 250; see also Fallon, *As-Applied*, *supra* note 20, at 1333; Monaghan, *supra* note 27, at 5–7.

nonfunctioning or excessively vague.⁶⁴ Some argue that, in addition, prophylactic concerns with chilling constitutional rights justify nonseverability presumptions and broad third-party standing rules; First Amendment overbreadth doctrine is traditionally defended on this basis, although Henry Monaghan has famously critiqued this view.⁶⁵ Even the Court, although retaining its attraction to the idea of a general rule governing facial challenges, has acknowledged that the availability of such challenges does vary with context and that in a few “limited settings” substantive concerns have justified greater use of facial challenges.⁶⁶

As a result, viewing the issue in *Lane* as the availability of facial challenges is misleading. A litigant should always be able to bring a facial challenge even of the *Salerno* variety, alleging that a statute by its terms has inseparable unconstitutional applications. Where severability is precluded—most commonly by a state supreme court’s interpretation of a challenged state statute—a federal court has no choice but to hold the statute invalid in toto if it accepts the claim of unconstitutional applications.⁶⁷ In other contexts, however, a court may respond by accepting the claim of unconstitutionality but disagreeing about severability, with the result that the statute is then enjoined or declared invalid in part to the extent it affects the plaintiff. Yet the possibility of this result justifies denying availability of such a facial challenge in the first place only when the litigant is not herself potentially subject to the unconstitutional application and a presumption of severability applies.⁶⁸

64. See Monaghan, *supra* note 27, at 17–18, 24–25; see also Dorf, *supra* note 20, at 251–64, 281–82; Fallon, *As-Applied*, *supra* note 20, at 1342, 1350–51.

65. Compare Monaghan, *supra* note 27, at 3, 21–30 (denying that First Amendment overbreadth doctrine embodies a nonseverability presumption or special standing rules), with Dorf, *supra* note 20, at 263–64 (stating that First Amendment overbreadth doctrine reflects special standing rules), and Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *Yale L.J.* 853, 867–75, 898–900 (1991) [hereinafter Fallon, *Making Sense*] (arguing that the Court applies a nonseverability presumption and special standing rules in First Amendment overbreadth cases).

66. See *Sabri v. United States*, 124 S. Ct. 1941, 1948–49 (2004).

67. See, e.g., *Virginia v. Black*, 538 U.S. 343, 363–64 (2003); *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–76 (1987). For this reason, the Court’s recent decision in *Virginia v. Hicks*, 539 U.S. 113, 121–24 (2003), where it presumed a housing authority’s trespass policy had inseparable unconstitutional applications yet nonetheless upheld the policy’s enforcement, seems dubious. The only explanation for the result in *Hicks* stems from the fact that the Virginia Supreme Court did not expressly rule on severability, but instead implicitly held the policy was inseparable by enjoining it in its entirety. *Hicks* suggests that the Court is not willing to adhere to such implicit state court holdings of nonseverability, at least where a rule’s unconstitutional applications appear inconsequential.

68. Ordinary severability rules preclude bringing overbreadth challenges because the assumption is that any unconstitutional applications could be severed, and thus actually resolving the question of their constitutionality is not necessary to decide the case at hand. See, e.g., *Sabri*, 124 S. Ct. at 1948 (arguing that facial overbreadth challenges are disfavored for this reason); *United States v. Raines*, 362 U.S. 17, 22 (1960) (“The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.”).

The real question raised by *Lane* is instead how should the Court approach severability in the Section 5 context: Should it apply its ordinary severability rules and presume unconstitutional applications are severable, or on the contrary presume nonseverability? The answer to this question determines whether the constitutionality of Section 5 legislation should be assessed facially in the contemporary sense—that is, in light of all of the statute’s applications—or on a more limited basis.

3. *United States v. Booker*. — This Term’s decision in *United States v. Booker*⁶⁹ on the constitutionality of the Federal Sentencing Guidelines gave the Court occasion to address severability and its impact on the availability of facial challenges. In *Booker*, the Court by a 5-4 majority held that the Sentencing Act and Federal Sentencing Guidelines were unconstitutional insofar as they require a judge to impose a sentence higher than the statutory maximum based on facts not proved to a jury beyond a reasonable doubt.⁷⁰ The Court then faced a difficult remedial question: whether to sever those provisions of the Sentencing Act that made the Guidelines mandatory; uphold the existing federal sentencing system, but require that any fact used by a judge to enhance a sentence beyond the statutory maximum be proven to a jury unless the defendant waives her Sixth Amendment rights; or invalidate the federal sentencing system as a whole, deeming the unconstitutional applications of the system inseparable. A different 5-4 majority adopted the first remedial option and, by excising the mandatory provisions of the Act, rendered the Guidelines advisory;⁷¹ the four dissenting Justices argued for the second approach, “engraft[ing]” the “Sixth Amendment ‘jury trial’ requirement” onto the existing system.⁷²

In its articulation of the rules governing severability analysis, the *Booker* Court adhered to two principles that guide established doctrine: Severability is determined by “looking to legislative intent”, and a court “must retain those portions of [a statute] that are (1) constitutionally valid, (2) capable of ‘functioning independently,’ and (3) consistent with Congress’ basic objectives in enacting the statute.”⁷³ The Court’s application of these principles, however, was more unusual,⁷⁴ in particular its creation of a new standard of appellate review—“reasonableness”—to replace the largely *de novo* standard of review expressly set out in the Act

69. No. 04-104, 2005 WL 50108 (U.S. Jan. 12, 2005).

70. See *id.* at *8–*14 (Stevens, J., opinion of the Court).

71. See *id.* at *15–*18 (Breyer, J., opinion of the Court). Only Justice Ginsburg joined both parts of the Court’s decision.

72. *Id.* at *16.

73. See *id.* at *16, *24 (citations omitted).

74. Or, as the dissenters put it, “extraordinary,” “creative,” see *id.* at *31–*32 (Stevens, J., dissenting in part), and making sense “[o]nly in Wonderland,” *id.* at *49 (Scalia, J., dissenting in part).

that it excised.⁷⁵ Its facial invalidation of provisions of the Sentencing Act that were capable of constitutional application was also notable.⁷⁶

Certainly, grounds exist to question whether the majority's interpretation accords with Congress' intent in adopting the Sentencing Act; in the words of Justice Scalia, it is "wonderfully ironic . . . [that in] order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing."⁷⁷ On the other hand, both the majority's and the dissenters' efforts to determine whether, in light of the Court's Sixth Amendment holding, Congress would have chosen to retain judge-based sentencing or nondiscretionary sentencing seem impossibly counterfactual, given the centrality of both these features to the sentencing system Congress established.⁷⁸ Hence, if congressional intent were really the Court's touchstone, the better course would have been to invalidate the federal sentencing system in its entirety.

The unwillingness of both the majority and the dissents to countenance total invalidation demonstrates the potency of the presumption of severability.⁷⁹ This unwillingness was also no doubt enhanced by the tremendous disruptive potential of total invalidation of the federal sentencing system, making it highly unlikely that either the current Congress or the Congress that enacted the Sentencing Act would prefer that option. Indeed, the majority made clear that it saw the Court's remedy issue primarily in terms of fashioning an interim measure until Congress could act; as it stated, "[o]urs, of course, is not the last word: The ball now lies in Congress' court."⁸⁰ As an interim measure, the majority's approach has much to recommend it; sentencing will proceed largely as before, albeit with the major caveat that judges will now have the freedom to deviate from Guidelines ranges that they previously lacked, but with some protection against radical departures.

The majority's facial invalidation of the mandatory provisions of the Sentencing Act provoked the most sustained criticism from the dissents—but from a methodological perspective at least, unwarrantedly so. Both Justice Stevens (joined by Justices Souter and Scalia) and Justice Thomas

75. See *id.* at *24–*25 (Breyer, J., opinion of the Court). In particular, the relevant provision provided for de novo review of departures from the applicable Guideline range. See 18 U.S.C. § 3742(e) (2000).

76. See *Booker*, 2005 WL 50108, at *24–*27 (Breyer, J., opinion of the Court).

77. *Id.* at *47 (Scalia, J., dissenting in part).

78. See, e.g., *id.* at *18–*23 (Breyer, J., opinion of the Court) (arguing that Congress sought to achieve its goal of greater uniformity through a system of judge-based sentencing in which sentences are based on "the real conduct that underlies the crime of conviction" (emphasis omitted)); *id.* at *41–*45 (Stevens, J., dissenting in part) (arguing that "Congress' unequivocal demand [was] that the Guidelines operate as a binding system," and that Congress had considered and rejected an advisory regime).

79. See *id.* at *24 (Breyer, J., opinion of the Court); *id.* at *36 (Stevens, J., dissenting in part); *id.* at *55–*56 (Thomas, J., dissenting in part).

80. See *id.* at *28 (Breyer, J., opinion of the Court).

contended that the proper approach was instead to prohibit unconstitutional applications of the statutes, although they disagreed as to whether severability was the proper mode of analysis. Justice Thomas, along with the majority, treated the remedial question as one of application severability. Justice Stevens, however, maintained that when some but not all of a provision's applications are unconstitutional, the governing analysis is the doctrine of constitutional avoidance rather than severability, the question being whether the provision in question could be construed so as to avoid the unconstitutional applications.⁸¹ As noted earlier, this is largely a distinction without a difference.⁸² Of the two, Justice Thomas' statement that while "[s]everability of provisions is perhaps more visible," nonetheless "severability questions arise from unconstitutional applications of statutes as well" is the better account of the Court's precedents.⁸³

More significant was Justice Stevens' further claim that the Court lacked authority to facially invalidate provisions that could have constitutional applications.⁸⁴ This claim is wrong as a matter of precedent; although rare, the Court has on occasion enjoined or invalidated all applications of a statute that it recognized could have some constitutional applications.⁸⁵ It also is wrong as a matter of logic. As Justice Stevens acknowledged, the unconstitutionality of some parts of a statute may force its invalidation as a whole if those provisions are not severable;⁸⁶ the reason for this is of course the valid rule requirement. Similarly, if a provision's unconstitutional applications cannot be severed or construed away, then on the same reasoning the provision cannot be constitutionally applied at all; no basis exists on which to distinguish these two situations. Justice Stevens' statement that "the Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional"⁸⁷ is true but irrelevant, because when a provision's unconstitutional applications are inextricable, the provision *is* unconstitutional.

81. See *id.* at *54–*57 (Thomas, J., dissenting in part); *id.* at *36 & n.6 (Stevens, J., dissenting in part).

82. See *supra* note 53 and accompanying text.

83. See *Booker*, 2005 WL 50108, at *54–*55 (Thomas, J., dissenting in part); *supra* notes 52–56 and accompanying text. One reason that comparatively few decisions exist engaging in application severability is that the Court rarely discusses severability when it upholds a statute's constitutionality, and thus the practice of application severability (like the presumption of severability) is usually implicit. For an example see *supra* note 58.

84. See *Booker*, 2005 WL 50108, at *32–*37 (Stevens, J., dissenting in part).

85. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874–79, 883–84 (1997) (excising reference to "indecent material" from federal statute as a violation of the First Amendment while acknowledging that a more narrowly tailored prohibition to protect children might be constitutional, but refusing to adopt a narrowing construction on grounds that the statute was not "readily susceptible" to one); *Wyoming v. Oklahoma*, 502 U.S. 437, 459–60 (1992) (facially invalidating statutory provision requiring that generating plants located in and producing power for sale in Oklahoma burn mixture containing at least ten percent Oklahoma-mined coal, despite potential constitutional application to state-run facility).

86. See *Booker*, 2005 WL 50108, at *36 (Stevens, J., dissenting in part).

87. *Id.*

The essence of Justice Stevens' position was really that where a statute has constitutional and unconstitutional applications, a Court should always adopt a construction that preserves the constitutional applications rather than facially invalidating it. Justice Thomas appeared to agree, although he voiced the point in terms of severability analysis.⁸⁸ Their position has some bite as a prudential norm urging courts to forego radical surgery—and in that vein stands as a close cousin to the presumption of severability and the disfavoring of facial challenges generally. But as a hard and fast rule, it is unpersuasive. Once a court has determined that a statute has unconstitutional applications, the question becomes what is the most plausible means of construing the statute to be constitutional. If the court determines that excising statutory provisions, despite the radical character of this approach, is most in keeping with congressional intent, then it should excise—its warrant for doing so stemming from its determination that the statute in current form is unconstitutional.⁸⁹

In *Booker*, the majority determined that the engraftment approach was not a plausible reading of the Sentencing Act, and further that Congress would have preferred invalidation of the Act's mandatory provisions to its total invalidation. Again, this is certainly a conclusion about which, as the majority acknowledged, "reasonable minds can, and do, differ."⁹⁰ But, accepting *arguendo* the majority's reading of the Sentencing Act, its remedial approach of facial invalidation was perfectly legitimate.⁹¹

88. See *id.* at *52–*54 (Thomas, J., dissenting in part).

89. Support for this comes from the well-established rule that a court "may impose a limiting construction on a statute [to render it constitutional] only if it is 'readily susceptible' to such a construction," see *Reno*, 521 U.S. at 884 (citation omitted), for, if a court determines that excising the offending provisions yields the more plausible interpretation, then the statute is not readily susceptible to an interpretation that simply narrows the provision's scope of application.

90. *Booker*, 2005 WL 50108, at *18 (Breyer, J., opinion of the court).

91. The interrelation between statutory construction and facial challenges also arose in *Clark v. Suarez Martinez*, a decision handed down the same day as *Booker*. *Clark* addressed the government's powers under the Immigration and Nationality Act's removal provision to indefinitely detain inadmissible aliens. No. 03-878, 2005 WL 50099 (U.S. Jan. 12, 2005). Again dissenting, Justice Thomas attacked the majority for imposing the interpretation of the removal provision previously adopted in regard to admitted aliens on the provision's application to inadmissible aliens. He emphasized that the Court had adopted this reading of the removal provision out of concerns about the constitutionality of indefinite detention of admitted aliens. As a result, he claimed that extending it to inadmissible aliens amounted to allowing "an end run around black-letter constitutional doctrine governing facial and as-applied constitutional challenges to statutes: A litigant ordinarily cannot attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances." *Id.* at *15–*16 (Thomas, J., dissenting).

Justice Thomas' criticisms in *Clark* were mistaken, and stemmed from a failure to recognize the valid rule requirement (and the concomitant presumption of severability implicit in the Court's reluctance to allow facial challenges). See *supra* notes 60–62 and accompanying text; see also *supra* note 53 (citing *Clark* as an example of the valid rule requirement). As Justice Scalia argued in response, "[the canon] is a tool for choosing between competing plausible interpretations of . . . statutory text"; nothing therefore precludes a litigant from using the constitutionality of a statute's application to others as a

II. CONGRESSIONAL POWER PRECEDENT

Given that the availability of facial challenges and severability turns on substantive constitutional law, the Court's jurisprudence in cases involving claims that Congress exceeded its enumerated powers warrants careful analysis. While the variation in the Court's Section 5 jurisprudence in recent years—both compared with earlier decisions that did not use the congruence-and-proportionality test and in the application of this test—might seem to call into question the utility of such an inquiry, important points nonetheless emerge. One is that the facial cast of recent Section 5 decisions is misleading, and in fact the Court at present has no consistent practice regarding whether challenges to Congress' powers are addressed on a facial or as-applied basis. A second point is the extent to which, in the recent Section 5 decisions and congressional power challenges generally, the Court either presumed that ordinary severability rules apply or, in fact, severed unconstitutional applications of challenged statutes.

A. Section 5 and Enforcement Power Precedent

1. *Recent Section 5 Decisions.* — Since *City of Boerne v. Flores*⁹² in 1997, the Court has handed down several decisions on the scope of Congress' Section 5 powers. Yet until *Lane*, a majority of the Court had never expressly addressed the question of whether facial challenges are appropriate in that context. At first inspection, it appears the Court implicitly treated these recent decisions as *Salerno*-type facial challenges; the decisions' tone and focus suggest that the Court held the statutes at issue invalid in all their applications. Indeed, both the majority and dissent in *Lane* agreed with this description.⁹³ On closer review, however, that characterization is difficult to sustain.

Boerne itself is a good example of the seemingly facial character of these decisions.⁹⁴ There, the Court addressed the constitutionality of the Religious Freedom Restoration Act (RFRA), which prohibits federal and state governments from imposing a substantial burden on the exercise of religion unless they can demonstrate the burden represents the least restrictive means of meeting a compelling government interest.⁹⁵ The

basis for arguing that the statute be given a particular construction *as it applies to her*. *Clark*, 2005 WL 50099, at *6. In so doing, she is simply asserting her own rights to be judged by a valid rule of law.

92. 521 U.S. 507 (1997).

93. See *Tennessee v. Lane*, 124 S. Ct. 1978, 1992 n.18, 2005 (2004); see also *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004) (noting that the Court had “recognized the validity of facial attacks” in suits addressing “legislation under [Section 5] of the Fourteenth Amendment”); Catherine Carroll, Note, Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment, 101 Mich. L. Rev. 1026, 1034–44 (2003) (arguing that the Court has repeatedly resolved the constitutionality of Section 5 litigation on a facial basis).

94. See also *Sabri*, 124 S. Ct. at 1948 (identifying *Boerne* as a facial challenge).

95. See *Boerne*, 521 U.S. at 515–16.

Court held RFRA “exceed[ed] Congress’ power,” underscoring both the breadth of RFRA’s restrictions on the states and the paucity of evidence of religious bigotry.⁹⁶ According to the Court, RFRA’s legislative history made clear that Congress’ goal was to statutorily overturn the decision in *Employment Division v. Smith*, which held that generally applicable legislation that only incidentally burdens religion does not offend the Free Exercise Clause.⁹⁷ True, suit under RFRA theoretically remains available to challenge laws directly targeting religion or denying religious groups individualized assessment, claims that still trigger strict scrutiny under the Free Exercise Clause.⁹⁸ The Court did not expressly address applicability of RFRA in such situations, and its brief description of the underlying facts clearly indicates that it did not view the case as an instance of government singling out a religious entity for harsh treatment.⁹⁹ Hence, *Boerne* could be read as only invalidating RFRA as applied to generally applicable laws, leaving open the question of its constitutionality in instances of intentional religious discrimination. But this reading is at odds with the Court’s reasoning in *Boerne*, in particular with its focus on the legislative record and broad scope of RFRA’s remedy instead of the specific facts of the case before it.¹⁰⁰

*Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank*¹⁰¹ also has a decidedly facial cast. *Florida Prepaid* considered whether the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), which abrogated the states’ Eleventh Amendment immunity for patent infringements, exceeded Congress’ Section 5 power.¹⁰² According to the majority, a state violates patent holders’ due process rights only when it “provides no remedy, or only inadequate rem-

96. *Id.* at 511, 530–36.

97. See *Employment Div. v. Smith*, 494 U.S. 872, 878–79, 884–85 (1990).

98. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 537 (1993).

99. *Boerne*, 521 U.S. at 511–12. According to Douglas Laycock, counsel for respondent Archbishop Flores, evidence of selective discriminatory treatment did exist, but was not included in the record, because the parties agreed to proceed with the case as a facial challenge to RFRA’s constitutionality. See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 *Wm. & Mary L. Rev.* 743, 782–83 (1997).

100. One reason why the Court may have failed to address the question of whether intentional discrimination and denial of individualized treatment claims remain available under RFRA is that RFRA does not add anything to these types of claims. The same substantive protections would be afforded to individuals asserting these claims under § 1983, or as a defense against state enforcement action. Congress itself was more concerned about providing protection against generally applicable laws that burden religious exercise, as demonstrated by its enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2000)), after *Boerne*. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236–37 (11th Cir. 2004) (discussing the legislative history and enactment of the RLUIPA).

101. 527 U.S. 627 (1999).

102. *Id.* at 635.

edies” for intentional or reckless patent infringement.¹⁰³ As a result, in order to assess whether the Patent Remedy Act was constitutional as applied to the case at hand, the Court would need to determine whether Florida’s remedies for patent infringement were constitutionally adequate. But although the majority recognized in a footnote that Florida provided remedies for patent infringement, it never undertook to assess their adequacy.¹⁰⁴ Instead, it emphasized that Congress failed to identify a “pattern of patent infringement by the States, let alone a pattern of constitutional violations,”¹⁰⁵ and had done “nothing to limit the coverage of the Act to cases involving arguable constitutional violations.”¹⁰⁶ The facial thrust of *Florida Prepaid* is reinforced by Justice Stevens’ dissent, joined by three other Justices, complaining that the majority’s opinion had “nothing to do with the facts of this case.”¹⁰⁷ Justice Stevens argued that the Court should address only whether the Patent Act was constitutional as “applied to willful infringement,” because the case emerged out of such a charge.¹⁰⁸ Although the majority never directly responded to this contention, its statement “that the Patent Remedy Act cannot be sustained under [Section 5]”¹⁰⁹ is more in keeping with an across-the-board assessment of the Act’s constitutionality.¹¹⁰

Nor is the seemingly facial character of these decisions limited to those invalidating Section 5 legislation. *Hibbs*, which upheld the family leave provision of the FMLA, arose out of a suit against a department of

103. *Id.* at 643–45.

104. *Id.* at 644 n.9.

105. *Id.* at 640.

106. *Id.* at 646.

107. *Id.* at 654 (Stevens, J., dissenting).

108. *Id.* at 653–54; see also Fallon, *As-Applied*, *supra* note 20, at 1356–59 (discussing *Florida Prepaid*).

109. *Florida Prepaid*, 527 U.S. at 647; see *id.* at 630; see also *Tennessee v. Lane*, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting) (arguing Court in *Florida Prepaid* did not leave open that the Patent Remedy Act might be constitutional as applied to “intentional, uncompensated patent infringements”).

110. A similar facial cast is evident in other recent Section 5 decisions. In considering Title I of the ADA in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and the Age Discrimination in Employment Act (ADEA) in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Court noted that irrational discrimination by state employers on the basis of age or disability was unconstitutional. But again, the Court did not examine whether the alleged discrimination in those cases was irrational, nor did it expressly limit its holdings that the abrogation of Eleventh Amendment immunity in these two statutes exceeded Congress’ Section 5 power to instances of rational discrimination. See *Garrett*, 531 U.S. at 360, 366–68; *Kimel*, 528 U.S. at 83–84, 91; see also *Lane*, 124 S. Ct. at 2005 (Rehnquist, C.J., dissenting) (arguing that if Court had used an as-applied approach in *Garrett*, “Title I might have been upheld ‘as applied’ to irrational employment discrimination”). Instead, the Court emphasized other types of remedies available to state employees subject to age or disability discrimination. See *Garrett*, 531 U.S. at 374 n.9 (noting remedies of injunctive relief and suits for money damages by the United States still remained available under Title I); *Kimel*, 528 U.S. at 91–92 (noting most state employees can recover money damages for age discrimination under state age discrimination statutes).

the Nevada state government. Yet the majority nowhere examined Nevada's leave provisions for state employees prior to the FMLA's enactment, even though it described the types of leave available in other states.¹¹¹ Moreover, writing for himself in dissent, Justice Scalia stated that unlike instances where legislation is challenged as violating individual constitutional rights, in congressional power challenges "the court first asks whether the statute is constitutional *on its face*," and then assesses whether the statute is also constitutional as applied if the facial challenge fails.¹¹² The Court did not leave room for such an as-applied challenge, however, stating "[w]e hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provisions of the [FMLA]."¹¹³

Nonetheless, it would be wrong to view these decisions as clearly establishing the use of facial challenges in Section 5 litigation.¹¹⁴ To begin with, the Court never expressly addressed that question and thus it never explained why the ordinary rules disfavoring facial challenges should not apply here. What the decisions most clearly reveal is the Court's belief that the state actions targeted by congressional legislation in most of these cases—imposition of general burdens on religion, patent infringement, age and disability discrimination—will rarely be unconstitutional. This lack of sympathy for the underlying constitutional violations leads to the broad tenor of these decisions; part of the explanation for the Court's refusal to leave open application of Title I of the ADA to irrational disability discrimination in *Board of Trustees v. Garrett* is, no doubt, that it believed such discrimination will almost always, if not always, be rational.¹¹⁵ In these decisions, the Court was focused on substance and not procedure, and thus discerning a view on the appropriateness of facial challenges requires some reading between the lines.

111. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733–34 (2003); see also *id.* at 755 (Kennedy, J., dissenting) (describing Nevada's leave policies).

112. See *id.* at 743 (Scalia, J., dissenting).

113. *Id.* at 725 (opinion of the Court).

114. However, Justice Stevens' attempt to distinguish this precedent in *Lane* is not particularly persuasive. He argued that "all [the] . . . recent [section] five cases[] concerned legislation that narrowly targeted the enforcement of a single constitutional right," 124 S. Ct. at 1993 n.18. This characterization of the Court's prior Section 5 jurisprudence elides important distinctions under the rubric of "single constitutional right." For example, Congress enacted RFRA to enforce individuals' free exercise rights, but as noted, the scope of the free exercise right varies significantly depending upon whether the government is simply subjecting religion to generally applicable laws or instead targeting it for special burdens. See *supra* notes 97–99 and accompanying text. To the extent that *Boerne's* language suggests that RFRA was invalid even with respect to the latter type of government action, it seems quite irrelevant that the constitutional protections against intentional religious discrimination and generally applicable legislation emanate from the same constitutional source.

115. See, e.g., 531 U.S. at 367 (stating it would be rational and thus constitutional for a state to refuse to make any accommodation for the disabled); see also *Kimel*, 528 U.S. at 87–88 (concluding "very little" of the conduct prohibited by the ADEA is likely to be unconstitutional and noting that age can be used as a proxy for other characteristics).

This is true even of *Florida Prepaid* and *Hibbs*, where the dissents' seeming arguments for an as-applied approach might suggest that the facial cast of the majority opinions was intended. In fact, however, the dissents' arguments are less supportive of an as-applied approach than they might at first appear. In particular, underlying Justice Scalia's view in *Hibbs* that Nevada must retain the ability to raise an as-applied challenge is his solitary belief—reiterated in *Lane*—that a state could not be subjected to the FMLA absent evidence that particular state engaged in discrimination.¹¹⁶ It was this substantive constitutional rule that the majority rejected, holding that a pattern of gender discrimination by states generally was sufficient to justify subjecting a particular state, Nevada, to the Act.¹¹⁷ While Justice Stevens' comments in *Florida Prepaid* are more procedural in focus, it is notable that he did not suggest that the Court limit itself to assessing whether the Patent Remedy Act was constitutional in regard to willful patent infringements by Florida alone, but rather willful infringements generally. As a result, even on Justice Stevens' terms, the challenge to the Patent Remedy Act went beyond the factual situation of the case at hand. Again, this is also true of *Lane*. Although the majority there refused to consider the constitutionality of Title II as applied to constitutional rights other than access to the courts, it did not limit itself to assessing the constitutionality of Title II as applied to the situations of the two plaintiffs in the case; indeed, it never seriously assessed whether their rights of access to the courts were actually violated.¹¹⁸

In sum, in all these decisions—*Lane*, *Hibbs*, and *Florida Prepaid* included—both the majority and the dissents agree that assessing the constitutionality of Section 5 legislation requires going beyond the specifics of the case before the Court. The reason for this agreement is not difficult to discern. If the constitutionality of a Section 5 statute turns on

116. See 538 U.S. at 741–42 (Scalia, J., dissenting) (“The constitutional violation that is a prerequisite to ‘prophylactic’ congressional action to ‘enforce’ the Fourteenth Amendment is a violation by the State against which the enforcement action is taken. There is no guilt by association . . .” (emphasis omitted)); see also *Lane*, 124 S. Ct. at 2010, 2012–13 (rejecting claim that Section 5 authorizes prophylactic legislation except to remedy racial discrimination, and even in cases of racial discrimination requiring an “identified history of relevant constitutional violations” before such legislation can be applied to a state). Moreover, Justice Scalia’s *Hibbs* dissent makes clear that he believes the constitutionality of Section 5 legislation should first be assessed facially. See 538 U.S. at 743.

117. See *Hibbs*, 538 U.S. at 727–28 (“Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights . . . In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.” (internal quotation marks omitted)).

118. See 124 S. Ct. at 1988 (noting in passing only that right of access to the court grants “a criminal defendant such as respondent Lane the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings” (internal quotation marks omitted)); see also *id.* at 2000 n.4 (Rehnquist, C.J., dissenting) (providing brief argument as to why no rights of access to the court were violated in the case before the Court).

whether a pattern of unconstitutional action exists in the states as a whole, then the Court must necessarily look beyond the actions of the state in the case before it in assessing the claim that the statute exceeds Congress' powers. Hence again, the facial tone of these decisions is really a reflection of their substantive analysis, rather than a position on whether the Court should assess the constitutionality of a challenged statute based on all its possible applications. Put differently, these decisions are "facial" in the sense that each addresses challenges to a general rule, that rule being the requirements of the targeted legislation. But this facial character says nothing about how broadly the Court must assess the constitutionality of that general rule.

A second reason why these decisions are less supportive of a facial approach than they initially appear concerns severability. The Court's failure to sever potentially constitutional applications of the challenged Section 5 statutes might seem to signal a departure from ordinary severability rules and the presumption of severability. In fact, however, the Court routinely presumed severability in these cases. This is clearest in *Garrett*, where the Court stated it was only addressing the constitutionality of Title I, and not other parts of the ADA.¹¹⁹ More importantly, *Garrett* (like many of these decisions) addressed only the constitutionality of making the states liable for money damages in private suits; the Court stressed that the duties imposed by Title I remained binding and could be enforced by other means, such as injunctive suits or suits for money damages brought by the United States.¹²⁰ Plainly, therefore, *Garrett* implicitly ruled the private suit remedy severable from Title I's substantive duties. Dissenting in *Hibbs*, Justice Kennedy advocated a similar interpretation of the FMLA.¹²¹

Another example arises from subsequent judicial responses to *Boerne*. *Boerne's* language and analysis appear in keeping with a *Salerno*-style approach holding the statute invalid in all its applications. Notably, however, several federal appellate courts have since upheld RFRA's substantive requirements as applied to federal law or the federal government and territories, even though invalid as applied to the states.¹²² On the

119. See *Garrett*, 531 U.S. at 360 n.1 (refusing to address the constitutionality of Title II of the ADA); see also *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000) (noting that the federal appellate courts had uniformly upheld the constitutionality of a separate provision of the Violence Against Women Act (VAWA) that made it a federal crime to travel across state lines "with the intent to injure, harass, or intimidate that person's spouse or intimate partner" and thereby cause the spouse or partner bodily injury).

120. 531 U.S. at 374 n.9.

121. See 538 U.S. at 759 (Kennedy, J., dissenting) (stating that the FMLA is "likely a valid exercise of Congress' power under the Commerce Clause, and so the standards it prescribes will be binding upon the States" and enforceable by private suits for injunctive relief or suits by the United States for money damages (citations omitted)).

122. See, e.g., *Kikumura v. Hurley*, 242 F.3d 950, 958-59 (10th Cir. 2001) (holding RFRA constitutional as applied to federal government); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831-33 (9th Cir. 1999) (holding RFRA constitutional as applied to federal law); *In re Young*, 141 F.3d 854, 858-61 (8th Cir. 1998) (same).

one hand, these rulings might appear perfectly unexceptional; after all, the federal government relies on its Article I and other powers, not the Section 5 enforcement power, in regulating the reach of federal law. Yet the substantive duties RFRA imposed on state and federal governments came in the same statutory provision, and thus courts must find the provision's reference to state governments severable in order to find the provision can still be applied to the federal government.¹²³ Absent such severability, the provision's unconstitutionality in regard to state governments would render it completely unenforceable.

In *Lane*, Chief Justice Rehnquist seemingly sought to rebut the Court's use of severability in other Section 5 decisions by characterizing Title II as an "undifferentiated" statute that "applies indiscriminately to all services, programs, or activities of any public entity."¹²⁴ The thrust of this characterization is unclear, however. His point might be that, unlike the other Section 5 legislation the Court considered, in the case of Title II no separate statutory text existed that the Court could sever; instead, here the Court was resorting to severing applications of a single statutory provision. But as discussed earlier, differentiating between text and application severability in this fashion is not supported by logic or case law.¹²⁵ A second way of understanding the Chief Justice's point is simply as the claim that Title II is not readily susceptible to having its different applications severed from one another. Perhaps so; it is certainly true that the majority offers no justification for its contrary premise that Title II can be construed in this fashion, and reference to severing applications is notably absent from the ADA's severability clause.¹²⁶ In failing to offer such a justification, however, the *Lane* majority has substantial precedential company; in fact, the Court only infrequently addresses severability unless it finds a particular provision or application unconstitutional.¹²⁷ Moreover, given the presumption of severability that lies behind the Court's professed practice of addressing constitutional challenges on an as-applied basis, the onus would appear to lie on the Chief Justice to provide greater justification than simply characterizing Title II as "undifferentiated" to explain why the majority erred in its construction of the statute. Regardless, even if the different applications of Title II should not

123. See *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997) (quoting statutory provision that states RFRA "applies to all federal and state law"); *Kikumura*, 242 F.3d at 959–60 (holding unconstitutional application of RFRA to the states is severable); *Young*, 141 F.3d at 858–59 (same). Congress has amended RFRA to only apply to federal law. See 42 U.S.C. § 2000bb-3a (2000).

124. *Tennessee v. Lane*, 124 S. Ct. 1978, 2005 (2004) (internal quotation marks omitted).

125. See *supra* text accompanying notes 51–57.

126. See 42 U.S.C. § 12213 ("Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the chapter, and such action shall not affect the enforceability of the remaining provisions of the chapter.").

127. See, e.g., cases cited *supra* notes 55–56.

be construed as severable, this would not justify applying a presumption against severability in other Section 5 challenges.

2. *Previous Enforcement Power Decisions.* — Moving beyond the Court's recent Section 5 precedent, it is worth asking whether earlier enforcement power decisions offer useful guidance. Once again, it is hard to discern a clear practice. Notably, however, these earlier decisions are more as-applied in tone, and the Court even more regularly engaged in severability.

A good example is *United States v. Raines*,¹²⁸ a decision relied on by Justice Stevens in *Lane*. In *Raines*, the government sought to enjoin Georgia voting officials from preventing blacks from registering to vote.¹²⁹ The Civil Rights Act of 1957, enacted pursuant to the Fifteenth Amendment's enforcement power, authorized the Attorney General to institute an action "[w]henver any person has engaged or there are reasonable grounds to believe that any person is about to engage" in acts that would deprive the right to vote based on race.¹³⁰ The district court had dismissed the government's action on the ground that "the statute on its face was susceptible of [unconstitutional] application," namely application to private individuals, and thus should be "considered unconstitutional in all its applications."¹³¹ The Supreme Court reversed. According to the Court, "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."¹³² *Raines* is not alone in expressly limiting its assessment of enforcement power legislation to a particular context; in *Katzenbach v. Morgan* the Court considered a challenge to section 4(e) of the Voting Rights Act of 1965 that attacked

128. 362 U.S. 17 (1960).

129. *Id.* at 19.

130. 42 U.S.C. § 1971(c).

131. *Raines*, 362 U.S. at 20. The district court's approach was not without precedential support. In particular, in *United States v. Reese*, 92 U.S. 214 (1875), the Court ruled that Congress' Fifteenth Amendment enforcement power authorized only federal legislation imposing criminal penalties on elections officials for refusing to accept the votes of qualified electors on account of race or color. As the statute before it contained no such state action limitation, the Court ruled it could not be enforced—even when the conduct of state elections officials was challenged precisely on this basis. See *id.* at 218–22; *id.* at 241–42 (Harlan, J., dissenting) (noting that the defendant was prosecuted for denying the right to vote on account of race); see also *James v. Bowman*, 190 U.S. 127, 136, 139–40 (1903) (refusing to apply a federal statute prohibiting the use of bribery to deny a qualified voter the right to vote on account of race in a case alleging bribery in federal elections). Given the Supreme Court's decision in *Raines*, however, *Reese* offers little support for deviating from ordinary severability rules in the enforcement power context today. See *Raines*, 362 U.S. at 24 (suggesting *Reese* may have rested on fair warning concerns but adding "to the extent *Reese* did depend on an approach inconsistent with what we think the better one . . . we cannot follow it here"); see also Stern, *supra* note 47, at 94–106 (criticizing *Reese* and arguing that the Court deviated from its approach in subsequent decisions).

132. *Raines*, 362 U.S. at 24–25.

the section only insofar as it would enable New York residents who were educated in Puerto Rico to vote.¹³³

Interestingly, despite its contemporary assignment to the as-applied camp, *Raines* actually represents an instance where the Court entertained a facial challenge in the traditional sense. Although the Court refused to consider the constitutionality of the 1957 Act as applied to private individuals, it upheld the statute's application to all state officers acting within the course of their official duties, not just to the case at hand. In other words, the Court upheld the constitutionality of a general rule it found embodied in the statute laid down by Congress: specifically, a prohibition on state officials depriving individuals of the right to vote based on race.¹³⁴ What the Court rejected was simply the claim that it had to address all possible applications before it could pronounce on the statute's constitutionality. According to the Court, this claim was at odds with its usual rules of practice which preclude individuals from challenging a statute's application to others except in a few narrow contexts, which included "that rarest of cases" where the Court concludes a statute is inseparable.¹³⁵ Implicit in the Court's decision is its view that the fact that Congress' enforcement power was involved did not suffice to justify a deviation from these rules or a special presumption of nonseverability.¹³⁶

Other earlier enforcement power decisions initially appear more facial in nature, but like the recent Section 5 decisions, on closer inspection their facial character becomes more questionable. Two decisions worth noting in this regard are the *Civil Rights Cases*¹³⁷ and *South Carolina v. Katzenbach*.¹³⁸ The *Civil Rights Cases* invalidated the Civil Rights Act of 1875's prohibition on racial discrimination in places of public accommo-

133. 384 U.S. 641, 644–45 (1966). Section 4(e) prohibits denying any person who has successfully completed sixth grade in a school accredited by any state, territory, the District of Columbia, or Puerto Rico the right to vote based on ability to read English. 42 U.S.C. § 1973b(e). The Court justified its decision to consider the challenge only on this limited basis on the ground that section 4(e) was adopted with "the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York" and with the understanding that "in all probability the practical effect of [the section] will be limited to enfranchising those educated in Puerto Rican schools." See *Katzenbach*, 384 U.S. at 645 n.3.

134. See *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004); *Raines*, 362 U.S. at 25. The same is true of *Katzenbach*; although the Court there made references to discrimination against Puerto Ricans in voting and provision of services, suggesting a traditional as-applied challenge, it never demanded any showing that such discrimination actually existed in New York. 384 U.S. at 652–55.

135. *Raines*, 362 U.S. at 23.

136. See *id.* at 22–24; see also *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) (stating in challenge to enforcement power legislation that the "Court has long since firmly rejected" earlier use of "a severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad, unless its different parts could be read as wholly independent provisions").

137. 109 U.S. 3 (1883).

138. 383 U.S. 301 (1966).

dation.¹³⁹ In so ruling the Court underscored that the Act was not limited to states that had violated Fourteenth Amendment rights,¹⁴⁰ and did not undertake a detailed inquiry into whether the states where the cases before it arose—New York, Tennessee, and California—fell into the innocent state category.¹⁴¹ Yet the Court also stated that “[i]nnkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them”¹⁴²—language that could be read as a rejection of the claim that the laws specifically challenged in the case sanctioned discrimination in accommodations. So understood, this language suggests that the Court did not hold the 1875 Act facially invalid and it remained applicable in the context of overtly discriminatory state laws.¹⁴³

South Carolina displays similar ambiguities. Although the Court there referred to evidence specific to South Carolina in upholding several chal-

139. 109 U.S. at 26.

140. See *id.* at 14 (“It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in States that may have violated the prohibition of the amendment.”).

141. See *id.* at 8–19. In this regard, the decision in the *Civil Rights Cases* stands in contrast to *United States v. Guest*, where the Court upheld federal indictments against private individuals for conspiracy to deny blacks access to places of public accommodation on the grounds that the indictments alleged sufficient state involvement to qualify as targeting state action. See *United States v. Guest*, 383 U.S. 745, 755–57 (1966); see also *id.* at 761–62 (Clark, J., concurring). Significantly, however, the Court in *Guest* disagreed on whether the federal statute in question applied to private action, and the Court’s emphasis on the specific facts alleged in the indictment was as much a response to statutory authority concerns as to concerns about whether, if read to encompass private action, the statute was constitutional. Compare *id.* at 755 (opinion of the Court) (reading statute as simply replicating “bare terms of the Equal Protection Clause”), with *id.* at 761–62 (Clark, J., concurring) (not addressing statutory question but stating Congress can reach private action), with *id.* at 777–84 (Brennan, J., concurring and dissenting) (reading statute as covering private action and arguing that the statute as so read was constitutional).

142. *The Civil Rights Cases*, 109 U.S. at 25.

143. Making sense of the Court’s statement is difficult for several reasons, not least because whatever was stated on the face of state laws, their administration was decidedly unequal, and addressing such discriminatory state administration was a main concern of the 1875 Act. See *United States v. Morrison*, 529 U.S. 598, 624–25 (2000) (citing legislative history to show that enacting Congress intended Civil Rights Act of 1875 to target facially neutral state laws administered with discrimination against newly free slaves). Another interpretation is that the Court was simply affirming Congress’ power to address state discrimination when it occurs through appropriately targeted legislation, not that it was suggesting that the 1875 Act could be constitutionally applied. This interpretation may accord better with the Court’s earlier conclusion that Congress may only target state action using its Fourteenth Amendment power. See *The Civil Rights Cases*, 109 U.S. at 10–12, 13–14. On the other hand, reading the quoted language as implying that the Act could be constitutionally applied where the law was overtly discriminatory comports with the opinion’s next sentence, affirming that “[i]f the laws themselves make any unjust discrimination . . . Congress has full power to afford a remedy under [the Fourteenth Amendment] and in accordance with it.” *Id.* at 25.

lenged provisions of the 1965 Voting Rights Act as valid exercises of Congress' Fifteenth Amendment enforcement power, it plainly did not limit its inquiry into the provisions' constitutional application to that state.¹⁴⁴ More importantly, many of the challenged provisions applied only to certain jurisdictions and applied identically to all the jurisdictions so covered, including South Carolina. Thus, by deciding the constitutionality of the Act as applied to South Carolina, the Court necessarily also addressed its constitutionality vis-à-vis the other covered jurisdictions. Recognizing this fact, the Court invited other states to participate, and numerous states submitted amicus briefs and participated in oral argument.¹⁴⁵ As a result, the case was really akin to a nationwide class action, in that nearly all of those states to which the statute applied were before the Court.¹⁴⁶

Most significantly, however, even where the Court appeared to analyze challenges to enforcement legislation on a facial basis, it generally presumed the severability of any unconstitutional portions. Once again the *Civil Rights Cases* provides an example: The Court there reaffirmed *Ex parte Virginia*,¹⁴⁷ an earlier decision where it had upheld a separate section of the Act as constitutional, thereby presuming that the Act's different sections were severable.¹⁴⁸ So too, in *South Carolina* the Court emphasized that it was not considering the constitutionality of the Voting Rights Act in its entirety, specifically relying on *Raines* in refusing to address the Act's criminal provisions.¹⁴⁹ In yet another decision, *Oregon v. Mitchell*, the Court similarly severed parts of a statute it deemed outside of Congress' powers rather than invalidating the statute in toto.¹⁵⁰ While these are all instances of text severability, in *Raines* the Court expressly refused to limit severability to that context, instead holding that the dis-

144. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 310–15 (1966) (discussing evidence of racial discrimination from South Carolina and other Southern states); *id.* at 327–30 (upholding application of coverage formula to five Southern states in addition to South Carolina).

145. See *id.* at 307–08.

146. It is also hard to generalize from the procedures used in *South Carolina v. Katzenbach* because it was a unique decision. Given the momentous nature of the question of the Voting Rights Act's constitutionality and the need for a speedy decision, the Court took the case in its original jurisdiction, but without even referring it to a special master for development of a factual record. See *id.* at 307; Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 80–93 (discussing how *South Carolina v. Katzenbach* reached the Supreme Court and effect of the grant of original jurisdiction on Court's analysis).

147. 100 U.S. 339, 349 (1879).

148. 109 U.S. at 15–16.

149. See 383 U.S. at 316–17 (citing *United States v. Raines*, 362 U.S. 17, 20–24 (1960)).

150. 400 U.S. 112, 117–18, 130–31 (1970) (Black, J., announcing the judgment of the Court in an opinion expressing his own view of the cases) (arguing that constitutional parts of the Voting Rights Act Amendments of 1970 could be severed from unconstitutional provision lowering voting age to 18 for state and local elections).

strict court had erred in considering the constitutionality of statutory applications not actually before it.¹⁵¹

At a minimum, therefore, *Raines* and these earlier enforcement power decisions provide some precedential support for applying the ordinary presumption of severability in Section 5 cases. In *Lane*, Chief Justice Rehnquist attempted to deny that any such support existed. He argued that because application of the statute to state officials in *Raines* was clearly constitutional, *Raines* said nothing about how the Court should proceed when the constitutionality of applying enforcement legislation to the state is at issue.¹⁵² This is unpersuasive, given that the Court upheld Title II's constitutionality as applied to state programs and services involving the right of access to the courts, making *Raines* directly analogous. The Chief Justice also suggested that *Raines* was irrelevant because it was decided "before [the Court] enunciated the congruence-and-proportionality test."¹⁵³ True enough, but this point simply presumes the answer to the very question confronting the Court: Does the congruence-and-proportionality standard, a test governing the substantive validity of Section 5 legislation, also generate an approach regarding facial challenges and severability different from that which otherwise generally obtains?

B. *Commerce and Spending Clause Precedent*

Confusion regarding the appropriateness of facial challenges is also evident in the Court's decisions addressing attacks on legislation as exceeding Congress' Article I powers. Interestingly, the Court's Commerce Clause decisions display far more consistency than its enforcement power decisions, with facial challenges being routinely entertained. Consistency is also apparent regarding Spending Clause challenges, but here the pattern is for the Court to insist that challenges be brought on an as-applied basis. The obvious question that results is how to explain the Court's differential practice regarding these two forms of Article I challenges.

The Court's willingness to entertain facial challenges holds true for both its earlier and more recent commerce power decisions. The Court's acceptance of facial challenges was closely related to the substantive standard it applied in judging the constitutionality of commerce-power legislation in its post-New Deal decisions. Demonstrating that a particular activity did not itself affect interstate commerce was insufficient to show that it was outside of Congress' regulatory purview. Instead, Congress' power to regulate economic conduct was measured on an aggregate basis: The key inquiry was whether the class of activities of which a particular instance was part had a substantial effect on interstate commerce.¹⁵⁴ This class-of-activities analysis meant that to bring a successful as-applied attack

151. See 362 U.S. at 23–25.

152. See *Tennessee v. Lane*, 124 S. Ct. 1978, 2005 n.11 (2004).

153. *Id.* at 2005.

154. See *Perez v. United States*, 402 U.S. 146, 151–56 (1971); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); see also *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (holding

a challenger would have to demonstrate, as the *Carolene Products* Court put it, that “the article [regulated], although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.”¹⁵⁵ Given the extremely deferential review used in assessing commerce power legislation’s rationality, however, succeeding on such an as-applied claim was in practice impossible.¹⁵⁶

Of course, this deferential standard of review meant that facial challenges to commerce power legislation had equally little chance of success, and thus judicial willingness to entertain such challenges was of no moment. When the Court applied a more rigorous and formalistic analysis that limited Congress’ scope of power—as it did in its early New Deal decisions—acceptance of facial challenges carried far more significance. It is worth noting that the Court’s practice regarding facial challenges in the early New Deal period was more varied. Some facial invalidations occurred,¹⁵⁷ but in other decisions the Court simply held particular statutory applications in excess of the commerce power.¹⁵⁸ This variation seems best explained, however, as resulting from differences in statutory text, with facial challenges being largely the norm.¹⁵⁹

Congress can regulate based on total incidence of racial discrimination on interstate commerce).

155. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

156. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964); *Wickard*, 317 U.S. at 125, 128–29; *Carolene Prods.*, 304 U.S. at 154.

157. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 307–10 (1936) (holding that labor provisions of Bituminous Coal Conservation Act of 1935 regulate production and fall outside of the commerce power); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362–74 (1935) (invalidating statute mandating retirement and pension plan for employees of interstate carriers as not a regulation of interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (invalidating statute excluding products of child labor from interstate commerce).

158. In *A.L.A. Schechter Poultry Corp. v. United States*, for instance, the Court treated a Commerce Clause challenge to the Live Poultry Code, adopted pursuant to section 3 of the National Industrial Recovery Act, on an as-applied basis, emphasizing that the violations of the Code with which the defendants had been charged did not involve interstate commerce. See 295 U.S. 495, 542–48 (1935) (concluding that “[s]o far as the poultry here in question is concerned, the flow of interstate commerce had ceased” and that defendants’ violations of wage and hour provisions had only an indirect effect on interstate commerce); see also *United States v. E.C. Knight Co.*, 156 U.S. 1, 16–18 (1895) (invalidating application of the Sherman Act to acquisition of monopoly on manufacture of refined sugar).

159. For example, part of the reason the *Schechter* Court treated the challenge on an as-applied basis was that penalties were only imposed under the Act for violations of a Code provision regarding a transaction in or affecting interstate commerce. See 295 U.S. at 542. The oddity of *Schechter* is that the Court considered the as-applied Commerce Clause challenge at all given that it had already held that the codemaking authority of section 3 represented an unconstitutional delegation of legislative power, see *id.* at 541–42, which would appear to facially invalidate section 3.

The class-of-activities inquiry remains the Court's approach today, at least where economic activity is involved.¹⁶⁰ However, the Court's recent commerce power decisions, *United States v. Lopez* and *United States v. Morrison*, suggest some return to a more formalistic analysis of the reach of congressional authority under the Commerce Clause, insofar as the decisions insist on a judicially imposed distinction between economic and noneconomic activity.¹⁶¹ More to the point here, these decisions quite clearly continue the Court's willingness to entertain facial challenges to the constitutionality of commerce power legislation. Indeed, they provide the strongest contemporary support for the use of facial challenges to invalidate federal statutes as exceeding congressional power.

At issue in *Lopez* was the constitutionality of the Gun-Free School Zones Act (School Zones Act), which made knowing possession of a gun in a school zone a federal offense. *Morrison* addressed the constitutionality of the private civil remedy provision of the federal Violence Against Women Act (VAWA). In both decisions, the Court focused on the nature of the class of activities being regulated—gun possession near a school in *Lopez*, gender-motivated violence in *Morrison*¹⁶²—as well as other facial characteristics of the challenged legislation, specifically the absence of a jurisdictional element that “would ensure, through case-by-case inquiry, that the [act] in question affects interstate commerce.”¹⁶³ Moreover, in both the Court concluded that the challenged provisions could not be sustained under the commerce power, indicating that they were invalid in their entirety and thus not available even when specific facts could be alleged demonstrating sufficient connection to interstate commerce.¹⁶⁴ The only reference to underlying facts in the two decisions came at the end of *Lopez*, where the Court stated in passing that “[r]espondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce.”¹⁶⁵ While this language alone might suggest that conviction under the School Zones Act could be sustained when

160. See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003) (“Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’” (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948))).

161. See *United States v. Morrison*, 529 U.S. 598, 610–13, 617–18 (2000); *United States v. Lopez*, 514 U.S. 549, 559–61 (1995); see also *Morrison*, 529 U.S. at 638–45 (Souter, J., dissenting) (characterizing *Lopez* and *Morrison* as embodying a formalistic analysis akin to that used from the onset of national commercial legislation in late 1880s to the early New Deal).

162. See *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

163. See *Lopez*, 514 U.S. at 561; see also *Morrison*, 529 U.S. at 613 (“[Section] 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”).

164. See *Morrison*, 529 U.S. at 627; *Lopez*, 514 U.S. at 565–66; see also *Morrison*, 529 U.S. at 607 (“[W]e invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”).

165. 514 U.S. at 567.

the evidence in a particular case demonstrated an interstate commerce connection, such a reading fits poorly with the rest of the opinion's emphasis on statutory text.¹⁶⁶

On the Spending Clause front, the Court's approach is noticeably different, as evidenced by the Court's *Sabri* decision last Term. *Sabri* involved a challenge to the constitutionality of a federal statute criminalizing bribery of state, local, and tribal officials of entities that receive at least \$10,000 in federal funds. The defendant in *Sabri* argued that the federal bribery statute was facially flawed because it did not require proof of a connection between the federal funds and the alleged bribe. The Court rejected this argument out of hand, stating that "[w]e simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook" and that the \$10,000 threshold meant no reason existed to suspect the statute would extend beyond the scope of legitimate federal interests.¹⁶⁷ Although the Court in fact entertained *Sabri*'s facial challenge, rejecting it rather summarily on the merits, the Court used the decision as an occasion to disavow such challenges to spending legislation. According to the Court, *Sabri*'s facial challenge was particularly inappropriate because "the acts charged against *Sabri* himself were well within the limits of legitimate congressional concern," meaning that any facial challenge he brought would have to be of the overbreadth variety, attacking application of the statute to others as unconstitutional.¹⁶⁸ "Facial challenges of this sort are especially to be discouraged" and limited to "relatively few settings."¹⁶⁹

Sabri is unusual in providing an express discussion of the appropriateness of facial challenges, but it does not stand alone in discouraging such challenges in the spending context. In a prior decision, *Salinas v. United States*, the Court similarly rejected a facial challenge to the bribery statute on the grounds that there was "no serious doubt about [its] consti-

166. See, e.g., *id.* at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise . . ."); *id.* at 567 ("[T]here is no requirement that his possession of the firearm have any concrete tie to interstate commerce."). Interestingly, in its decision below, the Fifth Circuit expressly refused to address whether the challenged section of the School Zones Act could ever be constitutionally applied based on proof of an interstate connection, holding that *Lopez*'s conviction still had to be reversed as the indictment failed to allege an interstate commerce nexus as part of the offense. See *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir. 1993). Congress appears to have read *Lopez* as facially invalidating the Act as it then stood, and subsequently amended the Act to include an express jurisdictional element. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 657, 110 Stat. 3009, 3009-370 (codified at 18 U.S.C. § 922(q)(2)(a) (2000)).

167. *Sabri v. United States*, 124 S. Ct. 1941, 1945-46 (2004).

168. *Id.* at 1948. *Sabri* was charged with bribing a city council member who also sat on the board of commissioners overseeing the Minneapolis Community Agency's budget; the City of Minneapolis and the agency received \$28.8 million and \$23 million in federal funds, respectively, in the year in which the bribery occurred. See *United States v. Sabri*, 326 F.3d 937, 939 (8th Cir. 2003).

169. See 124 S. Ct. at 1948-49.

tutionality . . . as applied to the facts of [the] case.”¹⁷⁰ *South Dakota v. Dole*,¹⁷¹ where the Court set out its current standard for the constitutionality of conditional federal spending legislation, is harder to categorize. The decision proceeds in largely general terms, without much reference to South Dakota’s particular situation. But this omission seems explained by the fact that the legislation treated all states the same, so that no meaningful distinction could exist between a facial and an as-applied challenge. To be sure, the Court has entertained and occasionally upheld facial challenges to Spending Clause legislation.¹⁷² But as *Sabri* demonstrates, it appears much less receptive to such challenges in spending power cases than in commerce power cases. Little objection was raised to *Sabri*’s express disavowal of facial overbreadth challenges, and the mild comment made by Justice Kennedy, joined by Justice Scalia, simply noted that the Court was not calling into question the approach it had followed in *Lopez* and *Morrison*.¹⁷³

Why this different receptivity to facial challenges in the Spending and Commerce Clause contexts? The Court’s sparse discussion in *Sabri* provides no clarification. One answer might be that the Court has not given much thought to the question and failed to recognize that its practice regarding these two Article I powers and facial challenges is inconsistent. However, given the majority’s discussion of the appropriateness of facial challenges in *Sabri*—combined with the concurrence’s distinction of *Lopez* and *Morrison*—ignorance of the inconsistency seems implausible. More likely, the Court’s lack of explanation reflects the fact that it is more confident about its approach in the two separate contexts than about how to reconcile the variation between them.

One way of trying to reconcile the decisions focuses on the fact that the federal bribery statute at issue in *Sabri* and *Salinas* required proof of a threshold amount of federal funds, thereby supplying the jurisdictional element that the Court found lacking in *Lopez* and *Morrison*. As a practical matter, the presence of the threshold triggering amount may explain the Court’s greater willingness in *Sabri* and *Salinas* to rely on a case-by-case inquiry to guard against congressional overreaching; it seems especially likely that *Lopez* would have come out differently had the School Zones Act included a jurisdictional element.¹⁷⁴ But this explanation can-

170. 522 U.S. 52, 60–61 (1997).

171. 483 U.S. 203 (1987).

172. See, e.g., *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–93 (1937) (upholding unemployment compensation provisions of the Social Security Act as not exceeding the spending power); *United States v. Butler*, 297 U.S. 1, 77–78 (1936) (invalidating Agricultural Adjustment Act of 1933 as exceeding Congress’ spending power because it invaded an area left for state regulation and was inherently coercive).

173. See 124 S. Ct. at 1949 (Kennedy, J., concurring in part).

174. See *United States v. Lopez*, 514 U.S. 549, 567, 561–62 (1995) (emphasizing that statute did not require showing of a connection to interstate commerce); see also *Jones v. United States*, 529 U.S. 848, 857–59 (2000) (construing federal arson statute, which includes a jurisdictional element, to cover “only property currently used in commerce or in

not be easily squared with what the Court actually says in these decisions, in particular *Sabri's* bald statement that “[w]e can readily dispose of th[e] position that, to qualify as a valid exercise of Article I power, the statute must require proof of connection with federal money as an element of the offense.”¹⁷⁵

An alternative explanation rests the difference in approach to facial challenges on the difference in substantive law applied in each context. *Lopez* and *Morrison* indicate that certain activities lie outside of Congress’ commerce power: “[T]he Constitution’s enumeration of powers . . . presuppose[s] something not enumerated.”¹⁷⁶ This explains why in the Commerce Clause context the focus of analysis is usually on the class of activities that Congress sought to regulate and on whether these activities are economic or noneconomic in nature,¹⁷⁷ a focus that almost always forces the Court to adopt an analysis that goes beyond the facts of the case before it.¹⁷⁸ *Raich v. Ashcroft*,¹⁷⁹ a Ninth Circuit decision that the Supreme Court is reviewing this Term, demonstrates this phenomenon. *Raich* enjoined application of the federal Controlled Substances Act to individuals who cultivated and possessed marijuana for personal medical use, pursuant to a physician’s advice. But the Ninth Circuit did not base its ruling on a determination that the activities of plaintiffs per se had a de minimis impact on interstate commerce; to the contrary, it noted that “[w]here the class of activities . . . regulated . . . is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.”¹⁸⁰ Instead, the appeals court held that such cultivation and use of marijuana represented a distinct class of activity that was noneconomic in nature and lacked sufficient connection to interstate commerce to bring it within Congress’ commerce power.¹⁸¹

Under the Court’s Spending Clause analysis, by contrast, Congress is not limited in the type of activities it can target: “[O]bjectives not

an activity affecting commerce” to avoid constitutional concerns); *United States v. Danks*, 221 F.3d 1037, 1038–39 (8th Cir. 1999) (per curiam) (upholding constitutionality of prohibition on possession of a firearm in a school zone amended to include a jurisdictional element). Although *Morrison* also emphasizes the importance of a jurisdictional element, see *United States v. Morrison*, 529 U.S. 598, 613 (2000), it is hard to imagine how a jurisdictional element could be added to VAWA’s private civil suit remedy without significantly curtailing its scope.

175. See 124 S. Ct. at 1945.

176. *Lopez*, 514 U.S. at 567 (paraphrasing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)); see also *Morrison*, 529 U.S. at 617–18 (“The Constitution requires a distinction between what is truly national and what is truly local.”).

177. See *Morrison*, 529 U.S. at 608–09, 613.

178. Congress has the power to enact legislation targeting a class of one, but such situations are quite rare. For an example, see *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468–73 (1977) (upholding federal statute regulating only disposition of Nixon’s papers against charge it unconstitutionally singled out the former President).

179. 352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (2004).

180. *Id.* at 1228 (emphasis and citations omitted).

181. *Id.* at 1228–31.

thought to be within Article I's 'enumerated legislative fields' . . . may nevertheless be attained through use of the spending power."¹⁸² The protection against congressional overreaching in spending lies not in judicially enforced subject matter constraints, but rather in the states' ability to reject funds combined with a clear statement requirement.¹⁸³ Indeed, given the loose relation to federal interests and high financial penalties the Court accepted in *Dole* and *Sabri*,¹⁸⁴ a state's only potentially viable option for arguing that these restrictions are not met is an as-applied challenge that bases claims of lack of connection to federal interests and coercion on the state's peculiar situation. Spending power challenges are thus substantively ill suited to facial treatment.

In any event, the Court's differing receptivity to facial challenges should not obscure a point of constancy in its recent commerce and spending power jurisprudence: In both, the Court appears to apply ordinary rules of severability.¹⁸⁵ The question of severability arose only implicitly in *Morrison*, when the Court cited a separate criminal provision of VAWA that contained a jurisdictional element as an example of legislation that was sufficiently tied to interstate commerce.¹⁸⁶ Although not discussing the question, the Court's comment that the federal appellate courts had uniformly upheld this provision suggests that it believed that the unconstitutional parts of the VAWA could be severed and would not force invalidation of the statute as a whole.¹⁸⁷ Several recent appellate court decisions similarly presume severability by invalidating particular

182. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citations omitted).

183. On the clear statement requirement, see *Dole*, 483 U.S. at 207 ("[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . .'" (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))). On states' power to decline, see *id.* at 211 ("'[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. . . . Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis.'" (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937))); see also *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143–44 (1947) (arguing state could adopt "the 'simple expedient' of not yielding to what she urges is federal coercion"). While the general welfare requirement might seem to impose a class-of-activities restriction on the spending power, this requirement is essentially left for legislative determination. See *Dole*, 483 U.S. at 207; *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976).

184. See *Sabri v. United States*, 124 S. Ct. 1941, 1946 (2004); *Dole*, 483 U.S. at 208–11.

185. In its early New Deal decisions, the Court at points seemed less willing to find severability. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 312–16 (1936) (holding that price-fixing and labor provisions of the Coal Act were inseparable, notwithstanding a severability clause); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 361–62 (1935); see also Stern, *supra* note 47, at 110–14 (critiquing *Carter's* approach as stemming from the Justices' substantive views regarding the legislation in question).

186. See *United States v. Morrison*, 529 U.S. 598, 613 & n.5 (2000) (describing 18 U.S.C. § 2261(a)(1) (2000), which made it a crime to "travel[] across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who . . . thereby causes bodily injury to such spouse or intimate partner").

187. See *id.* The Court has also made clear that it will construe federal legislation and regulations to conform to commerce power limits. See, e.g., *Jones v. United States*, 529 U.S. 848, 857–59 (2000).

applications of commerce power statutes while refusing to assess the statutes' constitutionality more broadly.¹⁸⁸ Severability is also presumed in spending power contexts. *Sabri's* argument against facial challenges in spending power cases, for example, carries with it the implication that any unconstitutional applications of spending legislation could be severed, since otherwise a successful as-applied challenge would be indistinguishable from a facial overbreadth challenge.

Further support for the Court's adhesion to ordinary severability rules in the Article I context comes from its decision in *New York v. United States*.¹⁸⁹ There, having found that Congress unconstitutionally commandeered state legislatures by requiring them to take title to low-level nuclear waste within their borders or face damage liability, the Court expressly held the take-title provision was severable. In so ruling, the Court invoked standard severability analysis and emphasized that invalid provisions should be deemed severable absent evidence to the contrary.¹⁹⁰ As the *New York* Court derived its anticommandeering rule from federalism concerns, the decision is instructive for how the Court approaches severability in similarly federalism-based commerce and spending power challenges.

* * *

The Court's congressional power precedent thus provides little support for application of a nonseverability presumption and resulting use of *Salerno*-style facial challenges in the Section 5 context. But one important distinction between prior congressional power analyses and the new congruence-and-proportionality test is that the former involved a far looser standard of review. As a result, the question raised under these prior standards was whether facial validity of a statute precluded the possibility that the statute exceeded Congress' powers as applied in a specific case. The greater rigor of the congruence-and-proportionality test, however, means that Section 5 legislation is much more likely to appear invalid if assessed in its entirety. The question the Court faces therefore is different; it is whether the probability of facial invalidity should preclude the

188. See, e.g., *United States v. Maxwell*, No. 03-14326, 2004 WL 2191801, at *14, *18, *21 (11th Cir. Oct. 1, 2004) (invalidating conviction for possession of child pornography where government failed to prove defendant's activities had a substantial effect on interstate commerce, but expressly leaving open whether statute could apply in another context); *United States v. Stewart*, 348 F.3d 1132, 1138-42 (9th Cir. 2003) (invalidating federal criminal prohibition on machinegun possession only as applied to homemade machineguns); *United States v. McCoy*, 323 F.3d 1114, 1131-33 (9th Cir. 2003) (holding Congress lacks power to prohibit noneconomic and noncommercial possession of child pornography, but expressly refusing to assess the constitutionality of the federal prohibition on possession of child pornography in other contexts).

189. 505 U.S. 144 (1992).

190. See *id.* at 186-87; see also *Printz v. United States*, 521 U.S. 898, 933-35 (1997) (invalidating background check and receipt-of-form requirements of the Brady Act but refusing to invalidate other provisions that become operative only if local law enforcement officer voluntarily complies with the statute, and further refusing to address severability of firearms dealer requirements).

possibility of as-applied validity. This change in standards and resultant posture of the severability question may not make a difference in the end, but it limits the extent to which this precedent is determinative of how the Court should proceed today.

III. NONSEVERABILITY AND THE CONGRUENCE-AND-PROPORTIONALITY TEST

What remains then is the pivotal normative inquiry: Precedent aside, how should the Court approach Section 5 challenges? More particularly, do substantive concerns justify the Court in deviating from ordinary severability rules and treating Section 5 challenges as *Salerno*-style attacks requiring examination of all of a Section 5 statute's applications? Two arguments might be offered to justify such a deviation in the Section 5 context. The first, focusing on the analytic requirements of the congruence-and-proportionality test, contends that applying a presumption of severability is at odds with the logic of that inquiry. The second, focusing instead on the values underlying the congruence-and-proportionality test and other constitutional concerns, offers instrumental reasons to forego application of ordinary severability rules. These two lines of argument are taken up in turn below.

A. *Severability and the Congruence-and-Proportionality Test's Substantive Requirements*

Determining whether severability is compatible with the substantive content of the congruence-and-proportionality test is complicated by confusion over what exactly the congruence-and-proportionality test means. The test could be seen as simply imposing a form of heightened means-end scrutiny or narrow tailoring requirement. Alternatively, it could represent a form of motive or purpose inquiry, which aims primarily at identifying instances where Congress is using Fourteenth Amendment remediation authority as a pretext for primary regulation.¹⁹¹ Both of these understandings are implicit in Chief Justice Rehnquist's claim that the logic of the congruence-and-proportionality inquiry requires the Court to consider all of a Section 5 statute's applications:

In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

. . . The effect [of the majority's as-applied approach] is to rig the congruence-and-proportionality test [T]he majority's approach is not really

191. See *The Civil Rights Cases*, 109 U.S. 3, 13–14, 18–19 (1883) (describing Fourteenth Amendment as authorizing only corrective legislation, not “primary” or direct legislation).

an assessment of whether Title II is “appropriate legislation” at all, but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.¹⁹²

Although closely related, these two accounts of the congruence-and-proportionality test suggest different justifications for deviating from ordinary severability rules, and thus each will be discussed separately. A third argument for nonseverability, also implicit in the Chief Justice’s statement, contends that the general nature of the congruence-and-proportionality inquiry inherently mandates facial treatment.

1. *The Congruence-and-Proportionality Test as a Narrow Tailoring Requirement.* — As it has emerged from recent decisions, with its emphasis on identifying an established pattern of state constitutional violations to which Congress could legitimately respond and on ensuring the means Congress chooses do not sweep too broadly, the congruence-and-proportionality test appears as a form of narrow tailoring analysis. The Court’s continued willingness to grant Congress some wiggle room—allowing Congress to “enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct”¹⁹³—suggests that the type of tailoring the test requires is more akin to intermediate than strict scrutiny.¹⁹⁴ The test does, however, require significantly greater tailoring than ordinary rationality review, as the amount of legislation to fail its strictures suggests.¹⁹⁵

In several other narrow tailoring contexts, the Court deviates from the ordinary presumption of severability and allows *Salerno*-style facial challenges—statutes regulating abortion or restricting speech are the most widely acknowledged examples.¹⁹⁶ Such deviation may stem from prophylactic concerns, and thus be more relevant to the instrumental

192. *Tennessee v. Lane*, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting) (citations omitted); see also Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105, 1157–58 (2003) (arguing that application severability is inconsistent with the congruence-and-proportionality test, which asks “whether the text Congress enacted was congruent and proportional to the record of constitutional violations Congress considered”).

193. *Lane*, 124 S. Ct. at 1985 (quoting *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003)); see also *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

194. On the degree of narrow tailoring congruence-and-proportionality requires, compare 1 Laurence H. Tribe, *American Constitutional Law* § 5-16, at 959 (3d ed. 2000) (describing review as “something between intermediate and strict scrutiny”), with Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 166 (1997) (suggesting standard akin to intermediate scrutiny), with Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L.J. 441, 477 (2000) [hereinafter Post & Siegel, *Equal Protection*] (arguing that the test “seem[s] analogous to the narrow tailoring required by strict scrutiny”).

195. See Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 Stan. L. Rev. 1127, 1132–33, 1153–58 (2000); McConnell, *supra* note 194, at 165–66.

196. See *supra* text accompanying notes 24–29.

concerns discussed below. But it also reflects in part the fact that given the narrow tailoring requirements mandated by substantive constitutional law, a court is less likely to be able to fashion a legitimate construction of the statute that allows it to conform to constitutional limits. Significantly, however, where the Court is able to construe a statute requiring heightened scrutiny to fit constitutional requirements, it generally does just that. Thus, in *Planned Parenthood v. Casey*, the Court (in several different opinions) invalidated the husband-notification and related notice requirements of Pennsylvania's abortion law that it found unconstitutional and upheld the rest.¹⁹⁷ Similarly, in *United States v. Grace*, in response to a facial challenge to a federal prohibition on "display of any flag, banner or device" on the Supreme Court's building and grounds, the Court held the prohibition was unconstitutional "as applied" to "the public sidewalks surrounding the building," thus severing this application of the statute from other applications.¹⁹⁸

Moreover, when the Court enjoins the challenged statute in toto, it is not because the Court rejects application of ordinary severability rules, but rather because the Court holds that under those rules unconstitutional aspects of the statute cannot legitimately be severed. Thus, in *Stenberg v. Carhart*, the Court concluded that Nebraska's statute banning "partial birth" abortions imposed an undue burden on abortion because it covered dilation and evacuation, the most common and safest method of previability abortions, as well as dilation and extraction, the method often referred to as "partial birth" abortion.¹⁹⁹ Rather than imposing a narrowing construction on the statute, or certifying the question of the statute's meaning to the state supreme court, the Court ruled that the statute was unconstitutional. But the Court nowhere suggested that ordinary severability rules were inapplicable simply because the statute was subject to heightened scrutiny. Instead, it refused to sever the statute's unconstitutional applications or overbroad language on the grounds that

197. 505 U.S. 833, 898, 901 (1992); see also *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (invalidating state provision authorizing police to use all necessary means to effect arrest of fleeing defendant only as applied to use of deadly force against unarmed, nondangerous suspects).

198. 461 U.S. 171, 172–73, 183–84 (1983); see also *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478 (1995) (enjoining application of broad honoraria ban for federal employees only as applied to lower-level executive branch employees); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld." (internal quotation marks omitted)); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–05 (1985) (refusing to facially invalidate state obscenity law but instead partially invalidating provision insofar as it reached constitutionally protected activity); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (noting that faced with an overbreadth challenge, a federal court "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction" and in any event, "if it is severable, only the unconstitutional portion is to be invalidated").

199. 530 U.S. 914, 937–38 (2000).

doing so would be at odds with the standard severability requirement that a narrowing construction be “reasonable and readily apparent” on the face of the statute.²⁰⁰ To take another recent example, in *City of Chicago v. Morales*,²⁰¹ the Court held Chicago’s antiloitering statute unconstitutional “on its face” for failing to provide citizens with fair notice of what conduct was prohibited and for failing to contain adequate guidelines to prevent arbitrary law enforcement. Narrowing was eschewed not because the First Amendment was involved but because vagueness “permeate[d] the ordinance.”²⁰² In addition, *Morales* came to the Court from the Illinois Supreme Court, which held the ordinance facially unconstitutional rather than narrowing its scope.²⁰³ As a result, the United States Supreme Court’s similar refusal to sever accorded with the established rule that state court rulings on the meaning of state statutes are binding and a litigant can challenge the statute as authoritatively construed and applied in her case.

This question of whether a state or federal statute is involved deserves emphasis. When the Court refuses to sever the unconstitutionally overbroad aspects of a state statute, the state is still able to seek the needed curative construction from its own courts.²⁰⁴ But where federal statutes are involved, no such option exists; if the Court refuses to sever, the burden then falls on Congress to amend the statute to fit constitutional requirements. Section 5 legislation is, of course, federal legislation, and thus whatever willingness the Court displays to presume non-severability in First Amendment overbreadth challenges to state statutes does not necessarily carry over.

This is not to say that the congruence-and-proportionality test imposes no substantive limits on the extent to which a court can engage in

200. *Id.* at 944 (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)); see also *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (facially invalidating statutory provisions found unconstitutional because provisions were not readily susceptible to a saving construction). Moreover, in *Stenberg*, the Court held that absence of a health exception also rendered the statute constitutionally infirm, so adopting a narrowing construction would not have led the Court to sustain it in any event. See 530 U.S. at 934–36. In *Hope Clinic v. Ryan*, a decision the Supreme Court later vacated in light of *Stenberg*, the Seventh Circuit displayed far more willingness to engage in creative judicial reconstruction to avoid holding “partial birth” abortion statutes unconstitutional. See 195 F.3d 857, 864–66 (7th Cir. 1999) (en banc), vacated, 530 U.S. 1271 (2000), decision on remand, 249 F.3d 603, 604–05 (7th Cir. 2001) (holding relevant portions of statutes unconstitutional).

201. 527 U.S. 41 (1999).

202. *Id.* at 54 & n.22.

203. See *City of Chicago v. Morales*, 687 N.E.2d 53, 64 (Ill. 1997) (holding “[t]he gang loitering ordinance is not reasonably susceptible to a limiting construction which would affirm its validity” because it was “clear” that Chicago’s City Council had intentionally “crafted an exceptionally broad ordinance”).

204. See *Virginia v. Black*, 538 U.S. 343, 367 (2003) (holding statute facially unconstitutional but leaving open possibility that state supreme court might interpret the statute so that it conformed to constitutional requirements on remand); *Osborne v. Ohio*, 495 U.S. 103, 115–22 & n.12 (1990) (upholding retrospective application of an adequately narrowed statute).

severability. The fact that the test represents a form of narrow tailoring may justify deviating from the presumption of severability at least insofar as to require courts to entertain what are in essence facial overbreadth challenges. More importantly, as noted above, the recent Section 5 decisions make the constitutionality of Section 5 legislation turn on the nature of the constitutional right in question and on the presence of a pattern and history of states violating this right.²⁰⁵ As a result, the congruence-and-proportionality test appears to preclude considering the constitutionality of Section 5 legislation in the context of a traditional as-applied challenge, where the court simply assesses whether a statute can be applied to the particular conduct before it. Indeed, the majority in *Lane* acknowledged this characteristic of the test, assessing whether Title II was constitutional “as it applies to the class of cases implicating the accessibility of judicial services” in the states generally, rather than limiting itself to considering whether Tennessee had violated the plaintiffs’ particular rights of access to the courts.²⁰⁶

But these limitations are relatively minor, and narrow tailoring alone does not justify a judicial refusal to apply ordinary severability analysis in responding to Section 5 challenges on the merits. *Lane*, moreover, is really an instance of this latter use of severability. The Court did not avoid the constitutional challenge asserted by Tennessee; instead, having found Title II constitutional in regard to enforcing the right of access to the courts, it applied the presumption of severability to avoid considering whether other applications of Title II were also constitutional. More precisely, *Lane* affirms the ability of states to challenge Section 5 legislation as unconstitutional on its face because it is insufficiently tailored to remedying a constitutional violation. All *Lane* rejects is the proposition that a court, having found Section 5 legislation to be constitutional in one context, must proceed to consider whether the legislation is constitutional in all its applications.

2. *The Congruence-and-Proportionality Test as a Purpose Inquiry.* — Another way of understanding the congruence-and-proportionality test is as a purpose or motive inquiry, because its underlying concern is to ensure that Congress does not use Section 5 as a pretext for imposing substantive regulations on the states that otherwise would be outside of Congress’ powers.²⁰⁷ Support for such an understanding of the test comes from the Court’s consistent insistence that valid Section 5 legislation must aim at

205. See *supra* text accompanying notes 6–7.

206. *Tennessee v. Lane*, 124 S. Ct. 1978, 1993 (2004).

207. For accounts of the congruence-and-proportionality test as a purpose inquiry, see, e.g., J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-Ends Relationships*, 36 U.C. Davis L. Rev. 407, 440–46 (2003); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 131–32 (1997) [hereinafter Fallon, Foreword]; see also Post & Siegel, *Equal Protection*, *supra* note 194, at 457–58, 460–63 (noting the ways the Court appears to be using congruence-and-proportionality as a means of uncovering illicit congressional purpose).

remediating, not redefining, Fourteenth Amendment violations.²⁰⁸ More than a separate interpretation, this view of the test represents an additional spin on the narrow tailoring account; the reason for imposing such scrutiny is to “smoke out” illegitimate congressional intent.²⁰⁹ Significantly, some commentators argue that claims of unconstitutional purpose represent an instance where the Court should refuse to sever unconstitutional applications because “[i]f a statute serves an [unconstitutional] purpose, . . . [t]he invalid . . . purpose pervades all of the provision’s applications.”²¹⁰ Thus, if the congruence-and-proportionality test represents an inquiry into congressional purpose, application of a nonseverability presumption might be justified.

In fact, however, the recent Section 5 decisions are hard to square with any understanding of the congruence-and-proportionality test as an inquiry into Congress’ actual motivations.²¹¹ One central characteristic

208. See, e.g., *Lane*, 124 S. Ct. at 1986; *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728–29 (2003); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

209. Smoking out illegitimate purpose is a prominent justification for use of strict scrutiny in the equal protection context. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We apply strict scrutiny to all racial classifications to ‘smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.’” (alteration in original) (internal quotation marks omitted) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989))). Debate has long raged over the intelligibility of subjective intent inquiries, with some justices and scholars questioning the possibility of ascertaining the intent of a multimember body. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) (arguing “it is virtually impossible to determine the singular motive of a collective legislative body” (internal quotation marks omitted)); *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968) (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high [in constitutional litigation] for us to eschew guesswork.”); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* 1205, 1212–22 (1970) (discussing *O’Brien* and other criticisms of purpose inquiries). This debate is beyond the scope of this Essay. Instead, for purposes here, it is enough to presume the theoretical possibility of discerning Congress’ actual purpose and ask instead whether such purpose should affect the constitutionality of Section 5 legislation.

210. Dorf, *supra* note 20, at 279; see also Fallon, *As-Applied*, *supra* note 20, at 1345 & n.124 (agreeing with Dorf, but listing some exceptions). One instance where the Court does apply severability notwithstanding a finding of unconstitutional purpose is in racial redistricting cases. Districts drawn primarily on the basis of race are unconstitutional, see, e.g., *Miller v. Johnson*, 515 U.S. 900, 913 (1995), but the Court does not respond to finding that one district was unconstitutionally drawn primarily because of race by invalidating the districting scheme as a whole, even though lumping members of one race in a particular district inevitably affects the contours of other districts. Instead, the Court has held that voters lack standing to challenge any district but their own on racial redistricting grounds, thereby precluding facial overbreadth challenges. *United States v. Hays*, 515 U.S. 737, 742–47 (1995).

211. See Beck, *supra* note 207, at 436–46; see also Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique*, *Morrison*, and the Future of Federal Antidiscrimination Law, 2000 *Sup. Ct. Rev.* 109, 132–35 (describing congruence-and-proportionality as applying only where the legitimacy of congressional ends is unclear and Court wants to give Congress the benefit of the doubt); Post & Siegel, *Equal Protection*, *supra* note 194, at

of the recent decisions is the Court's insistence on independently scrutinizing whether a pattern of state constitutional violations existed and whether a Section 5 measure is adequately tied to remedying those violations.²¹² Moreover, in applying the congruence-and-proportionality test, the Court at times has looked at judicial evidence of state constitutional violations not identified by Congress.²¹³ Both of these practices are more in keeping with an inquiry into whether challenged legislation objectively appears remedial than into actual congressional intent. So too is the Court's willingness to apply the congruence-and-proportionality test with full vigor to legislation enacted before *Boerne*.²¹⁴ In the latter case, an inquiry into Congress' purpose would more sensibly focus on whether the legislation appeared sufficiently remedial under then-existing standards.

Regardless, what remains wholly unexplained is why congressional intent should matter in analyzing the constitutionality of Section 5 legislation. In this regard, it is worth noting that in the Commerce Clause context, the Court has long ruled that Congress' actual purpose is irrelevant where Congress is clearly regulating interstate commerce.²¹⁵ Even under the Court's pre-New Deal restrictive view of the commerce power, it held that Congress' motivation in enacting regulations was immaterial when Congress targeted interstate commerce on the face of a statute.²¹⁶ The

459–60, 477, 510–11 (describing both *Kimel* and *Morrison* as going beyond an investigation into whether Congress intended legislation to be remedial and arguing the congruence-and-proportionality test is an “odd and awkward way” to identify “legislation enacted for the purpose of defining the substantive meaning of the Equal Protection Clause”).

212. See, e.g., *Hibbs*, 538 U.S. at 728–37; *Bd. of Trs. v. Garrett*, 531 U.S. 356, 368–73 (2001); see also McConnell, *supra* note 194, at 166 (describing Court as independently assessing the remedial character of Section 5 legislation under congruence-and-proportionality test); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 *Yale L.J.* 1943, 1964–65 (2003) [hereinafter Post & Siegel, Legislative Constitutionalism] (same).

213. See *Lane*, 124 S. Ct. at 1989–90 (“The historical experience that Title II reflects is also documented in this Court's cases . . . [and t]he decisions of other courts . . .”). In *Lane*, Chief Justice Rehnquist criticized the majority's willingness to go beyond the congressional record, see *id.* at 2000–01 (Rehnquist, C.J., dissenting), but he pursued the same practice in his majority opinion in *Hibbs*, see 538 U.S. at 729, 733–34 (Rehnquist, C.J.) (relying on judicial decisions chronicling state gender discrimination in employment and examination of state family leave policies in concluding that sufficient record of state gender discrimination in the administration of leave benefits existed to justify congressional remedy).

214. The congruence-and-proportionality test first appeared in *Boerne* in 1997. RFRA, there addressed, was enacted in 1993, see *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). The ADA was enacted in 1990, see *Lane*, 124 S. Ct. at 1982; the FMLA in 1993, see *Hibbs*, 538 U.S. at 724; the VAWA in 1994, see *United States v. Morrison*, 529 U.S. 598, 605 (2000); the Plant Remedy Act in 1992, see *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 631 (1999); and the ADEA was extended to the states in 1974, see *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 68 (2000).

215. See, e.g., *United States v. Darby*, 312 U.S. 100, 115 (1941).

216. See, e.g., *Hoke v. United States*, 227 U.S. 308, 322–23 (1913); *Champion v. Ames (Lottery Case)*, 188 U.S. 321, 355–56 (1903).

emphasis on jurisdictional elements in *Lopez* and *Morrison*, as well as the Court's continued willingness to allow Congress broad room to regulate economic activity (and reaffirmance of the constitutionality of federal legislation motivated by noncommercial concerns, such as the Civil Rights Act), indicate that the Court continues to adhere to this view.²¹⁷ The Court plainly believes that the difference in scope of Congress' commerce and Section 5 powers necessitates more rigorous means-ends scrutiny of the latter. But it has never offered a justification for why legislation that satisfies this scrutiny, in part or whole, should be rendered entirely invalid on the basis of congressional purpose.²¹⁸

Perhaps most importantly, viewing the congruence-and-proportionality test as entailing, even in part, an assessment of Congress' actual intent has significant ramifications for Congress' institutional independence. The Court's decisions increasingly suggest that the key to whether Section 5 legislation will be upheld as congruent and proportional is the standard of judicial review applicable to the underlying constitutional right itself. Legislation seeking to vindicate rights that trigger only rationality review if sued on directly is likely to exceed Congress' Section 5 powers; by contrast, legislation aimed at securing rights receiving heightened scrutiny has a far greater chance of judicial sustainment.²¹⁹ As a result, some have criticized the recent Section 5 decisions as judicial power grabs, arguing that the Court is illegitimately arrogating to itself the power to determine the scope of Fourteenth Amendment rights.²²⁰ The

217. See *Morrison*, 529 U.S. at 609, 611; *United States v. Lopez*, 514 U.S. 549, 558, 562 (1995).

218. In addition, while constitutional tests frequently include purpose inquiries, these often take an objective form. Rather than probing for evidence of actual purpose, for example, the Court often relies on the presence of facial classifications as justification for applying heightened scrutiny, and a subjectively benign purpose does not suffice to lower the level of scrutiny. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–29 (1995) (applying strict scrutiny to racial classifications regardless of specific race targeted); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (applying strict scrutiny to content-based speech regulation notwithstanding legitimate legislative motivation). On the use of purpose tests in constitutional analysis, see generally Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297 (1997) (discussing legislative purpose test in constitutional law); Fallon, *Foreword*, *supra* note 207, at 90–102 (same).

219. See *Hibbs*, 538 U.S. at 735–36 (arguing that presence of a heightened standard of scrutiny made it “easier for Congress to show a pattern of state constitutional violations”); see also *Lane*, 124 S. Ct. at 1988 (underscoring that Title II of the ADA aimed not only at remedying disability discrimination, which is subject only to rationality review, but “also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review”). On the importance of standard of review to the scope of Congress' enforcement power, see Post & Siegel, *Legislative Constitutionalism*, *supra* note 212, at 1964–67.

220. See, e.g., Caminker, *supra* note 195, at 1168–86; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 5, 136–53 (2001); McConnell, *supra* note 194, at 181–92; Post & Siegel, *Legislative Constitutionalism*, *supra* note 212, at 1966–71, 1980–84.

Court has responded by maintaining that it is simply adhering to *Marbury v. Madison*'s insistence that the judicial role is to say what the law is in cases properly before it.²²¹ But if the congruence-and-proportionality test is viewed as a purpose inquiry, the Court will have traveled substantially beyond simply asserting a power to ensure that Section 5 legislation conforms to judicial understandings of Fourteenth Amendment rights. Instead, the Court in essence would be requiring Congress to adhere to these judicial understandings in its deliberations or risk having its enactments invalidated—even if, objectively assessed, these enactments do not add to the scope of judicially established Fourteenth Amendment rights. Such a move would represent an extraordinary degree of judicial control over Congress' exercise of its enumerated powers.²²²

3. *Inherent Facial Character of the Congruence-and-Proportionality Inquiry.*— Finally, a third justification for a facial approach to Section 5 challenges merits brief discussion. The discussion in Part II established that Congress' power to act under Section 5 (and in other contexts) is assessed on a general basis; again, in *Hibbs* and *Lane*, the Court relied on evidence of a pattern of constitutional violations in the states generally as justifying application of Section 5 legislation to specific states, without inquiring into whether Nevada and Tennessee were guilty as well. As a result, it might be argued that challenges to legislation as exceeding such power are inherently facial in character because these challenges necessarily must look beyond the specific facts of the case at hand. Matthew Adler and Michael Dorf recently offered an argument along these lines when they maintained that the requirements for valid Section 5 legislation, or indeed any congressional legislation, are constitutional "existence conditions."²²³ By this, they meant that the inquiry in a congressional power challenge focuses on whether the legislation is valid as a

221. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Hibbs*, 538 U.S. at 728 ("[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees."); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." (citing *Marbury*, 5 U.S. (1 Cranch) at 177)).

222. See Kramer, *supra* note 220, at 13 (distinguishing between judicial supremacy and judicial sovereignty on similar grounds). Robert Post and Reva Siegel have suggested that, on the contrary, it is the Court's independent inquiry into whether Section 5 legislation is remedial, and not its investigation into Congress' purpose, that represents the greatest intrusion on congressional power. See Post & Siegel, *Equal Protection*, *supra* note 194, at 459–62, 511. This conclusion might follow if the subjective inquiry were limited to whether Congress intended its legislation to be remedial, given its own understanding of the rights involved. But given the Court's insistence that Congress lacks power to deviate substantively from judicial pronouncements regarding the scope of Fourteenth Amendment rights, any inquiry into purpose would appear to be an investigation into whether Congress intended its legislation to remedy violations of such rights as judicially defined. Indeed, a purpose inquiry would appear to preclude precisely the kind of policentric constitutional interpretation they advocate, as they subsequently appear to acknowledge. See Post & Siegel, *Legislative Constitutionalism*, *supra* note 212, at 2023; see also *id.* at 2020–45 (setting out policentric model).

223. See Adler & Dorf, *supra* note 192, at 1108–10, 1119–20.

general matter, not on whether the legislation can be constitutionally applied in a particular case.²²⁴

This line of reasoning has some bite, as far as it goes. But it does not go very far. To be sure, this generalized character of the congruence-and-proportionality test has some effect on the form of Section 5 challenges. As noted above, it meant that the Court in *Lane* could not sustain Title II simply on evidence that Tennessee had discriminated against the plaintiffs as they claimed; instead, a wider pattern and history of discrimination by the states was required.²²⁵ But nothing in the general nature of the congruence-and-proportionality inquiry prohibits a court, having found application of a statute to be constitutional in a particular class of cases, from determining whether this class of applications is separable from the remainder of the statute.²²⁶ Put differently, the logic of the congruence-and-proportionality inquiry does mandate judicial assessment of the constitutionality of congressional legislation in terms of some general rule the statute embodies. Again, however, both facial and as-applied challenges can represent such general rule attacks. Whether a statute's validity is assessed solely in regard to a particular class of cases or in light of all its applications affects the substance of the rule at issue, but not its general character.

B. *Instrumental Arguments Against Severability Under the Congruence-and-Proportionality Test*

In addition to arguments from precedent and the substantive content of the congruence-and-proportionality test, the Chief Justice also offered instrumental reasons for denying severability. He maintained that assessing the constitutionality of Section 5 legislation on an as-applied basis "eliminates any incentive for Congress to craft [Section 5] legislation for the purpose of remedying or deterring actual constitutional violations."²²⁷ Instead, it will fall to the courts "to sort out which hypothetical applications of an undifferentiated statute . . . may be enforced," with the result that "States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights."²²⁸ These claims

224. See *id.* at 1151–55.

225. See *supra* notes 205–206 and accompanying text.

226. To their credit, Adler and Dorf acknowledge that the availability of severability differentiates congressional power challenges from other instances where the validity of legislation is put at issue. They argue against broad use of application severability in congressional power challenges on the grounds that "all content-based existence conditions would function as application conditions." Adler & Dorf, *supra* note 192, at 1155–57. This response seems to presume the very question at issue, however: whether the need to assess the validity of congressional power legislation on a general basis is satisfied once a court determines that the statute is constitutional in regard to a particular class of cases, or if instead the court must also determine the constitutionality of all or most of its applications.

227. *Tennessee v. Lane*, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting).

228. *Id.*

parallel the standard instrumental arguments for facial challenges and nonseverability in First Amendment overbreadth cases, specifically that requiring individuals to challenge overbroad statutes on a case-by-case basis risks “chilling” exercise of First Amendment rights and undermines legislative incentives to draft statutes that take First Amendment concerns seriously.²²⁹ To these two instrumental arguments could be added a third, also raised by the Chief Justice: Allowing severability in the Section 5 context imposes significant burdens on the federal courts and thus deviates from “the proper role of the Judiciary.”²³⁰

Such instrumental concerns properly inform severability doctrine. The presumption of severability embodied in ordinary severability doctrine is not constitutionally mandated. Once the constitutionality of a statute is put in question by one subject to the statute’s enforcement, the case and controversy requirements of Article III are satisfied.²³¹ Instead, like the Court’s disavowal of facial challenges, the presumption of severability is rooted in policy considerations, including general constitutional values of federalism and separation of powers; the presumption allows courts to avoid wholesale invalidation of statutes when curing limited constitutional violations. But although relevant to severability analysis, these instrumental arguments do not suffice to justify deviating from ordinary severability rules.

1. *Nonseverability and Deterrence of State Assertions of Constitutional Rights.* — Undoubtedly, an as-applied approach to Section 5 challenges, under which the Court only considers the constitutionality of legislation

229. See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (describing First Amendment overbreadth doctrine as resting on “concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech” because “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from speech”); *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (“The [overbreadth] doctrine is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions.”); Fallon, *Making Sense*, supra note 65, at 867–75, 884–89 (describing chill and legislative incentive arguments). But see Monaghan, supra note 27, at 31–33 (describing incentive argument for overbreadth regarding federal statutes but concluding it fails to justify nonseverability). For an initial and influential academic analysis of the chill argument for overbreadth, see Note, *The First Amendment Overbreadth Doctrine*, 83 *Harv. L. Rev.* 844, 852–58, 865–82 (1970).

230. See *Lane*, 124 S. Ct. at 2005–06 (Rehnquist, C.J., dissenting).

231. Thus, for example, the Supreme Court justifies its willingness to entertain overbreadth challenges on the ground that the rule against allowing an individual to challenge a statute’s application to third parties reflects simply prudential limits on standing. See, e.g., *United States v. Sabri*, 124 S. Ct. 1941, 1948 (2004); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion). As noted earlier, see supra notes 60–66 and accompanying text, dispute exists regarding whether overbreadth challenges are correctly viewed as a species of third-party standing or as rooted in the valid rule requirement, as Henry Monaghan has argued. But individuals’ constitutional standing to bring such challenges is only that much clearer under Monaghan’s account, and thus this dispute makes no difference to the point here.

in regard to the case at hand and severs other applications, will lead to “piecemeal” litigation. States will not be able to procure a determinative assessment of a Section 5 statute’s constitutionality in a single proceeding. But this is true whenever a court denies a facial challenge or severs applications of a statute not directly before it. In fact, in its justifications for limiting the availability of facial challenges, the Court usually describes forcing constitutional litigation to proceed in a “piecemeal” fashion as a virtue, not a vice.

The question therefore is whether something unique to the Section 5 context renders concerns about piecemeal proceedings more salient. One distinguishing feature of Section 5 litigation is that it overwhelmingly involves a state as a party, and does so universally when the underlying issue is whether a congressional abrogation of Eleventh Amendment immunity is constitutional.²³² Moreover, in ordinary overbreadth challenges, the litigant wants to attack application of a statute to a hypothetical third party, making it speculative whether such an application will occur. But in the Section 5 context, it is at least plausible to expect that a state attacking other applications of a statute will itself be subject to those applications. The as-applied approach therefore not only forces piecemeal assessment of a statute’s constitutionality, but also piecemeal assessment of a particular party’s rights.

On the other hand, states are better positioned than most to handle such repeated litigation. While defending challenges takes resources, states have attorney general offices and staffs already in place to handle litigation on their behalf. Increasingly, state attorneys general are collaborating on Section 5 challenges and other litigation, lessening the resource burden.²³³ Moreover, states often have a financial incentive to litigate Section 5 challenges, because success on such challenges serves to remove their liability for money damages in private suits. And states do not face criminal penalties for engaging in conduct prohibited by Section 5 legislation. These latter two features in particular serve to distinguish

232. The cases that do not involve states as parties are those where Section 5 legislation targets private action—a category rendered perhaps a null set by *United States v. Morrison*, 529 U.S. 598, 620–27 (2000)—and those where the legislation authorizes actions against individual state officials, see, e.g., *United States v. Raines*, 362 U.S. 17, 24–25 (1960).

233. See Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 *Colum. L. Rev.* 1998, 2002–09 (2001) (detailing substantial increase in state attorney general cooperation and multistate litigation since 1980); see also Steven Andersen, *Power of the State: The Rise of the State Attorneys General*, *Corp. Legal Times*, Aug. 2003, at 1, 38 (describing rise in activity and power of state attorneys general); David Bank, *States to Investigate Oracle Bid: Attorneys General Agree to Cooperate, Share Costs to Review PeopleSoft Offer*, *Wall St. J.*, Aug. 1, 2003, at A2 (noting attorneys general from almost thirty states formally agreed to cooperate in antitrust investigation).

Section 5 from First Amendment challenges and make claims of chill much harder to justify in regard to the former.²³⁴

This leaves the claim that federalism values should make the Court especially wary of imposing litigation burdens on states. The states' distinctive role in the constitutional order might seem to justify special treatment in the form of denying severability when congressional legislation is challenged as treading on their constitutional prerogatives. But if so, then severability should also be denied whenever states challenge congressional legislation, and perhaps whenever congressional legislation is challenged as violating state autonomy or intruding into the states' proper sphere.²³⁵ Yet the rejection of facial challenges in the Spending Clause context announced in *Sabri*, as well as the rejection of judicial protection against direct federal regulation of the states announced in *Garcia v. San Antonio Metropolitan Transit Authority*,²³⁶ indicate that such special solicitude for the "states as states" does not apply across the board. Moreover, recognition of the distinctive position of the states might instead counsel the Court to limit itself to considering the constitutionality of Section 5 statutes only as implicated by the case before it, as a state may

234. See Carroll, *supra* note 93, at 1061–62 (arguing that states will not be deterred from asserting their rights). Moreover, several scholars have questioned the empirical basis for the chilling effect argument even in regard to the First Amendment, given that citizens are unlikely to be sufficiently aware of how a statute is written to be chilled from engaging in expressive activities, and even less likely to be aware of curative constructions claimed to reduce such chilling effect. See Fallon, *Making Sense*, *supra* note 65, at 885–88 (describing and responding to criticisms of chilling effect as justification for First Amendment overbreadth doctrine).

235. Tom Lee raised with me the possibility that a separate nonseverability rule should exist in Eleventh Amendment challenges, reflecting the presumption against states being subjected to financial liability in private suits that the Amendment represents. Although an intriguing suggestion, I am ultimately unpersuaded. The presumption against state financial liability is already incorporated into Section 5 analysis by the requirement that congressional abrogations of state sovereign immunity be clearly stated. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). Imposing a nonseverability rule in addition would seem to overcount the Eleventh Amendment, especially given the Court's repeated holding that valid exercises of Congress' Section 5 power can abrogate Eleventh Amendment immunity. See *Lane*, 124 S. Ct. at 1985; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Nor, intuitively, is the Eleventh Amendment's protection against private financial claims so central to federalism as to single the Eleventh Amendment out from other federalism contexts, such as anticommandeering challenges, where the Court's precedent makes clear no special nonseverability presumption applies. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 *Tex. L. Rev.* 1, 51–65 (2004); *supra* notes 189–190 and accompanying text. The practical effects of a special Eleventh Amendment nonseverability rule also counsel against it, as such a rule would implausibly make the courts' analytic approach turn on plaintiffs' remedial choices: Where plaintiffs sought monetary relief for violations of a Section 5 statute, a court would have to consider all the statute's applications to determine its constitutionality, but if plaintiffs sought only injunctive relief, to which the Eleventh Amendment is not applicable, the court would limit its assessment to the application at hand.

236. 469 U.S. 528, 546–47 (1985).

prefer to take a more discriminating approach and not challenge all of a statute's applications.²³⁷

In any event, the claim that federalism values mandate application of a special nonseverability rule in the Section 5 context, at a minimum must be expressly stated and justified, something the Court has yet to do. Such a defense is all the more necessary given that the Court cannot grant the states special status here without simultaneously disregarding the distinctive position of Congress. Denying severability means denying Congress the right to have its statutes remain in force insofar as they fall within its enumerated powers. Again, this goes beyond the Court's insisting that its determinations of the meaning of Fourteenth Amendment rights set the contours of Congress' enforcement power; instead, the Court would be refusing to uphold Section 5 legislation, *even to the extent such legislation conformed to such judicial determinations*, if the statutes also had applications that went beyond. Simply invoking the respect due states is therefore inadequate to deny severability unless some reason exists why respect for the states should so significantly trump respect for Congress in this context.

2. *Nonseverability and Congressional Incentives.* — The incentive argument might appear, at first glance, to justify prioritizing respect for the states over Congress. This argument maintains that priority should be given to protecting the states because Congress is in a position to protect its own interests by framing its legislation with greater care; the states, however, have no resort but the courts. Denying severability gives Congress a needed incentive to take constitutional limits on its Section 5 powers seriously; otherwise, as the Chief Justice maintained, Congress will just rely on the courts to do its work.

237. Numerous states, for example, signed onto amicus briefs in *Lane* and *Hibbs* arguing that the statutes challenged in those cases were constitutional, at least in some applications. See Brief of the States of Minnesota et al. as Amici Curiae in Support of Respondents at *1, *Lane* (No. 02-1667), 2003 WL 22733906 (arguing that Title II is constitutional in all its applications and noting “[a]lthough the states more typically advocate the application of Eleventh Amendment immunity, this case is different. . . . The states should support every effort to eradicate the effects of the documented long-term, pervasive and invidious discrimination against people with disabilities in the provision of public services”); Brief of Kansas and Delaware as Amici Curiae in Support of Respondents at *1, *Lane* (No. 02-1667), 2003 WL 22733907 (arguing Title II is constitutional as applied to pursuit and enforcement of fundamental due process rights); Brief for States of New York et al. as Amici Curiae in support of Respondents at *1, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 31427565 (“[A]llowing our citizens to enforce their FMLA rights without restriction is consistent with the obligation of attorneys general of the amici curiae States to protect the public interest by ensuring that workplace gender discrimination against our citizens, with all of its vestiges, is eliminated.”); see also *Morrison*, 529 U.S. at 661–62 (Breyer, J., dissenting) (noting that “attorneys general in the overwhelming majority of States (38) supported congressional legislation” on the problem of violence against women). Other states argued that Title II of the ADA and the FMLA were unconstitutional. See Brief of Amici Curiae Alabama et al. in Support of Petitioner at *6–*22, *Lane* (No. 02-1667), 2003 WL 22176110; Brief for the States of Alabama et al. as Amici Curiae in Support of Petitioners at *4–*30, *Hibbs* (No. 01-1368), 2002 WL 1974391.

But this incentive argument assumes that Congress will not take constitutional limits on its Section 5 power (limits members have sworn by oath to uphold) seriously absent judicial encouragement.²³⁸ Such an assumption is at odds with the respect due a coordinate branch of government and the usual judicial course of presuming that congressional legislation is constitutional.²³⁹ More importantly, reliance on the courts to ensure Section 5 legislation fits constitutional limits cannot be facilely dismissed as congressional irresponsibility. To begin with, the scope of Fourteenth Amendment rights is not always so clear. For instance, the Court has vacillated tremendously in setting out the constitutional right of access to the courts, even acknowledging dispute as to whether the substantive basis of the right rests in equal protection or due process.²⁴⁰ As a result, Congress, in good faith, may not be able to discern clearly the bounds of its Section 5 authority. In addition, the Court sometimes invokes one standard but in practice appears to apply another, suggesting greater constitutional protection than it may be willing to acknowledge overtly. *City of Cleburne v. Cleburne Living Center, Inc.*'s rigorous use of supposed rationality review in addressing equal protection claims brought by the disabled is a prime example.²⁴¹ It seems unfair to penalize Congress for not correctly guessing that the Court meant the standard it formally invoked in that decision, not the standard it actually applied. And of course, the Court's recent Section 5 decisions all involved statutes enacted before the Court adopted the congruence-and-proportionality test and at a time when the Court was instead far more deferential in its re-

238. Justice Scalia for one has voiced skepticism that Congress takes such constitutional limits seriously:

My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality. That presumption reflects Congress' [] status as a coequal branch of government with its own responsibilities to the Constitution. But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.

Justice Antonin Scalia, Speaking at the Telecommunications Law and Policy Symposium (Apr. 18, 2000), quoted in Ruth Colker & James J. Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80, 80 (2001).

239. See *Morrison*, 529 U.S. at 607.

240. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 120–21 (1996). Compare *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding due process “prohibit[s] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages”), with *United States v. Kras*, 409 U.S. 434, 444–46 (1973) (holding due process does not require waiving fees in bankruptcy proceeding), and *Ortwein v. Schwab*, 410 U.S. 656, 658–61 (1973) (holding neither due process nor equal protection requires waiving fee to obtain review of welfare benefits termination).

241. 473 U.S. 432, 446–47 (1995); *id.* at 458–60 (Marshall, J., concurring in part and dissenting in part) (arguing that the Court's refusal to apply the *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), one-step-at-a-time rule or acknowledge legitimacy of city's property value concern was incompatible with ordinary rationality review).

view of Section 5 legislation.²⁴² That these statutes do not hew to the test's requirements is hardly Congress' fault.

The most serious flaw in the incentive argument, however, is that the effect of denying nonseverability would be to unduly narrow Congress' Section 5 powers. According to the Court, Congress has some room to maneuver and has the power to prohibit some state conduct that is not unconstitutional: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."²⁴³ Indeed, all but Justice Scalia agree that Congress' Section 5 power has some prophylactic scope.²⁴⁴ Accepting *arguendo* the logic of the incentive argument,²⁴⁵ realistically this room exists only if the Court is willing to sever congressional excesses. Otherwise, the risk of total invalidation may well lead Congress to err on the side of caution and stick closely to prohibiting only clearly unconstitutional conduct. To put the point differently, the effect of nonseverability is to unjustifiably chill *Congress* in exercising the full scope of its powers under Section 5.

3. *Judicial Manageability and the Judicial Role.* — This leaves the final instrumental justification for nonseverability: namely, that addressing challenged Section 5 legislation on a case-by-case basis will prove burdensome for the courts, improperly placing them in the position of rewriting congressional legislation.²⁴⁶ This argument carries particularly little weight. First, ordinary severability doctrine already adequately addresses the judicial role concern. Severability is inappropriate unless it represents a fair and reasonable interpretation of a statute rather than a rewriting of statutory text. Similarly, the ordinary presumption of severability indicates that the judicial efficiency gains of assessing a statute's constitutionality in a single proceeding do not on their own outweigh the institutional concerns counseling for a case-by-case approach.

In addition, the judicial manageability problems the Court may face in having to determine the constitutionality of Section 5 legislation on an

242. See *supra* notes 147–153 and accompanying text.

243. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

244. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation . . ."); *id.* at 756 (Kennedy, J., dissenting) (noting Congress' power under Section 5 to enact prophylactic measures); see also *Tennessee v. Lane*, 124 S. Ct. 1978, 2010–12 (2004) (Scalia, J., dissenting) (arguing that Section 5 "does *not* authorize . . . so-called 'prophylactic' measures").

245. The incentive argument assumes that members of Congress are more concerned with ensuring the legislation they enact withstands judicial challenge than with the political benefits gained simply by enacting legislation that their constituents or interest groups desire. This seems a highly dubious assumption, thus raising an additional reason to reject this argument for nonseverability. See Frederick Schauer, *Ashwander Revisited*, 1995 *Sup. Ct. Rev.* 71, 92–93; Vermeule, *supra* note 52, at 1962. *Contra* Fallon, *Making Sense*, *supra* note 65, at 888–89 & n.221.

246. See *The Supreme Court, 2003 Term—Leading Cases: Constitutional Law, State Sovereign Immunity*, 118 *Harv. L. Rev.* 248, 260, 266–67 (2004) (raising this criticism of the *Lane* decision).

as-applied basis are a direct function of the substantive standard the Court has imposed in this context. Given that the scope of Congress' power turns on the judicial scrutiny triggered by the underlying constitutional right, it is inevitable that the same statute may be constitutional as applied to protect one constitutional right and unconstitutional in regard to another. Having thus created the situation where application-specific assessments are necessary to determine if challenged legislation is constitutional, the Court cannot readily complain about the resultant burdens on the courts.

C. Other Congressional Power Contexts

This leaves the question of whether deviation from ordinary severability rules is appropriate in other congressional power contexts. The greater rigor of the congruence-and-proportionality test compared to Article I analysis, which generally applies a far more deferential review even when federalism concerns are at stake,²⁴⁷ makes the claim for federalism-based nonseverability outside of Section 5 a particularly doubtful proposition. Notably, when the Court has employed a more restrictive analysis in reviewing Article I legislation, such as the anticommandeering rule, it still responds to finding unconstitutionality by severing the offending provisions.²⁴⁸

Perhaps most importantly, nothing in the class-of-activities analysis under the Commerce Clause mandates a nonseverability presumption and corresponding use of *Salerno*-style facial challenges.²⁴⁹ Again, this analysis does lend commerce power challenges a general character. A court must go beyond the specific facts of the case at hand and instead assess the generic nature of the activity at issue. Moreover, some efforts to invalidate particular applications of commerce power legislation may parse too finely. The activity at issue may be identified so narrowly as to

247. See Caminker, *supra* note 195, at 1134–41, 1186–96; see also *Eldred v. Ashcroft*, 537 U.S. 186, 217–18 (2003) (refusing to apply the congruence-and-proportionality test outside of the Section 5 context).

248. See, e.g., *New York v. United States*, 505 U.S. 144, 186–87 (1992).

249. Debate on this point has recently surfaced in the courts of appeals. Compare *United States v. Stewart*, 348 F.3d 1132, 1140–42 (9th Cir. 2003) (arguing that class-of-activities analysis does not preclude as-applied challenges where activity in question is not part of a larger enterprise), with *United States v. Morales-De Jesús*, 372 F.3d 6, 18–22 (1st Cir. 2004) (arguing that class-of-activities analysis requires a court to assess the economic nature of the activity in question by reference to the general activity regulated by the statute, but allowing other as-applied challenges), and *United States v. McCoy*, 323 F.3d 1114, 1133–37 (9th Cir. 2003) (Trott, J., dissenting) (arguing that class-of-activities analysis requires a court to assess whether the activity “generically described in the statute” has an effect on interstate commerce and thus precludes as-applied challenges (emphasis omitted)). The issue of whether as-applied challenges are available in the Commerce Clause context was also mentioned during oral argument in *Raich v. Ashcroft*. Transcript of Oral Argument at 6, 16, *Raich v. Ashcroft* (No. 03-1454), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1454.pdf (on file with the *Columbia Law Review*).

not fairly constitute a discrete class.²⁵⁰ Alternatively, even if a discrete class of activity, it may be practically inseparable if congressional regulation is to be effective.²⁵¹ Finally, ordinary severability analysis may preclude efforts to segregate particular applications. But rarely will these constraints entail that a court must examine *all* applications of a commerce power statute in order to determine its constitutionality. Hence, notwithstanding the substantive requirements of the class-of-activities test, as-applied challenges generally remain available in the commerce power context, provided these challenges involve a challenge to some general rule in the statute.²⁵²

What then to make of *Lopez* and *Morrison*? Once more, the absence of any express discussion of facial challenges or severability in these decisions cautions against reading too much into their text. Yet their seeming refusal to sever potentially constitutional applications of the statutes therein challenged and resort to total invalidation is striking. Insofar as their mode of analysis departs from ordinary severability doctrine, it seems that *Lopez* and *Morrison* are in error. It is not clear, however, that these decisions in fact represent such a departure. In both, limiting the statutes to their legitimate field of operation would have required the Court to, in essence, add a jurisdictional element. Arguably, this would stray over the line from judicial narrowing to judicial rewriting of a challenged statute.²⁵³ A variety of jurisdictional elements are often potentially available to cure constitutional defects. In the School Zones Act, for example, the possibilities ranged from requiring that the gun in question

250. This complaint might be lodged against the Ninth Circuit's decision in *Stewart*, which treated possession of homemade machineguns as a distinct class of activity. See 348 F.3d at 1136–40.

251. The Ninth Circuit's decision in *Raich v. Ashcroft*, barring the application of federal drug laws to cultivation and possession of marijuana for personal medical purposes, 352 F.3d 1222, 1234 (9th Cir. 2003), seems vulnerable for this reason, as does the Eleventh Circuit's recent determination in *United States v. Maxwell*, 386 F.3d 1042, 1067 (11th Cir. 2004), that Congress lacks power to regulate local possession of child pornography. See also *United States v. Holston*, 343 F.3d 83, 90–91 (2d Cir. 2003) (upholding federal prohibition of mere possession of child pornography on the ground that Congress could rationally conclude such a ban was necessary to enforce its regulation of the national market in child pornography).

252. However, fact-specific claims of privilege and immunity—the traditional basis of an as-applied challenge—are not totally excluded from commerce power analysis. In *United States v. Morrison*, the Court essentially limited class-of-activity analysis and aggregation to contexts involving economic activity. See 529 U.S. 598, 613 (2000). Hence, once a court determines that a given activity is noneconomic, the question then becomes whether the specific instance of that activity at issue had a substantial effect on interstate commerce. See, e.g., *Maxwell*, 386 F.3d at 1059–60. In addition, courts regularly assess whether the specific conduct at issue falls within the scope of commerce power legislation. See, e.g., *Morales-De Jesús*, 372 F.3d at 18–21.

253. See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995) (refusing to craft nexus requirement to save unconstitutionally broad honoraria ban, arguing “[w]e cannot be sure that our attempt to redraft the statute to limit its coverage . . . would correctly identify the nexus Congress would have adopted”).

traveled in interstate commerce (the solution Congress subsequently adopted) to demanding it be possessed in immediate connection with a commercial activity.²⁵⁴ Choosing which approach Congress would want to take might well have exceeded proper judicial bounds; automatically presuming that Congress would want to preserve the broadest possible reach of the statute seems at odds with according Congress credit for taking federalism concerns seriously.²⁵⁵ Moreover, in the case of the VAWA Congress did include a jurisdictional element in the Act's criminal enforcement provision, suggesting that the absence of such an element in the civil remedy provision was intentional.²⁵⁶

Of course, at times the Court has engaged in seemingly radical statutory surgery and reconstruction to save a statutory scheme after ruling some of its provisions or applications unconstitutional. The recent decision in *United States v. Booker* is now the paradigm example.²⁵⁷ The Court's unwillingness to do so in *Lopez* and *Morrison* may relate to its sense that the implication of facial invalidation of the latter statutes was less severe, or perhaps an unarticulated (and undefended) reluctance to engage in as extensive saving efforts where a statute's constitutional infirmity stemmed not from an independent constitutional prohibition, but from its exceeding the constitutional grant of powers to Congress. At a minimum, the Court's inconsistent approach to severability analysis undermines the effort to justify *Lopez* and *Morrison* in severability analysis terms.

CONCLUSION

The majority in *Lane* seems to have gotten it largely right. True, the opinion gives too little explanation of how facial and as-applied challenges actually differ and of where its approach falls on the range of facial and as-applied analysis. But the majority was correct on the critical issue: In the Section 5 context, no reason exists—whether based in precedent, the substantive content of the congruence-and-proportionality test, or instrumental concerns—to deviate from ordinary severability doctrine and the general presumption of severability. States should be able to bring facial challenges to Section 5 statutes—that is, challenges which attack the general rule and requirements set forth in such legislation, as op-

254. In addition, as *Lopez* involved a criminal statute, the rule of lenity might counsel against severability. See Vermeule, *supra* note 52, at 1968–69.

255. Cf. *Jones v. United States*, 529 U.S. 848, 858–59 (2000) (reading federal arson statutes narrowly in part because of principle that courts should not presume Congress has “significantly changed the federal-state balance in the prosecution of crimes” absent clear evidence to that effect (internal quotation marks omitted)).

256. That *Lopez* and *Morrison* can be read to accord with ordinary severability doctrine says nothing, of course, about whether these decisions are correct in their substantive analyses of the challenged statutes' constitutionality—as to which the dissents in those cases contain powerful criticisms. See, e.g., *Morrison*, 529 U.S. at 640–645, 654–55 (Souter, J., dissenting).

257. See *supra* Part I.B.3.

posed to challenges that focus on the facts of the controversy in the case before the court. But once a court determines that the statute is constitutional with respect to enforcing the constitutional right at issue in the case at hand, the proper course is generally for the court to uphold this application of the statute and not proceed to consider other applications. The converse is also true: If a court holds the statute to exceed Congress' power in regard to the right at issue, it should enjoin the legislation only as so applied, leaving open whether the statute would be constitutional in other contexts. While instances may exist where a statute has only one type of application, examination of the Court's Section 5 cases makes clear such occasions are likely rare.

The one qualifier is that under the ordinary rules of severability, a court should only sever Section 5 legislation in this fashion if it determines that the statutes are readily susceptible to such a construction. Where the *Lane* majority erred was in never engaging in such an inquiry and instead simply relying on a tacit presumption of severability (although that is often the Court's standard practice). Moreover, satisfying severability analysis can be a significant hurdle. At a minimum, severability case law demonstrates that the Court has varied in its willingness to read statutes as supporting curative constructions.²⁵⁸

Thus, a final question is whether denying the propriety of facial challenges and a nonseverability principle in the Section 5 context would make much difference, given that the Court can reach the same result through express application of severability analysis. The answer is yes, it would make a significant difference. No doubt, the same separation-of-powers and federalism concerns identified by many as animating the Court's recent Section 5 decisions would lead it to take a stingy approach to severability in some cases, and to conclude that severing potentially unconstitutional applications would represent illegitimate judicial rewriting of a congressional statute. Critically, however, control over severability lies largely with Congress.²⁵⁹ Provided Congress makes clear that not just unconstitutional provisions but unconstitutional applications are to be deemed severable,²⁶⁰ the Court's ability to facially invalidate Section 5 legislation will be significantly curtailed.

258. See *supra* note 47 and accompanying text.

259. See Nagle, *supra* note 48, at 241–44 (describing evidence that Congress is aware of severability and the impact of severability clauses); see also Shumsky, *supra* note 47, at 267–71 (arguing that courts should treat explicit congressional instructions regarding severability as dispositive).

260. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) (holding that “[s]everability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes”).