

Facial Challenges and Separation of Powers

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INTRODUCTION

In several Supreme Court decisions this decade, the question of whether a constitutional attack on a statute should be considered “as applied” to the actual facts of the case before the Court or “on the face” of the statute has been a difficult preliminary issue for the Court.¹ The issue has prompted abundant academic discussion.² Recently, scholars have noted a preference of the Roberts Court for as-applied constitutional challenges.³ However, the cases cited as evidence for the Roberts

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1. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (“The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge.”); *Tennessee v. Lane*, 541 U.S. 509, 551–52 (2004) (Rehnquist, C.J., dissenting) (expressing doubts about the Court’s use of an as-applied analysis of the constitutional challenge).

2. See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41 (2006); Gillian E. Metzger, Essay, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005).

3. See David L. Franklin, *Looking Through Both Ends of the Telescope: Facial*

Court's preference for as-applied challenges all involve constitutional challenges which concede the legislative power to enact the provision but nevertheless argue for unconstitutionality because the statute intrudes upon rights or liberties protected by the Constitution.⁴ Of course, this is not the only type of constitutional challenge to a statute; some constitutional challenges attack the legislative branch's underlying power to pass the statute in question. Modern scholarship, however, as well as the Supreme Court, has mostly ignored the difference between these two different types of constitutional challenges when discussing facial and as-applied constitutional challenges. In glossing over this difference, considerations that fundamentally affect whether a facial or as-applied challenge is appropriate have gone unnoticed. By clearly distinguishing between these two very different types of constitutional challenges, and the respective role of a federal court in adjudicating each of these challenges, a new perspective can be gained on the exceedingly difficult question of when a facial or as-applied challenge to a statute is appropriate.

In this Article, I argue that federal courts are constitutionally compelled to consider the constitutionality of a statute on its face when the power of Congress to pass the law has been challenged. Under the separation-of-powers principles enunciated in *INS v. Chadha*⁵ and *Clinton v. City of New York*,⁶ federal courts are not free to ignore the "finely wrought"⁷ procedures described in the Constitution for the creation of federal law by "picking and choosing"⁸ constitutional applications from unconstitutional applications of the federal statute, at least when the statute has been challenged as exceeding Congress's enumerated powers in the Constitution. The separation-of-powers principles of *Chadha* and *Clinton*, which preclude a "legislative veto" or an executive "line item veto," should similarly preclude a "judicial application veto" of a law that has been challenged as exceeding Congress's constitutional authority.⁹

Challenges and the Roberts Court, 36 HASTINGS CONST. L.Q. 689, 697 (2009) ("In sum, then, the Court in recent years has repeatedly reaffirmed its fidelity to the traditional model with its strong preference for as-applied challenges."); Doug Kmiec, *Facing Consensus: The Importance of the "Facial" vs. "As Applied" Distinction in the Roberts Court*, CONVICTIONS: SLATE'S BLOG ON LEGAL ISSUES, Apr. 29, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/29/facing-consensus-the-important-of-the-facial-versus-as-applied-distinctions-in-the-roberts-court.aspx> ("The 'facial' vs. 'as applied' distinction animates the minimalism of the Roberts Court."); Ed Whelan, *The Roberts Court and Facial vs. As-Applied Challenges*, NAT'L REV. ONLINE, Mar. 18, 2008, <http://bench.nationalreview.com/post/?q=NDY3ZmJmYWFIYWZmMDEzMmZmY5MmY0NTc2NmZjYmE=> ("Chief Justice Roberts's strong interest in reviving attention to the distinction between facial and as-applied challenges.").

4. See, e.g., *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (considering challenge to an Indiana state law as violating the constitutional "right to vote"); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (considering challenge to a Washington state law as violating associational rights protected by the First Amendment); *Carhart*, 550 U.S. at 141–43 (considering challenge to Partial Birth Abortion Act of 2003 as violating constitutional right of privacy).

5. 462 U.S. 919 (1983).

6. 524 U.S. 417 (1998).

7. *Chadha*, 462 U.S. at 951.

8. *Daniels v. United States*, 532 U.S. 374, 391 (2001) (Souter, J., dissenting).

9. A case involving this type of challenge is on its way to the Court. In *Northwest Austin Municipal Utility District Number One v. Mukasey*, the United States District Court for the District of Columbia determined that a facial rather than an as-applied approach was appropriate

In Part I of the Article, I will show that the Supreme Court's use of facial and as-applied adjudications of statutes cannot be synthesized or understood using traditional doctrinal explanations. In addition, I will demonstrate that this threshold question can be determinative as to the constitutionality of a statute, thus making it important to formulate a doctrine that can guide courts in resolving the "facial-versus-as-applied" question.

In Part II of this Article, I will examine contemporary scholars' attempts to supply a doctrine to descriptively account for the Court's cases. I conclude that the modern, conventional wisdom fails as a descriptive account because of a misunderstanding about the relationship between the facial-versus-as-applied question and the severability question. The conventional wisdom wrongfully assumes that the facial-versus-as-applied question is answered by looking at the doctrine of severability, when in fact the question of severability becomes relevant only after the facial-versus-as-applied question has been answered. Moreover, the conventional wisdom fails to account for the overbreadth doctrine, a doctrine allowing facial adjudication of a statute without reliance on the doctrine of severability. What is needed, then, is a normative doctrine to facilitate reasoned adjudication in the future.

In Part III, I attempt to provide a start toward a cohesive, normative doctrine in this area of the law by arguing that federal courts are constitutionally compelled to consider challenges to Congress's power to pass a statute as a facial challenge rather than an as-applied challenge.

I. THE CURRENT CONFUSION AS TO WHEN COURTS SHOULD USE FACIAL OR AS-APPLIED ANALYSIS

A. The Problem

As several commentators have noted, the Supreme Court's current jurisprudence regarding facial and as-applied challenges to statutes is conflicted.¹⁰ Much of the attention regarding this confusion has been directed toward what standard a court should apply when a statute has been challenged on its face.¹¹ In *United States v. Salerno*,¹² the Supreme Court suggested that a facial challenge could be successful only if a challenger could prove that "no set of circumstances exists under which the Act would be valid."¹³ The *Salerno* standard has been questioned, however, by both the courts¹⁴ and a multitude of academics.¹⁵

for a challenge to Congress's authority to pass the 2006 extension of Section 5 of the Voting Rights Act. 573 F. Supp. 2d 221, 235–36 (D.D.C. 2008), *rev'd sub nom.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).

10. See Metzger, *supra* note 2, at 878–80 (describing the various scholars who have noted the "confusion" in this area and the "disconnect" between the Supreme Court's black-letter rules and actual practice in this area).

11. See Dorf, *supra* note 2, at 239 (attempting to clarify when facial challenges are appropriate); Fallon, *supra* note 2, at 1321 (same).

12. 481 U.S. 739 (1987).

13. *Id.* at 745.

14. See, e.g., Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., dissenting from denial of cert.) (labeling the *Salerno* standards as "dicta" and inaccurate).

15. See, e.g., Dorf, *supra* note 2, at 238 ("This article argues that the *Salerno* principle is wrong.").

In addition to this confusion regarding *which* standard to apply when adjudicating a facial challenge, the Supreme Court's jurisprudence is also conflicted as to *when* a facial challenge should be entertained in the first place. The Court's recent decisions in *Tennessee v. Lane*¹⁶ and *Gonzales v. Raich*¹⁷ represent two different approaches to this question. In *Lane*, the Court answered the question whether Title II of the Americans with Disabilities Act¹⁸ (ADA) "exceed[ed] Congress' power under § 5 of the Fourteenth Amendment."¹⁹ Two paraplegics had brought suit against the State of Tennessee and a number of Tennessee counties claiming that their failure to make various courtrooms handicap-accessible had violated Title II of the ADA,²⁰ which generally requires that government entities make reasonable accommodations for the disabled in all public services.²¹ The paraplegic plaintiffs sought both damages and equitable relief.²²

Because Tennessee had claimed immunity pursuant to the Eleventh Amendment, it was necessary to determine whether Congress had abrogated that immunity pursuant to its Section 5 power to enforce the Fourteenth Amendment.²³ To answer this question, the Court (sans Justice Scalia)²⁴ continued to use the "congruence and proportionality"

16. 541 U.S. 509 (2004).

17. 545 U.S. 1 (2005).

18. 42 U.S.C. §§ 12131–65 (2006).

19. *Lane*, 541 U.S. at 513. Although Justice Stevens, in his majority opinion, framed the issue as involving Congress's power to enact legislation under Section 5 of the Fourteenth Amendment, a compelling argument can be made from Court precedent that the issue in *Lane* should have been the closely related question of Congress's power to abrogate the states' Eleventh Amendment immunity. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Title I of the ADA was not a valid abrogation of the States' Eleventh Amendment immunity, *id.* at 374 n.9. The Court determined that the abrogation analysis must be different than the analysis to determine whether Congress validly enacted the statute pursuant to Section 5 of the Fourteenth Amendment; the abrogation analysis must exclude evidence of Fourteenth Amendment constitutional violations by nonstate government actors, while the "power" question would presumably allow such evidence. *See id.* at 368–69; *see also* *Thompson v. Colorado*, 278 F.3d 1020, 1032 n.7 (10th Cir. 2001) (identifying the abrogation-power dichotomy established in *Garrett*). In *Lane*, however, the Court appeared to move away from the abrogation-power dichotomy, framing the issue in terms of Congress's power to enact Title II and considering evidence of constitutional violations by local actors as well as state actors. *See Lane*, 541 U.S. at 513, 527 n.16. The Court, however, was not completely explicit about its rejection of the dichotomy approach used in *Garrett* as it noted that judicial branches of local governments have traditionally been treated as state actors for purposes of Eleventh Amendment immunity. *See id.* at 527 n.16. Thus, for purposes of this Article, I will take the Supreme Court at its word and assume that the issue in *Lane* was actually Congress's power to enact Title II rather than the power to abrogate Eleventh Amendment immunity.

20. *Lane*, 541 U.S. at 513–14.

21. 42 U.S.C. § 12132.

22. *Lane*, 541 U.S. at 514.

23. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59–73 (1996) (holding that Congress can abrogate Eleventh Amendment immunity only through its Section 5 power to enforce the Fourteenth Amendment).

24. In his *Lane* dissent, Justice Scalia explained that he would not continue to apply the "flabby" congruence and proportionality test. 541 U.S. at 557–58 (Scalia, J., dissenting).

test first articulated in *City of Boerne v. Flores*.²⁵ Under this test, the Court determines whether the congressional statute in question is a congruent and proportional response to a history and pattern of unconstitutional state action.²⁶ In *Lane*, however, the Court disagreed on the manner in which the congruence and proportionality test should be employed. To dissenting Chief Justice Rehnquist and dissenting Justices Kennedy and Thomas, the congruence and proportionality test required the Court to measure the full range of potential applications of the statute versus the various constitutional rights the statute could be viewed as enforcing.²⁷ Under this facial approach, the question of whether Congress had the power to abrogate Eleventh Amendment immunity through Title II of the ADA would be conclusively resolved by the Court in the *Lane* case. This facial approach had been used by a majority of the circuit courts to consider the Title II question before *Lane*.²⁸ Under this global approach, the dissenters determined that Title II, as a whole, was not a valid abrogation of Tennessee's Eleventh Amendment immunity.²⁹

The *Lane* majority, however, framed the issue differently than the dissent, employing an as-applied approach to determining the constitutionality of Title II. Rather than considering all the constitutional rights that Title II could be viewed as enforcing, which was the facial approach advocated by Chief Justice Rehnquist, the majority focused only on the constitutional right deemed at issue in the case: the right of access to the courts.³⁰ In this limited context, the majority concluded, Title II was a congruent and proportional response to unconstitutional deprivations of access to the courts. Thus, under this as-applied approach, Congress was within its power under Section 5 of the Fourteenth Amendment and the statute could be applied against Tennessee, at least under the facts of the case before the Court. Under the majority's analysis, then, no global determination was made on Congress's power to pass Title II of the ADA as it had been written; all that was determined was that Congress had the power to pass and apply the statute to the facts of the case before the Court.³¹

The as-applied approach used by the majority of the Court in *Lane* stands in stark contrast to the Court's facial approach in *Gonzales v. Raich*.³² *Raich* involved a challenge to Congress's power under Article I to "prohibit the local cultivation and use of marijuana in compliance with California law" pursuant to the Controlled Substances Act (CSA).³³ In *Raich*, the CSA was not challenged on its face; indeed, the challengers stipulated that the CSA as a whole was "well within Congress's commerce power."³⁴ Instead, the CSA was challenged as it applied to two California citizens who used

25. 521 U.S. 507 (1997).

26. *See id.* at 530–32 (explaining the congruence and proportionality test).

27. *Lane*, 541 U.S. at 551–52 (Rehnquist, C.J., dissenting).

28. *See* Seth A. Horvath, Note, *Disentangling the Eleventh Amendment and the Americans With Disabilities Act: Alternative Remedies for State-Initiated Disability Discrimination Under Title I and Title II*, 2004 U. ILL. L. REV. 231, 248 n.155 (listing circuit court decisions examining the constitutionality of Title II of the ADA).

29. *Lane*, 541 U.S. at 553–54 (Rehnquist, C.J., dissenting).

30. *Id.* at 530–31 (majority opinion).

31. *Id.*

32. 545 U.S. 1 (2005).

33. *Id.* at 5, 7.

34. *Id.* at 15.

marijuana grown locally within California for medicinal purposes, as permitted under California law.³⁵ Despite the best efforts of the challengers to frame the issue narrowly as an as-applied challenge,³⁶ the Court's analysis was essentially facial in character, reasoning that the intrastate usage by the challengers in the case before the Court could not be isolated from Congress's general objective to regulate controlled substances, which clearly came within Congress's Article I powers.³⁷ The majority in *Raich* reasoned that the as-applied approach advocated by the challengers was inappropriate and inconsistent with Court precedent, stating: "we have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'"³⁸ In particular, the *Raich* majority relied on its recent decisions in *United States v. Lopez*³⁹ and *United States v. Morrison*⁴⁰ to justify its approach. In *Lopez*⁴¹ the Court struck down the Gun-Free School Zones Act of 1990,⁴² and in *Morrison* the Court struck down the Violence Against Women Act of 1994.⁴³ In both cases, the Court used a facial approach in reaching its conclusion that Congress had exceeded its authority under the Commerce Clause.⁴⁴

As in *Lane*, however, the majority's framing of the constitutional challenge was criticized sharply by the dissent. In *Raich*, Justice Thomas reasoned:

[I]t is implausible that this Court could set aside entire portions of the United States Code as outside Congress' power in *Lopez* and *Morrison*, but it cannot engage in the more restrained practice of invalidating particular applications of the CSA that are beyond Congress' power. This Court has regularly entertained as-applied challenges under constitutional provisions, including the Commerce Clause. There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis.⁴⁵

The Court's recent decisions in *Lane* and *Raich* present a clear contrast in the different approaches a federal court can take when a litigant challenges Congress's constitutional authority to pass a statute. I will use the phrase "facial versus as applied" to refer to these two contrasting approaches. How a court resolves the facial-versus-as-applied question can be outcome determinative—not only for the litigants involved in the case before the court, but for the statute in question as well. In *Lane* the Court proceeded with an as-applied analysis of the challenge to congressional authority to

35. *Id.* at 6–7, 15.

36. *Id.* at 15.

37. *Id.* at 18–20.

38. *Id.* at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (internal quotations omitted) (alteration in original).

39. 514 U.S. 549 (1995).

40. 529 U.S. 598 (2000).

41. *Lopez*, 514 U.S. at 551.

42. 18 U.S.C. § 922(q) (Supp. V 1988), *invalidated by Lopez*, 514 U.S. 549.

43. *Morrison*, 529 U.S. at 601–02.

44. *See id.* at 613; *Lopez*, 514 U.S. at 567.

45. *Gonzales v. Raich*, 545 U.S. 1, 72–73 (2005) (Thomas, J., dissenting) (citations omitted).

enact Title II of the ADA under Section 5 of the Fourteenth Amendment, and concluded that Congress did have authority to pass the statute, at least under the circumstances presented by the case.⁴⁶ Had the majority in *Lane* viewed the challenge as one that had to be adjudicated on its face, rather than in the limited context of an access-to-courts case, it presumably would have agreed with the analysis in Chief Justice Rehnquist's dissent. In *Raich*, the majority used a facial analysis to uphold the power of Congress to pass the CSA.⁴⁷ Had the majority used Justice Thomas's as-applied approach, it presumably would have been forced to conclude that Congress could not reach the type of purely intrastate possession of marijuana implicated in the case before the Court.

There are other, even starker, examples of the effect that the Court's as-applied-versus-facial decision can have on Congressional enactments. Compare the fate of Title I of the ADA versus Title II of the ADA. In *Board of Trustees of the University of Alabama v. Garrett*,⁴⁸ the Supreme Court determined that Title I of the ADA, which prohibits employers (including state employers) from "discriminating" against employees with disabilities, was not a valid abrogation of state sovereign immunity under Congress's power to enforce the Fourteenth Amendment.⁴⁹ The decision was based on the face of the statute; the Court determined that Title I was not a valid abrogation of state sovereign immunity in any situation.⁵⁰ As has already been discussed, in *Lane* the Court determined that Title II of the ADA was valid in the context of access to the courts for the disabled, even though the distinction made by the Court was not reflected in the text of the statute.⁵¹ In *United States v. Georgia*,⁵² the Court took this as-applied approach one step further by holding that claims asserted under Title II were *always* valid inasmuch as the Title II claim also represented a valid constitutional claim under the Fourteenth Amendment.⁵³ Thus, because of the decision to proceed in an as-applied manner in *Georgia*, Title II of the ADA remains a viable option for a plaintiff seeking money damages against a state official for unconstitutional discrimination, because Title II was upheld as a valid abrogation in *Georgia* as it applied to actual unconstitutional discrimination.⁵⁴ A plaintiff making a similar claim for unconstitutional employment discrimination under Title I of the ADA, however, will not be able to seek money damages—even in situations in which the plaintiff had suffered unconstitutional discrimination—because that provision was invalidated on its face by the Court in *Garrett* in regard to the sovereign immunity abrogation issue.⁵⁵ Thus, a plaintiff suffering unconstitutional discrimination can sue for money damages under Title II of the ADA but not under Title I of the ADA; this

46. *Tennessee v. Lane*, 541 U.S. 509, 530–34 (2004).

47. *Raich*, 545 U.S. at 22–25.

48. 531 U.S. 356 (2001).

49. *Id.* at 374.

50. *Id.* at 372–74.

51. *Lane*, 541 U.S. at 530–31.

52. 546 U.S. 151 (2006).

53. *Id.* at 159.

54. *Id.*

55. *Garrett*, 531 U.S. at 372–74.

discrepancy appears to be based solely on the Court's different approach to the facial-versus-as-applied-question.⁵⁶

Another illustrative, and historical, pair of cases on the importance of the facial-versus-as-applied issue is *United States v. Reese*⁵⁷ and *United States v. Raines*.⁵⁸ In *Reese*, the Supreme Court considered a challenge to congressional Reconstruction legislation aimed at preventing efforts within the states to impede eligible voters from voting.⁵⁹ The Court used a facial approach to strike down the statute on its face.⁶⁰ The Court reasoned that Congress's power to pass legislation under the Fifteenth Amendment was limited to addressing voting discrimination based on race, color, or previous condition of servitude.⁶¹ Although the statute in question had been used to prosecute election officials who had denied voting access to an African American,⁶² the Court reasoned that the statute was invalid on its face because it was not explicitly limited to the type of voting discrimination prohibited by the Fifteenth Amendment.⁶³ Because the statute had a wider scope, it was invalid on its face even though the statute was being applied to a situation involving racial discrimination.⁶⁴ In *Raines*, however, the Court rejected a conceptually identical argument with regard to the Civil Rights Act of 1957.⁶⁵ The case involved racial discrimination by a state actor⁶⁶ clearly within Congress's power to prohibit under the Reconstruction amendments. However, the state-actor defendant asserted a facial challenge to the statute because it arguably applied to discrimination by nonstate actors as well.⁶⁷ The Court refused to entertain the facial challenge to the statute, reasoning that the statute was, at the least, constitutional as applied to the state-actor defendant in this case.⁶⁸ Had the Court used the *Reese* approach, however, it would have had to strike down the statute on its face because the 1957 Act applied to conduct (racial discrimination by nonstate actors) that was not covered by the Fourteenth and Fifteenth Amendments.

B. Descriptive Explanations of the Court's Jurisprudence

It is clear, then, that the facial-versus-as-applied threshold issue can have a profound effect on the ultimate validity of congressional statutes. Because of this issue's importance, it is imperative that the issue be decided according to a clear framework. If

56. There is no indication in the *Georgia* opinion as to why the Court's analysis could not apply with equal force to claims seeking money damages under Title I for alleged constitutional discrimination.

57. 92 U.S. 214 (1875).

58. 362 U.S. 17 (1960).

59. *Reese*, 92 U.S. at 216.

60. *See id.* at 221–22.

61. *Id.* at 217.

62. *Id.* at 215.

63. *Id.* at 219–20 (reasoning that the statute could leave an election official open to punishment for reasons not contemplated by the statute).

64. *Id.* at 221.

65. 42 U.S.C. § 1995 (2006).

66. *United States v. Raines*, 362 U.S. 17, 19 (1960).

67. *Id.* at 20.

68. *Id.* at 25.

no doctrine controls this question's resolution, the issue can be manipulated to achieve a certain result in a case and a certain disposition on the constitutionality of a congressional enactment—scholars have already noted this occurrence.⁶⁹ Unfortunately, however, there exists no simple doctrine that explains the Court's jurisprudence on this issue. In the following Part, I will show that a host of doctrines that might be used to understand the facial-versus-as-applied issue fail to descriptively account for even the Court's most recent jurisprudence.

1. A Pleading Issue

Consider first the view taken by Justice Scalia dissenting in *City of Chicago v. Morales*.⁷⁰ According to Justice Scalia, the litigant making the constitutional challenge to a statute will either challenge the statute on its face or as it applies to the litigant under the facts of the case.⁷¹ Under this view, then, the litigant will determine the proper framework by which the Court will analyze the constitutional challenge being made.⁷² In practice, however, the Court has not allowed individual litigants challenging the statute to dictate to the Court, through their pleadings, the proper framework for adjudicating a constitutional challenge to a statute. One need look no further than the *Lane* and *Raich* decisions to eliminate this theory as a valid description of the Court's jurisprudence. In *Raich*, the challengers to the CSA clearly framed their challenge as applied to their individual facts and disavowed any attempt to make a facial challenge.⁷³ Nevertheless, the Court's analysis was facial and has the effect of insulating the CSA from further challenges based on a lack of congressional power to pass the statute.⁷⁴ In *Lane*, judging from the briefs and oral argument, there was obviously much confusion among the litigants over whether the Court should consider the constitutional challenge to Title II on its face. The State of Tennessee, the party making the constitutional challenge, preserved both a facial and an as-applied challenge in its briefings,⁷⁵ but at oral argument seemed to stress the facial challenge.⁷⁶

69. See Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the Agins' Tests*, 33 URB. LAW. 343, 358 (2001) (suggesting that the facial and as-applied "nametags" can be manipulated depending on how a court feels about the merits of a case).

70. 527 U.S. 41 (1999).

71. *Id.* at 77–78 (Scalia, J., dissenting).

72. Of course, even under this view of when the Court should entertain a facial challenge to a statute, there is still the separate but related question over what standard the litigant must meet to mount a successful facial challenge. This question was the primary issue addressed by Justice Scalia in his *Morales* dissent. See *id.*

73. See *Gonzales v. Raich*, 545 U.S. 1, 8 (2005) (arguing the CSA did not apply because the marijuana was grown for a private medical use).

74. See *id.* at 17–20 (reasoning that a purpose of the CSA is to regulate the trafficking of illicit drugs and measuring any production and use, even a purely "private" use, as a legitimate congressional pursuit).

75. Reply Brief for Petitioner at 1, *Tennessee v. Lane*, 541 U.S. 509 (2004) (No. 02-1667) (arguing that Title II is unconstitutional under either a facial or as-applied approach).

76. See Transcript of Oral Argument at 4–5, *Lane*, 541 U.S. 509 (No. 02-1667) ("[W]hether the Court views the statute in its—in overall operation, or as focused narrowly on the courthouse access context, either analysis leads to the same conclusion. Having said that, I would say that the prohibition of Title II is a single, unitary, very elegant one-sentence

Nevertheless, the *Lane* majority used an as-applied approach to resolve the issue.⁷⁷ In both *Raich* and *Lane*, the Court ignored the challenging litigant's framing of the case. In *Raich*, it was done explicitly when the Court rejected the as-applied analysis stressed by the respondents. In *Lane*, the rejection was more implicit, but nevertheless functionally the same. In its pleadings, Tennessee had made both an as-applied challenge to Title II of the ADA—framing the issue much like the issue was framed in the *Lane* majority opinion—and a facial challenge. The Court considered Tennessee's as-applied challenge, which it rejected, but the Court never considered the facial claim. If the Court was merely at the mercy of Tennessee's framing of its constitutional challenge, the Court would have been obligated to consider Tennessee's facial challenge after disposing of Tennessee's as-applied challenge.⁷⁸ In this sense, then, *Lane* is just as strong of a case as *Raich* to support the proposition that a constitutional challenger to a statute cannot dictate to a court the reference by which a court will view the constitutional challenge. In *Raich*, an as-applied challenge was made, but the Court's analysis was facial. In *Lane*, Tennessee asserted both a facial and an as-applied challenge, but the Court considered only the as-applied challenge and refused to consider the facial challenge. It has not been the case, then, that the Court has felt compelled to frame its analysis of the constitutional challenge according to the challenger's pleadings.

2. Judicial Deference

Another descriptive theory, and one that can at least explain the *Lane* and *Raich* decisions, is that the Court will use the approach—either facial or as applied—that preserves as much of the congressional statute as possible. The Court has intimated that this canon of adjudication has applicability to the facial-versus-as-applied question,⁷⁹ as have some commentators.⁸⁰ And, this theory does well in accounting for some cases, such as *Raich* and *Lane*. In *Raich*, an as-applied approach would have resulted in certain applications of the CSA being declared unconstitutional,⁸¹ so the Court instead

prohibition in section 12132 of Title 42. It doesn't purport to subdivide the statute—the statute's prohibitions into particular subject matter areas. And as the United States points out in its brief, this Court's prior congruence and proportionality cases in—in the abrogation context suggest that the Court looks usually at the overall operation of the statute.”)

77. See *Lane*, 541 U.S. at 530–31.

78. Recitation of the *Salerno* standard would presumably have disposed of Tennessee's facial challenge. If Title II of the ADA could be constitutionally applied to the facts of the case before the Court, then, under *Salerno*, the facial challenge was without validity. The Court never engaged in this analysis, probably wanting to avoid another dispute about the appropriateness of the *Salerno* standard. However, if a litigant can choose which type of challenge to assert to a statute, and if, as Justice Scalia seemed to maintain in *Morales*, the Court was compelled to respond to the litigant's pleading and framing of the case, it should have also considered the facial challenge put forward by Tennessee.

79. See *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (rejecting a facial challenge to the Partial-Birth Abortion Act of 2003 because of the many constitutional applications of the statute).

80. See David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 651–62 (2008) (discussing facial and as-applied challenges and the desire to preserve as much of a statute as possible from invalidation).

81. See *Gonzales v. Raich*, 545 U.S. 1, 73 (2005) (Thomas, J., dissenting) (using an as-

viewed the constitutional challenge as one that must be decided facially to preserve the entire CSA.⁸² Conversely, in *Lane*, a facial approach would probably have required striking down Title II of the ADA,⁸³ so the Court used an as-applied approach to preserve, at least, the ADA's requirements to a portion of the conduct that Congress intended to regulate. These two cases, at least, could thus be understood as the Court deferring to a coordinate branch of government and attempting to limit its decision so as to do the least violence to the work of Congress. And, other Supreme Court cases also seem to fit nicely into this theory. In *United States v. Georgia*,⁸⁴ for instance, the Court again considered a challenge by a state to Congress's ability to abrogate Eleventh Amendment immunity under Title II of the ADA.⁸⁵ And, again, the Court refused to consider the issue facially, instead holding that claims asserted under Title II were valid inasmuch as the Title II claim also represented a valid constitutional claim under the Fourteenth Amendment.⁸⁶

Unfortunately, this descriptive theory breaks down upon consideration of other cases. In *Lopez*, the Court used a facial analysis to strike down the Gun-Free School Zones Act of 1990,⁸⁷ had the Court used the *Lane* approach or the approach advocated by Justice Thomas's dissent in *Raich*, it could have asked whether the gun in question had actually travelled in interstate commerce.⁸⁸ This approach would have at least presented a colorable argument that the Act was constitutional as applied to Lopez if his gun had actually moved in interstate commerce. Similarly, in *Board of Trustees of the University of Alabama v. Garrett*,⁸⁹ the Supreme Court determined that Title I of the ADA, which prohibited employers (including state employers) from "discriminating" against employees with disabilities, was not a valid abrogation of state sovereign immunity under Congress's power to enforce the Fourteenth Amendment.⁹⁰ Again, had the Court been committed to preserving as much of Title I as possible, it could have used an as-applied approach to ask whether the employment discrimination against the plaintiffs in *Garrett* was so irrational as to amount to a constitutional deprivation. If it was, the Court could have at least held that Title I was a valid abrogation as applied to the plaintiffs who had suffered unconstitutional employment discrimination. Indeed, this was the very method used by the Court in *Georgia*.⁹¹ Recent cases, like *Lopez* and *Garrett*, demonstrate that the Court has not always strived to preserve as much of the statute as possible when considering how to frame constitutional challenges. This theory, then, fails to descriptively account for the Court's jurisprudence on the facial-versus-as-applied question.

applied analysis to conclude that the constitutional challenge was valid in the case before the Court).

82. *See id.* at 22–24 (majority opinion).

83. *See Tennessee v. Lane*, 541 U.S. 509, 551–52 (Rehnquist, C.J., dissenting) (applying a facial analysis and concluding that Title II was unconstitutional).

84. 546 U.S. 154 (2006).

85. *Id.* at 156.

86. *Id.* at 159.

87. *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

88. *See Gonzalez v. Raich*, 545 U.S. 1, 73 (2005) (Thomas, J., dissenting) (using an as-applied analysis to conclude that the constitutional challenge was valid in the case before the Court).

89. 531 U.S. 356 (2001).

90. *Id.* at 367.

91. *See Georgia*, 546 U.S. at 159.

3. Different Constitutional Clauses

The Court's use of facial and as-applied analysis is no more comprehensible when one attempts to separate the Court's decisions based solely on the constitutional clause involved. Consider first the Court's Commerce Clause decisions. *Lopez* and *Raich* both involve facial determinations in a Commerce Clause challenge with different results as to the fate of the statute in question: in *Raich* the CSA was upheld on its face, while in *Lopez* the Gun-Free School Zones Act of 1990 was struck down on its face.⁹² Other Supreme Court Commerce Clause decisions, however, use an as-applied analysis and again reach different conclusions. For example, in *Katzenbach v. McClung*,⁹³ the Supreme Court upheld the constitutionality of the public accommodations provisions of the Civil Rights Act as applied to Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama.⁹⁴ In *United States v. E.C. Knight Co.*,⁹⁵ the Court used the same type of as-applied analysis but reached a different conclusion: The Court determined that the Sherman Act could not be applied to set aside a monopoly in manufacturing because the Act could not be applied to "manufacturing."⁹⁶

Thus, a chart of the Court's use of facial and as-applied challenges in the Commerce Clause context, with the possible modes of analysis charted on the y-axis and the results charted on the x-axis, shows that every possible result has been reached.

Table 1. Commerce Clause

	Struck Down	Upheld
Facial	<i>Lopez v. United States</i>	<i>Gonzales v. Raich</i>
As Applied	<i>United States v. E.C. Knight Co.</i>	<i>Katzenbach v. McClung</i>

Supreme Court decisions addressing Congress's power to enforce the Fourteenth Amendment can be similarly charted. As mentioned above, *Garrett* involved a facial invalidation of the challenged statute.⁹⁷ In *Nevada Department of Human Resources v. Hibbs*,⁹⁸ however, the Supreme Court upheld the Family and Medical Leave Act on its face as a valid abrogation of Eleventh Amendment immunity.⁹⁹ As has already been discussed, the Court used an as-applied analysis in *Lane* and *Georgia* to uphold Title II as a valid abrogation of sovereign immunity.¹⁰⁰ And, although I have not been able to find an Enforcement Clause case in which the Supreme Court used an as-applied analysis to strike down an application of a congressional enforcement statute, this result is necessarily implicated by *Lane* and *Georgia*. If Title II of the ADA is a valid

92. See *Raich*, 545 U.S. at 17–20; *Lopez*, 514 U.S. at 567.

93. 379 U.S. 294 (1964).

94. *Id.* at 304–05.

95. 156 U.S. 1 (1895).

96. *Id.* at 17.

97. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2000) (holding that a contrary outcome "would allow Congress to rewrite the Fourteenth Amendment").

98. 538 U.S. 721 (2003).

99. See *id.* at 726–27.

100. See *supra* notes 45–56 and accompanying text.

abrogation of sovereign immunity as applied to the context of courtroom access or in the case of actual constitutional deprivations, it is conceivable that the statute might not be a valid abrogation in other contexts. Indeed, some lower courts have followed the Court’s as-applied analysis in *Lane* and *Georgia* but have come to different conclusions as to the statute’s constitutionality as applied to the facts of the case before the court. For instance, in *Simmang v. Texas Board of Law Examiners*,¹⁰¹ the Western District of Texas held that Title II of the ADA was not a valid abrogation of sovereign immunity as applied to a request for an accommodation on the Texas bar exam.¹⁰² Thus, it seems fair to conclude that no doctrinal consistency can be ascertained by focusing solely on the constitutional source of congressional power; federal courts used both facial and as-applied analyses to both uphold and strike down statutes.

Table 2. Enforcement Power

	Struck Down	Upheld
Facial	<i>Board of Trustees v. Garrett</i>	<i>Nevada Department of Human Resources v. Hibbs</i>
As Applied	<i>Simmang v. Texas Board of Law Examiners</i>	<i>Tennessee v. Lane</i>

The same divergence of approaches and results can be seen in cases involving the assertion of individual rights such as freedom of speech. In this context, at least, the Court has been somewhat more aware of the facial-versus-as-applied issue, developing the overbreadth doctrine to justify a facial invalidation of a statute that does not infringe on the free speech rights of the litigant asserting the constitutional challenge.¹⁰³ Nevertheless, the Court has failed to develop a coherent doctrine as to when the overbreadth doctrine should be employed,¹⁰⁴ and there are a plethora of cases that fit into each of the four categories of cases identified above. In *Watchtower Bible and Tract Society v. Village of Stratton*,¹⁰⁵ the Supreme Court struck down an ordinance on its face that prohibited door-to-door advocacy without first applying for and receiving a permit from the village’s mayor.¹⁰⁶ In *United States v. O’Brien*,¹⁰⁷ the Supreme Court upheld, on its face, a federal law prohibiting the destruction or mutilation of draft

101. 346 F. Supp. 2d 874 (W.D. Tex. 2004).

102. *See id.* at 875 (holding that Title II was not a valid abrogation of sovereign immunity as applied to claim for accommodation on Texas bar exam).

103. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (explaining that under the overbreadth doctrine litigants “are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression”).

104. *See Luke Meier, A Broad Attack on Overbreadth*, 40 VAL. U. L. REV. 113, 135–37 (2005) (explaining the various applications and limitations of the overbreadth doctrine).

105. 536 U.S. 150 (2002).

106. *Id.* at 169.

107. 391 U.S. 367 (1968).

cards.¹⁰⁸ In *Spence v. Washington*,¹⁰⁹ the Supreme Court used an as-applied analysis to overturn the conviction of a college student for displaying a privately owned American flag outside his apartment.¹¹⁰ The Supreme Court also used an as-applied analysis in *Adderley v. Florida*,¹¹¹ but with a different result than the one reached in *Spence*. In *Adderley*, the Supreme Court affirmed a criminal trespass conviction against an as-applied challenge to the application of the statute to the defendant.¹¹²

Table 3. Free Speech

	Struck Down	Upheld
Facial	<i>Watchtower Bible and Tract Society v. Stratton</i>	<i>United States v. O'Brien</i>
As Applied	<i>Spence v. Washington</i>	<i>Adderley v. Florida</i>

II. LEGAL SCHOLARSHIP ON THE AVAILABILITY OF FACIAL CHALLENGES

Modern scholars, in an attempt to reconcile the Court's jurisprudence on the facial-versus-as-applied question, have put forward more sophisticated arguments than the easily dismissed theories discussed above. The predominant approach found in modern legal scholarship regarding the facial-versus-as-applied issue is to largely deny that it exists. The conventional modern wisdom is that the difference between facial and as-applied challenges is largely illusory and that the crux of the issue boils down to a question of severability.

Unfortunately, these thought-provoking theories fare no better in descriptively explaining the Court's jurisprudence than the theories dismissed in Part I. The modern conventional wisdom misunderstands the relationship between severability and the facial-versus-as-applied question. To modern scholars, the implicit choice made by courts regarding the severability of a statute determines the scope of the court's ruling—what I have termed the facial-versus-as-applied question. Unfortunately, this theory, while conceptually plausible, does not descriptively account for the process that lawyers use to litigate, and courts use to adjudicate, a case. Courts do not stumble into the facial-versus-as-applied decision only after making a severability decision. Rather, courts confront the facial-versus-as-applied decision head-on. Only after deciding the proper framing by which to analyze the constitutional challenge presented would a severability analysis become relevant, but even here there is no indication that the Court is engaging in the analysis that has been assumed by modern scholars. In essence, modern conventional wisdom confuses the cause-and-effect relationship between the facial-versus-as-applied question and the severability question. The severability question is not a causal driver of the scope of the Court's analysis in a constitutional challenge; at most, it is an issue that might need to be addressed after the facial-versus-as-applied question has been answered. In addition, the modern

108. *Id.* at 372.

109. 418 U.S. 405 (1974).

110. *Id.* at 405–06.

111. 385 U.S. 39 (1966).

112. *Id.* at 46–48.

conventional wisdom utterly fails to account for the overbreadth doctrine, which measures the validity of some facial challenges without considering the severability question. Thus, the modern conventional wisdom, although ingenious and creative, fails to descriptively account for the Court's jurisprudence in this area.

A. The Modern Conventional Wisdom

Rather than focusing on the differences between as-applied and facial challenges, most modern scholars have attempted to understand the Supreme Court's tortured jurisprudence in this area by assuming that there is little difference between the two analyses. Professor Dorf states that "[t]he distinction between as-applied and facial challenges may confuse more than it illuminates. In some sense, any constitutional challenge to a statute is both as-applied and facial."¹¹³ Along the same lines, Professor Fallon argues that "facial challenges are less categorically distinct from as-applied challenges than is often thought."¹¹⁴ Similarly, Professor Metzger states that "[t]he distinction between facial and as-applied challenges is more illusory than the ready familiarity of the terms suggests."¹¹⁵ For these scholars, then, questions of facial-versus-as-applied analysis mask the dispositive inquiry in the cases: whether constitutional applications of the statute can be severed from unconstitutional applications. In a recent publication, Professor Metzger attempts to summarize conventional thinking regarding the relationship between facial challenges and severability:

Although the Court rarely acknowledges the role severability plays in its assessment of constitutional challenges, existing scholarship generally agrees that the debate regarding the availability of facial challenges is, at bottom, fundamentally a debate about severability. 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. If unconstitutional applications are not severed, the statute cannot be applied to any litigant, even one making no claim of constitutional protection for her conduct. 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.¹¹⁶

Professor Metzger has, by and large, accurately portrayed modern thinking on facial challenges and severability. In his widely influential article *Overbreadth*,¹¹⁷ Henry Monaghan first put forward the view that every litigant has a right to be judged by a constitutionally valid rule of law.¹¹⁸ Under this view, any statute is void in its entirety if

113. Dorf, *supra* note 2, at 294.

114. Fallon, *supra* note 2, at 1341.

115. Metzger, *supra* note 2, at 880.

116. *Id.* at 887–88 (quoting Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3) (alterations in original) (footnotes omitted).

117. Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

118. *See id.* at 1–5; *see also* Dorf, *supra* note 2, at 243–44 (identifying both his and Professor Fallon's agreement with Monaghan's premise).

it is capable of being unconstitutionally enforced under any set of facts.¹¹⁹ Other modern scholars have generally accepted Monaghan's premise that a litigant has the right to be judged by a constitutionally valid rule of law.¹²⁰ Thus, for these scholars, the question of a statute's constitutionality will always hinge on whether unconstitutional applications of the statute can be severed from the constitutional ones.¹²¹ In *Lane*, then, the question was not whether the Court should consider Title II facially, but whether the Court could sever the "unconstitutional" applications of the statute from the "constitutional" applications: "[V]iewing the issue in *Lane* as the availability of facial challenges is misleading. . . . The real question raised by *Lane* is instead how should the Court approach severability in the Section 5 context."¹²²

The modern conventional wisdom was partially attacked in a recent article by David Franklin.¹²³ Franklin, like me, doubts the role that severability plays in the facial-versus-as-applied debate: "[T]he centrality of severability analysis to the distinction between facial and as-applied review has been overstated by these commentators."¹²⁴ Franklin's analysis focuses on the perceived analytical shortcoming of the conventional wisdom. Franklin's essential argument is that the conventional wisdom cannot account for cases in which the Court either generically upholds or strikes down a statute on its face¹²⁵—what he terms (borrowing from Mark Isserles) a "valid-rule facial challenge."¹²⁶ Franklin asserts that the proponents of the severability analysis fail because they assume that the constitutionality of a statute is always analyzed by considering how the statute applies in various situations—what Isserles and Franklin call the "overbreadth assumption."¹²⁷

To help illustrate the debate between Franklin and the proponents of the conventional wisdom addressing severability, consider Professor Monaghan's well-known hypothetical in which it is assumed that dancing in a barroom is expressive conduct covered by the First Amendment.¹²⁸ Assume further that the Court has upheld

119. *See* Dorf, *supra* note 2, at 243–44.

120. *See, e.g., id.* at 238 ("[B]ecause no one may be judged by an unconstitutional rule of law, a statute that has unconstitutional applications cannot be constitutionally applied to anyone, even to those whose conduct is not constitutionally privileged, unless the court can sever the unconstitutional applications of the statute from the constitutionally permitted ones."); Fallon, *supra* note 2, at 1331–33 (describing the process of severing invalid "subrules" of a statute); Monaghan, *supra* note 117, at 1–4 (articulating the view that no person may be judged by an unconstitutional rule of law).

121. *See* Dorf, *supra* note 2, at 294 (discussing courts avoiding constitutional questions by, inter alia, severing unconstitutional provisions of statutes); Fallon, *supra* note 2, at 1333–34 (describing severing unconstitutional provisions without crossing the vague line of judicial lawmaking); Metzger, *supra* note 2, at 931–32 (concluding there is no reason to abandon the presumption of severability regarding Section 5 statutes).

122. Metzger, *supra* note 2, at 889–90.

123. Franklin, *supra* note 2.

124. *Id.* at 64.

125. *See id.* at 66 (commenting that "the severability and facial versus as-applied review question stand on distinct grounds").

126. *Id.* at 44.

127. *Id.* at 65 (quoting Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 365, 385 (1998)).

128. *See* Monaghan, *supra* note 117, at 9–10 (explaining the barroom-dancing hypothetical).

laws restricting *barefoot* barroom dancing because these laws advance the government's compelling interest in sanitation and are the least restrictive means by which to advance that interest. In light of this precedent, Congress passes a statute prohibiting all dancing in barrooms, and a prosecution is brought against one who is dancing barefoot in a bar.

Based on the accepted conventional wisdom, according to Monaghan and the proponents of the severability analysis, the court will distinguish between the different factual scenarios under which the statute might be applied. The hypothetical barroom-dancing statute, then, will be facially invalid only if the unconstitutional applications of the statute (against those dancing with shoes on) cannot be severed from constitutional applications of the statute (against those dancing barefoot).¹²⁹ Professor Dorf, for example, states:

The answer [to whether the hypothetical statute is facially unconstitutional] depends on whether the court treats the unconstitutional applications of the statute as severable from the constitutional ones. Suppose that the highest court of the state holds the statute unconstitutional as applied to persons who are not barefoot. That does not necessarily mean that the entire law must fall. The court might void the statute to the extent it criminalizes nonbarefooted dancing, but sever the remainder as valid—in essence, rewriting the statute. Prior to the court's ruling, the law read: "Barroom dancing shall be an offense." By ruling that the statute's unconstitutional applications are severable, the court essentially holds that the law has two parts. The first reads: "Barroom dancing shall be an offense if the dancer is not barefoot." The second reads: "Barroom dancing shall be an offense if the dancer is barefoot." Under this analysis, the second part of the statute stands on its own as a constitutionally valid law. Thus, the court would sustain [the] conviction [of a barefoot dancer] under the statute because he is being judged by a valid rule—the newly severed second part of the statute.¹³⁰

The problem with Professor Dorf's analysis, according to Franklin, is that a court *could* analyze the statute without regard to the two different circumstances under which it applies (barefoot and with shoes). Under Professor Dorf's example, the court engaged in its analysis by first determining that the statute was unconstitutional as applied to barroom dancers wearing shoes; the court then engaged in its severability analysis. It is easy to imagine an opinion, Franklin might state, in which the court strikes down the statute on its face according to the following logic: "The statute intrudes upon the First Amendment right of expression. Thus, it must be justified by a compelling state interest which is the least restrictive means by which to advance the government's interest. We have previously upheld narrowly tailored restrictions on barefoot barroom dancing based on the government's compelling interest in sanitation. In the present case, the government has claimed an interest in sanitation. Although this government interest is compelling, the statute is not narrowly tailored to achieve the government's objective. Thus, the statute is unconstitutional."

In this hypothetical court opinion, the style of which should be familiar to anyone familiar with American constitutional law, the statute is unconstitutional on its face

129. I have intended, in my hypothetical, for "barefoot" and "with shoes on" to be mutually exclusive categories. The "hard case" of flip-flops has been ignored.

130. Dorf, *supra* note 2, at 249.

without regard to whether the “good” applications of the statute can be severed from the “bad” applications of the statute. The statute is analyzed as a complete whole—what Franklin terms a valid-rule facial challenge—and not as applied to barefoot dancing or as applied to dancing with shoes on. The statute is not rewritten as if it applied separately to barefoot dancing and dancing with shoes on. It is summarily analyzed on its face.

Professor Franklin has correctly identified a weakness in the modern conventional wisdom. However, he is slightly misguided in attempting to state his critique of the conventional wisdom as an analytical point rather than an empirical point. As an analytical point, Professor Franklin’s argument fails because the proponents of severability analysis can simply respond by arguing that, in cases in which the Court has written an opinion in the manner of a valid-rule facial challenge, the severability analysis is “implicit” in the Court’s analysis.

Franklin assumes that our abbreviated hypothetical Supreme Court opinion, the style of which is replicated in hundreds of actual Supreme Court opinions, undermines the conventional wisdom based on severability analysis because the opinion is written as a valid-rule facial challenge. But, we can anticipate the response of those like Dorf and Metzger—indeed, Dorf even hints at his response to Franklin in his explanation of how a court would handle the barroom-dancing situation. For Dorf, the Court will engage in a severability analysis to determine whether the constitutional applications of the statute (those that apply to barefoot barroom dancing, which is what the defendant in our hypothetical case has done) can be severed from the unconstitutional ones.¹³¹ Thus, Dorf would explain our hypothetical opinion—the valid-rule facial challenge—by stating that the Court had engaged in an implicit analysis that the unconstitutional applications of the statute could not be severed from the constitutional applications of the statute.¹³² As an analytical matter, it is impossible to refute this assertion.

B. The Shortcomings of the Modern Conventional Wisdom

1. As a Descriptive Theory

Franklin’s attack on the conventional wisdom, then, is ultimately unsuccessful because it cannot analytically disprove the conventional wisdom’s reliance on severability analysis. Those like Dorf and Metzger can explain valid-rule facial challenges as instances where the Court did the severability analysis implicitly. Metzger concedes that the conventional wisdom relies on reading “underneath” the Court’s written analysis in its opinions when she writes that “the Court rarely acknowledges the role severability plays in its assessment of constitutional challenges.”¹³³

The problem with the modern conventional wisdom is not an analytical shortcoming, as Professor Franklin suggests, but rather it is a descriptive, or empirical, shortcoming. Legal scholarship is at its best when it synthesizes a seemingly incoherent

131. *See id.* at 249–51.

132. *Id.* at 250 (discussing the *Marbury* Court’s implicit analysis of severability).

133. Metzger, *supra* note 2, at 887. Metzger continues this defense of the conventional wisdom later in her article: “The Court rarely discusses severability when it upholds a statute’s constitutionality, and thus the practice . . . is usually implicit.” *Id.* at 892.

body of law by identifying and articulating the underlying principles which govern the cases. That is what proponents of the conventional wisdom have attempted to do, and their efforts are laudable. Ultimately, however, the scholarship must accurately reflect the analysis actually engaged in by the Court to be valuable; it must be descriptively accurate. It is on this point that the conventional wisdom fails. Although the severability theory can analytically explain the Court's opinions, it is not an accurate description of the actual process the courts (and lawyers arguing the cases) have engaged in when confronted with a constitutional challenge to a statute.

To evaluate how the conventional wisdom holds in accurately describing the methodology of the Court in deciding cases raising the facial-versus-as-applied question, consider again the *Lane* and *Lopez* opinions. According to the conventional wisdom, *Lane* was not decided as a facial challenge because the "presumption of severability" allowed the Court to consider the challenge more narrowly.¹³⁴ Rather than considering Congress's power to pass Title II of the ADA generically, the Court considered the power to require reasonable accommodations in the context only of access to courts, as this application of the statute could be severed from other applications of the statute. In *Lopez*, according to the conventional wisdom, the statute was struck down on its face because the unconstitutional applications of the statute could not be severed from the constitutional applications. For the sake of argument, we will assume that guns which had actually travelled in interstate commerce would constitute constitutional applications of the statute while guns which had existed purely within the State of Texas would be an unconstitutional application of the Act.¹³⁵

Lane and *Lopez* are a nice pair of cases for proponents of the modern conventional wisdom and the argument that the availability of facial challenges ultimately depends on a severability analysis. After all, the severability in *Lane* was based on a conceptual legal distinction: access to the courts had been protected at various times by the Court through various different constitutional clauses.¹³⁶ In this sense, then, the ease of severability was high: what was at issue was a constitutional right that was protected in a different manner than other less-protected constitutional rights to accommodations for the disabled in different circumstances.¹³⁷ Meanwhile, in *Lopez*, the distinction between constitutional and unconstitutional applications was a somewhat convoluted, fact-intensive question. Maybe the gun at issue in *Lopez* was manufactured in Lubbock and shipped directly to San Antonio, but did the steel used to make the gun come from Pittsburgh? The task of severing unconstitutional applications from constitutional applications was thus much easier in the *Lane* case because it was based on legal doctrine rather than fact-intensive inquiries resolved through case-by-case litigation. In essence, the severability issue in *Lane* involved a conceptual distinction, while in *Lopez* it involved a factual distinction. Thus, *Lane* and *Lopez* are good cases for the proponents of the conventional wisdom, because severing constitutional applications from unconstitutional applications can presumably be more easily done in the *Lane* context, as opposed to the *Lopez* context.

134. *Id.* at 917 (stating the *Lane* Court "applied the presumption of severability to avoid considering whether other applications of Title II were also constitutional").

135. This is the as-applied analysis essentially advocated for by Justice Thomas in his *Raich* dissent. See *Gonzales v. Raich*, 545 U.S. 1, 72–73 (2004) (Thomas, J., dissenting).

136. See *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

137. See *id.*

The problem with the conventional wisdom's explanation of *Lane* and *Lopez*, however, is that there is no indication that the Court actually engaged in the analysis claimed by the severability proponents, implicitly or explicitly. In *Lane*, the majority justifies its decision to consider Tennessee's claim as applied only to the constitutional right of access in a one-paragraph, abbreviated discussion toward the end of the opinion.¹³⁸ The opinion does not mention severability. The closest the Court comes to engaging in a severability analysis is in footnote eighteen, where the Court distinguishes the prior Section 5 Enforcement Clause decisions by noting that only one constitutional right was implicated by the statutes being challenged in those cases, while Title II potentially implicates numerous constitutional rights.¹³⁹ Similarly, the *Lopez* decision contains no detailed conclusion that the statute must be struck down on its face because it is difficult to separate the constitutional applications of the statute from the unconstitutional applications of the statute.¹⁴⁰ Indeed, both the majority and dissenting opinions seem to assume that the statute's constitutionality will be decided on the face of the statute, but there is no indication that this conclusion has been reached only after a severability analysis.¹⁴¹

Perhaps the Court makes no mention of a severability analysis in *Lane* and *Lopez* because the analysis was done implicitly or without "acknowledgment"¹⁴² by the Court, as the proponents of the severability theory argue. In comparing the Court's holding in *United States v. Georgia* to *Lopez*, however, reliance on an "implicit" or "unacknowledged" analysis by the Court seems even more unlikely. In *Georgia*, the Court again used an as-applied analysis to uphold a claim under Title II of the ADA. But, unlike in *Lane*, the distinction drawn by the Court was not based on the type of constitutional right implicated in the case. Instead, the distinction drawn by the Court was that the plaintiff had alleged actual constitutional deprivations under the Eighth Amendment prohibition against cruel and unusual punishment.¹⁴³ In terms of an "ease of severance" analysis, the *Georgia* case is somewhere between *Lopez* and *Lane*. I postulated that, in *Lopez*, the statute could not be severed into constitutional and unconstitutional applications because any unconstitutional applications would be difficult to discern and delineate from constitutional applications: individual attention in each case as to whether the gun in question had somehow traveled, or at least substantially affected, interstate commerce. But, in the *Georgia* case, the Court relied on a distinction in adopting an as-applied approach that required the same type of fact-intensive analysis that was supposedly (and implicitly) rejected in *Lopez*. Perhaps, on the ease of severability issue, the *Georgia* case can be distinguished from the *Lopez* case. Whether this distinction can be drawn or not is irrelevant. What is important is that in *Lopez*, the Court adopted a facial approach, and we are told by the proponents of severability analysis that this was because unconstitutional and constitutional applications were not easily severable. In *Georgia*, the Court adopted an as-applied approach, apparently (according to the conventional wisdom) because of the ease of

138. *Id.* at 530–31.

139. *See id.* at 530 n.18.

140. *See United States v. Lopez*, 514 U.S. 549, 561–62 (1995).

141. *See generally id.* at 551–68 (assuming that the statute's constitutionality will be determined on the face of the statute).

142. Metzger, *supra* note 2, at 887.

143. *See United States v. Georgia*, 546 U.S. 151, 157–58 (2006).

severing unconstitutional applications from constitutional applications. But, from a severability analysis, it seems that the two cases are somewhat related. At least, they are related enough, in terms of ease of severability, that one would expect the Court to engage in a discussion distinguishing *Georgia* from *Lopez*. In addition, in *Garrett* that the Court facially determined that Title I of the ADA was not a valid abrogation of sovereign immunity. Were the constitutional violations that could be asserted under Title I more difficult to sever than the constitutional violations that could be asserted under Title II in *Georgia*? From a severability standpoint, *Garrett* and *Georgia* seem nearly identical, but a different conclusion was reached regarding the facial-versus-as-applied question. More important than these contrasting conclusions, however, is that a severability analysis does not appear to be even a small part of the Court's analysis of the claim. There is no such discussion of severability in any of these cases. Severability analysis is not mentioned in the opinions. The process for engaging in a severability analysis has not been identified. Neither the briefs nor oral arguments focus on the question of severability. Particularly in cases where the severability analysis seems to at least raise the same issues, and the Court has supposedly reached different conclusions on the severability analysis, one would at least expect to find an analysis or a description of the Court's reasoning. It does not exist.

I am inclined to take the Court at face value on this question. If a severability analysis is really the dispositive point on the facial-versus-as-applied question, I cannot believe that this analysis would never be made a part of the Court's formal disposition of the case in the written opinions. According to the proponents of the conventional wisdom, the important facial-versus-as-applied analysis is the causal effect of a severability analysis. Why then, does the Court, in cases such as *Raich* and *Lane*, engage in a debate over the "effect" rather than the "cause"? If the debate in *Lane* was really about the ease of severing constitutional and unconstitutional application of Title II, why did Chief Justice Rehnquist's dissent not focus on the severance issue? The same point applies to Justice Thomas's dissent in *Raich*. The best explanation is not that the Court stumbled into this framing of the case only after it determined that it could not separate unconstitutional applications from constitutional ones. Although this understanding of the decisions is theoretically feasible, it is not the best description of the Court's analytical process in framing the decision in a facial cast. If the facial character of these decisions rests on a severability conclusion, one would expect to find a trace of this type of analysis in the Court's opinions. That there is no such analysis indicates that the facial-versus-as-applied decision is not made after a severability analysis, as modern scholarship currently posits. Instead, the decision to consider a challenge to a statute as a facial challenge is independently determined by the Court as a framing question.

2. Overbreadth Challenges

Perhaps even more damaging to Professor Metzger's claim that "the debate regarding the availability of facial challenges is, at bottom, fundamentally a debate about severability"¹⁴⁴ is the fact that severability often plays no part in the availability of facial challenges even *when* a court commits to analyzing a constitutional challenge

144. Metzger, *supra* note 2, at 887.

to a statute based on how the statute applies in various situations. This is the type of analysis the Court rejected in cases such as *Raich*, *Garrett*, and *Lopez*, and this analysis regularly occurs under the First Amendment overbreadth doctrine.

Under the overbreadth doctrine, a court entertains a free-speech facial challenge to a statute despite the fact that the statute is constitutional under the facts of the case before the court.¹⁴⁵ As such, the doctrine is an exception to normal rules regarding standing.¹⁴⁶ The litigant argues that the entire statute should be struck down because it could be applied unconstitutionally in other fact patterns not before the court. It is not fatal to the constitutionality of a statute, however, that a court might hypothesize about a few situations in which application of the statute would be unconstitutional.¹⁴⁷ Rather, a statute is unconstitutional under the overbreadth doctrine if the number of unconstitutional versus constitutional applications of the statute crosses some threshold standard.

Under the overbreadth doctrine, the Court considers a facial challenge to a statute by positing the various different scenarios under which the statute will apply (both constitutional and unconstitutional) and proceeding to analyze the ratio of constitutional versus unconstitutional applications. The facial challenge to the statute is determined on the number of constitutional applications to unconstitutional applications—not on whether the unconstitutional applications can be severed from the constitutional ones.

To use a concrete example, suppose that a state prohibits all political speech or demonstrations on the campus of State University. A student is expelled for violating the prohibitions by marching into classrooms during class and chanting antiwar slogans. After being expelled pursuant to the law, the student brings a facial challenge to the constitutionality of the statute. Although the student concedes that his demonstrations during class were not constitutionally protected, the student argues that the entire statute should be struck down because the statute could be unconstitutionally applied to students demonstrating on the lawn outside the student union. According to Professor Metzger, if it is assumed that applying the statute to students on the lawn is unconstitutional, the constitutionality of the remainder of the statute depends on whether this unconstitutional application (and other unconstitutional applications) can be severed from the constitutional applications, such as those prohibiting protests during classes. Under the overbreadth doctrine, the various applications of the statute are also tested for constitutionality. However, instead of determining whether the unconstitutional applications can be severed from the constitutional applications, the Court instead determines whether the ratio of constitutional applications versus

145. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (“Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”).

146. *See id.*

147. *See Massachusetts v. Oakes*, 491 U.S. 576, 595 (1989) (Brennan, J., dissenting) (“We will not topple a statute merely because we can conceive of a few impermissible applications.”); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (“It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.”).

unconstitutional applications meets the constitutionally required ratio. Severability plays no part of this analysis.

3. Conclusions

The mistake by modern scholars in placing so much emphasis on severability can be traced to a commitment to Monaghan's theory that every litigant has a right to be judged by a constitutionally valid rule of law, and that even one invalid application of a statute dooms the entire statute unless the invalid applications can be severed. This theory finds little support in the Court's jurisprudence; in fact, at a certain level, Monaghan's position is the polar opposite of the *Salerno* standard, in which even one valid application of a statute prevents a facial invalidation of the statute.¹⁴⁸ Perhaps it is time to rethink Monaghan's theory. In an effort to synthesize this area of the law while remaining true to Monaghan's premise, scholars have advanced a theory of severability that does not describe the actual process used by the Court in determining whether to consider a challenge to a statute as applied or on the face of the statute. If the conclusions are wrong, perhaps the premise is too.

If the facial-versus-as-applied decision does not depend on notions of severability, what does explain the Court's jurisprudence in this area? In his excellent article, Professor Franklin argues that the Supreme Court's Commerce Clause decisions, which scholars agree have been mostly facial in nature, can be explained based on an implicit reliance by the Court in Commerce Clause cases on legislative purpose.¹⁴⁹ Obviously, once legislative purpose is considered, a facial analysis of the statute becomes appropriate (or, as the conventional wisdom might say, it becomes impossible to sever the unconstitutional applications from the constitutional applications). This is an insightful comment. At a certain level, however, Franklin's conclusion is somewhat question begging: if the Court's Commerce Clause determinations have tended, for the most part, to be facial in character, and if this can be explained by the Court's focus on legislative purpose, why does the Court engage in an analysis such as legislative purpose that calls into question the entire statute in all of its applications? Could the Court have developed a test for determining Congress's power under the Commerce Clause that asked whether each individual case implicated interstate commerce? The Court has clearly not done so. But why? At a certain level, the insight that the Court's current Commerce Clause test naturally leads to a facial determination gives no insight into *why* the doctrine developed as it did. What is needed, then, is a more fundamental understanding of the issue. A root-cause explanation, if you will.

This explanation will be the focus of Part III. Like other modern scholars in this area, I fail in terms of offering a descriptive theory that can explain *all* of the Court's jurisprudence regarding the facial-versus-as-applied question. Indeed, my focus in Part III will be limited only to the context of cases challenging a statute as beyond Congress's enumerated powers. Even in this more limited context, my theory fails in the descriptive objective in synthesizing *all* of the cases. However, by offering a normative account of how constitutional challenges to congressional authority to pass a

148. See *United States v. Salerno*, 481 U.S. 739, 751–52 (1987).

149. See Franklin, *supra* note 2, at 90 (“Ultimately, a judicial concern with permissible legislative purposes provides the most plausible explanation of the facial character of the Court's recent Commerce Clause cases.”).

statute should be handled, an account which can descriptively account for a very large majority of cases already decided by the Court, I hope to make inroads toward a coherent doctrine which can govern this analysis in the future.

III. THE UNCONSTITUTIONALITY OF AS-APPLIED ADJUDICATION IN CONGRESSIONAL POWER CASES

In their article *Constitutional Existence Conditions and Judicial Review*,¹⁵⁰ Professors Adler and Dorf distinguish between “existence conditions” and “application conditions” in describing clauses of the Constitution.¹⁵¹ An “existence condition,” they posit, is a condition that, if it is not satisfied, precludes a law from having legal validity.¹⁵² The paradigm example they use is a fictitious “Safe Workplace Act,” which, although relied upon by a party to litigation before a court, was never actually enacted into law by Congress according to the strictures of Article I.¹⁵³ An “application condition,” however, is a constitutional provision whose violation does not preclude a statute from being thought of as valid law even if the application condition precludes its enforcement in some situations.¹⁵⁴

The focus of Professor Adler and Dorf’s article is on the importance of the two concepts they identified to the overall concept of judicial review under *Marbury v. Madison*.¹⁵⁵ But, obviously, their ideas have import on the facial-versus-as-applied question we are concerned with here. The authors remark that “it should be uncontroversial that courts must . . . facially invalidate laws that fail existence conditions.”¹⁵⁶ Professors Adler and Dorf are absolutely correct that a law failing an existence condition would have to be invalidated on its face. The idea is similar to Monaghan’s valid-rule requirement, but more limited in its scope: while Monaghan claims the almost global assertion that any law which has unconstitutional applications is invalid,¹⁵⁷ Adler and Dorf limit the application of this concept to when the law in question has failed an “existence condition.”¹⁵⁸

In addition to identifying this important concept, Professors Adler and Dorf proceed to analyze which portions of the Constitution constitute existence conditions.¹⁵⁹ The authors conclude that, as a matter of precedent, subject-matter limitations on congressional power have developed such that they are, in fact, existence conditions.¹⁶⁰ The support for this descriptive claim comes from the Court’s historical practice of

150. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105 (2003).

151. *Id.* at 1108.

152. *See id.* at 1109–14.

153. *Id.* at 1117.

154. *See id.* at 1109–14.

155. 5 U.S. (1 Cranch) 137 (1803); *see* Adler & Dorf, *supra* note 150, at 1109 (discussing the distinction between application and existence conditions with regard to *Marbury*).

156. *Id.* at 1170.

157. *See* Monaghan, *supra* note 117, at 8.

158. *See* Adler & Dorf, *supra* note 150, at 1114–15 (stating that existence conditions determine what counts as nonconstitutional law).

159. *Id.* at 1136–45.

160. *Id.* at 1151.

considering challenges to Congress's power on their face,¹⁶¹ a trend that, at least with respect to the Commerce Clause, Professor Franklin also identifies in his recent article.¹⁶² Unfortunately for Professors Adler and Dorf, they could not anticipate the direction of the Supreme Court in recent cases like *Lane* and *Georgia*. In fact, as support for their proposition that the subject-matter limits of Congress were existence conditions, Adler and Dorf rely on the failure of the Court in *Kimel v. Florida Board of Regents*¹⁶³ or *Garrett* to consider whether the individual plaintiff in the case before the Court had been subject to unconstitutional discrimination, instead broadly striking down the relevant statutes in those two cases.¹⁶⁴ However, this was precisely the approach the Court took in *Georgia*, and, to some extent, was the approach of the Court in *Lane*. In addition, Adler and Dorf could not have predicted the legitimate debate regarding the proper framework by which to consider the constitutional challenge to the Controlled Substances Act in *Raich*. Several lower courts, as well as Justice Thomas, have taken an as-applied approach that Adler and Dorf stated was nonexistent in the Supreme Court's case law.¹⁶⁵

It seems then, that, although the idea of existence conditions provides a great start for articulating a class of cases which must be considered facially, the descriptive account offered by Adler and Dorf can no longer be assumed. The Court, in both *Lane* and *Georgia*, took an approach on the facial-versus-as-applied question that is inconsistent with Adler and Dorf's descriptive account of the cases prior to the time of their writing in 2003. To make utility of the existence condition theory on the facial-versus-as-applied question, then, a normative case needs to be made for treating Congress's enumerated powers as ones that are, in fact, existence conditional. That is the aim of this Part of the Article. By offering a normative account, the inconsistent and contradictory results discussed in Part I can be avoided, at least with regard to constitutional challenges involving claims that Congress has exceeded an enumerated power. When a litigant challenges whether a legislative enactment fell within Congress's enumerated powers, the Court would be required to consider this question on the face of the statute.

The normative argument I advance for treating congressional power cases as "existence conditions"—that is, as requiring resolution on the face of the statute—will be based on the constitutional principles established in such cases as *INS v. Chadha*¹⁶⁶ and *Clinton v. City of New York*.¹⁶⁷ That the facial-versus-as-applied question might involve constitutional principles seems to be anticipated by Chief Justice Rehnquist and Justice Thomas in the recent debates in *Lane* and *Raich* over the facial-versus-as-applied issue. In his dissent from the majority's facial validation of the Controlled Substances Act in *Raich*, Justice Thomas stated: "[t]here is no reason why, when

161. *See id.* at 1151–52 (describing the Court's historical jurisprudence in treating enumerated powers as existence conditions).

162. *See* Franklin, *supra* note 2, at 68–69 (noting that the Court has favored a valid-rule facial approach to Commerce Clause cases since the *Lopez* decision).

163. 528 U.S. 62 (2000).

164. *See* Adler & Dorf, *supra* note 150, at 1154–55.

165. *See id.* at 1155 ("The Justices all regarded the enumerated powers as setting forth existence conditions.").

166. 462 U.S. 919 (1983).

167. 524 U.S. 417 (1998).

Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis."¹⁶⁸ In his dissent from the Court's as-applied analysis in *Lane*, Chief Justice Rehnquist seemed to answer Justice Thomas's statement by pondering that there might, in fact, be a constitutional reason why the as-applied approach advocated by Justice Thomas in *Raich*, and in fact adopted by the majority of the Court in *Lane*, was impermissible.

I have grave doubts about importing an "as applied" approach into the § 5 context.

....

In conducting its as-applied analysis . . . the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all "services," "programs," or "activities" of any "public entity." Thus, the majority's approach is not really 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. . . .

....

. . . The majority's as-applied approach simply cannot be squared with either our recent precedent or the proper role of the Judiciary.¹⁶⁹

Both Chief Justice Rehnquist and Justice Thomas, in dissent, are flirting with an issue that has been just below the surface of the contemporary debate over facial-versus-as-applied challenges: *what does the Constitution require with regard to facial and as-applied challenges?* When Chief Justice Rehnquist speaks in terms of his "grave doubts"¹⁷⁰ of the propriety of an as-applied analysis in *Lane* and the "proper role of the Judiciary,"¹⁷¹ is there a constitutional argument to support his intuitions? What if Justice Thomas was incorrect in *Raich*: what if there is a reason why the as-applied approach advocated by Justice Thomas in *Raich* was inappropriate, and what if that reason is the Constitution itself?

In this Part, I will argue that all federal courts are required to decide facially whether a statute passed by Congress was within its enumerated powers under the Constitution. Based on the separation-of-powers principles enunciated in *INS v. Chadha* and *Clinton v. City of New York*, and relied upon recently by an American Bar Association Task Force¹⁷² examining presidential signing statements, federal courts are

168. *Gonzales v. Raich*, 545 U.S. 1, 73 (2005) (Thomas, J., dissenting).

169. *Tennessee v. Lane*, 541 U.S. 509, 551–52 (2004) (Rehnquist, C.J., dissenting) (quoting U.S. CONST. amend. XIV, § 5) (emphasis in original) (citation omitted).

170. *Id.* at 551.

171. *Id.* at 552.

172. TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS'N, RECOMMENDATION AND REPORT (2006), http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf

not free to pick and choose constitutional applications from unconstitutional applications of a statute if the constitutional challenge to the statute is a lack of congressional power to enact the statute. To give the Court this power would exceed the judicial power described in Article III by allowing the Court to produce legislation that is not a product of the “finely wrought” procedures contained in the Constitution for the creation of law.

A. Chadha, Clinton, and the ABA Task Force on Presidential Signing Statements

In *INS v. Chadha*, the Supreme Court considered the constitutionality of the “legislative veto” provision¹⁷³ contained in the Immigration and Nationality Act (“Immigration Act”).¹⁷⁴ The Immigration Act established a procedure for the deportation of aliens from the United States.¹⁷⁵ As part of this procedure, immigration judges were permitted to exercise their discretion to suspend deportation of a deportable alien if certain criteria were satisfied.¹⁷⁶ When an immigration judge exercised her discretion to suspend deportation of an alien, the Immigration Act required that a report of this action be sent to Congress specifying the reasons that deportation had been suspended.¹⁷⁷ After receiving this report, either house of Congress, within a specified time period, could “veto” the suspension of deportation through a simple resolution passed by majority vote.¹⁷⁸ This legislative veto would become effective upon passage in either the House or the Senate, and presentment to the President was not necessary.¹⁷⁹

After resolving a host of justiciability issues,¹⁸⁰ the Supreme Court struck down the legislative-veto provisions contained in the Immigration Act.¹⁸¹ In the majority opinion by Chief Justice Burger, the Court determined that “the legislative power of the Federal government [must] be exercised in accord with [the] single, finely wrought and exhaustively considered, procedure”¹⁸² provided for in the Constitution. This procedure for legislative action included both the Presentment Clause,¹⁸³ in which legislation is first presented to the President before becoming law, and the bicameral requirement of Article I,¹⁸⁴ in which a majority of both the House and Senate must concur in the passage of a bill before it becomes law. Because the legislative veto in the Immigration Act allowed for the exercise of legislative power without compliance with the bicameral requirement (either the House *or* the Senate could “veto” the executive branch’s decision to not deport an alien) nor compliance with the

[hereinafter ABA REPORT].

173. 462 U.S. 919, 923 (1983).

174. Immigration and Nationality Act, Pub. L. No. 82-414, § 244, 66 Stat. 163, 214–18 (1952).

175. *Chadha*, 462 U.S. at 924–25.

176. *Id.* at 924.

177. *Id.* at 925.

178. *Id.*

179. *Id.* at 927.

180. *See id.* at 930–44.

181. *Id.* at 959.

182. *Id.* at 951.

183. U.S. CONST. art. I, § 7, cl. 2.

184. U.S. CONST. art. I, § 1.

Presentment Clause (the veto became effective without presentment to the President), it violated the separation-of-powers design implicit in the Constitution, and the Court thus struck it down on its face.¹⁸⁵ The Court acknowledged that the type of legislative veto in the Immigration Act had been incorporated into hundreds of other congressional enactments¹⁸⁶ and that this “political invention”¹⁸⁷ allowed for an efficient sharing of power between the executive branch and legislative branch,¹⁸⁸ but it reasoned that the strictures of the Constitution could not be ignored: “[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government”¹⁸⁹

Given the Court’s analysis in *Chadha*, its decision in *Clinton v. City of New York*¹⁹⁰ was predictable. In *Clinton*, the Court struck down as unconstitutional¹⁹¹ the “line item” veto made available under the Line Item Veto Act.¹⁹² Under the Act, the President was given authority, in certain circumstances, to “cancel” certain provisions of a bill without vetoing the entire bill.¹⁹³ Once the President exercised his authority to cancel a provision, the President was required to notify Congress, which would then have the opportunity to enact a “disapproval bill” by a majority vote of each branch of Congress which would have the effect of overriding the President’s cancellation.¹⁹⁴ The Line Item Veto Act was challenged in *Clinton*, and again the Court concluded that the law was unconstitutional because it produced legislation that was not a product of the “finely wrought” procedure that the Framers designed.¹⁹⁵ The Court noted that the cancellation procedure outlined in the Line Item Veto Act differed from the presidential veto provided for in the Constitution in two respects.¹⁹⁶ First, the cancellation took place after a bill became a law, while a veto is exercised before a bill becomes a law.¹⁹⁷ Second, a veto is of the entire bill passed by Congress, while a cancellation was allowed for individual provisions of a bill.¹⁹⁸ The Court reasoned that this deviation from the manner described in the Constitution for the production of legislation was invalid: “What has emerged in these cases from the President’s exercise of his statutory cancellations powers, however, are truncated versions of two bills that passed both Houses of Congress.”¹⁹⁹

185. *Chadha*, 462 U.S. at 956.

186. *See id.* at 944.

187. *Id.* at 945.

188. *See id.* at 958.

189. *Id.* at 944.

190. 524 U.S. 417 (1998).

191. *See id.* at 448.

192. Line Item Veto Act, 2 U.S.C. §§ 691–92 (Supp. II 1994), *invalidated by Clinton v. City of New York*, 524 U.S. 417 (1998).

193. *See Clinton*, 524 U.S. at 436.

194. *See id.* at 436–37.

195. *See id.* at 439.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 440.

Recently, the Supreme Court's analysis in *Chadha* and *Clinton* were relied on by the American Bar Association's Task Force on Presidential Signing Statements in condemning the practice of presidential signing statements.²⁰⁰ Presidential signing statements are an official statement by the President upon signing a bill into law.²⁰¹ Presidents have been issuing signing statements since the beginning of the nineteenth century,²⁰² and the statements have ranged from the innocuous statement in which the President applauds or explains the legislation to the more controversial signing statement in which the President commits to ignoring and not enforcing particular parts of the legislation.²⁰³ For the last twenty years, presidential signing statements have been included by West in the United States Code Congressional and Administrative News.²⁰⁴

Responding to a perceived increase by President George W. Bush in the number of signing statements claiming that the executive branch would not enforce or follow particular provisions of a law,²⁰⁵ the ABA Task Force was commissioned to study the practice of presidential signing statements.²⁰⁶ The conclusions of the ABA Task Force report are dramatic. The report concludes that signing statements in which the President "claim[s] the authority or state[s] the intention to disregard or decline to enforce all or part of a law the President has signed, or . . . interpret[s] such a law in a manner inconsistent with the clear intent of Congress,"²⁰⁷ are "contrary to the rule of law and our constitutional system of separation of powers."²⁰⁸

The concern driving the opinions in both *Chadha* and *Clinton*, and the conclusions of the ABA Task Force, is that citizens not be governed by legislation that is not a result of the "finely wrought" procedures described in the Constitution. As the Court stated in *Clinton*:

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each.

. . . .

. . . If the Line Item Veto were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as "Public Law 105-33 as modified by the President" may or may not be desirable, but it is surely not a document that may "become a law" pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.²⁰⁹

200. See ABA REPORT, *supra* note 172, at 9, 18.

201. Ryan McManus, Note, *Sitting in Congress and Standing in Court: How Presidential Signing Statements Open the Door to Legislator Lawsuits*, 48 B.C. L. REV. 739, 758–59 (2007).

202. See ABA REPORT, *supra* note 172, at 7.

203. *Id.* at 6.

204. *Id.* at 10.

205. *Id.* at 6.

206. *Id.* at 3.

207. *Id.* at 5.

208. *Id.*

209. *Clinton v. City of New York*, 524 U.S. 417, 438, 448–49 (1998).

The exact and laborious procedures described in the Constitution for the creation of legislation, which both the legislative and line-item vetoes violated, serve a valuable purpose, according to the Court:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.²¹⁰

B. Applying Chadha, Clinton, and the Task Force Report to the Judiciary

When the Supreme Court, or, for that matter, any federal court, considers a constitutional challenge to Congress's power to enact a statute, and the Court analyzes the challenge other than on the face of the statute, the Court is violating the separation-of-powers principles that formed the basis of the *Chadha* and *Clinton* opinions and the ABA Task Force report. To illustrate, consider a hypothetical based on Title II of the ADA (the statute in question in both *Lane* and *Georgia*), which requires reasonable accommodations in places of public accommodation. Suppose that the ADA has just passed through both houses of Congress and has been presented to the President for signing, but that she has some misgivings about the requirements the ADA might impose under certain situations involving state and local governments. Our hypothetical President frets that although the "reasonable accommodation" standard is appropriate, and constitutional, for situations involving courthouses and prison wards, she thinks that the accommodation standard is ill-suited, and beyond Congress's enumerated powers, for places such as hockey rinks owned by local governments. The President is conflicted as to how to proceed. She thinks the legislation will accomplish much needed reforms in courthouses and prison wards, but doubts that Congress can require local and state government to make these accommodations outside these specific factual contexts. Our hypothetical President considers attempting to veto the legislation in part, but counsel advises her that this option was foreclosed by the *Clinton* case. Not wanting to "throw the baby out with the bath water," the President decides to sign the ADA into law, but simultaneously issues a signing statement indicating a reluctance to enforce the reasonable accommodations requirements of Title II outside the context of courthouses and prison wards.

The President's signing statement, and subsequent nonenforcement, would be unconstitutional according to the ABA Task Force report.²¹¹ By deciding not to enforce

210. *INS v. Chadha*, 462 U.S. 919, 959 (1983) (citation omitted).

211. See ABA REPORT, *supra* note 172, at 5 (stating that a President's decision to "disregard or decline to enforce . . . part of a law he has signed" is "contrary to the rule of law and our constitutional system of separation of powers").

what she thinks are unconstitutional applications of Title II, the President has violated the separation-of-powers principles from *Chadha* and *Clinton*, at least according to the ABA Task Force report. The President's choice, under *Clinton*, was to veto the entire law or sign it into law. But, having signed it into law, the President was constitutionally committed to enforcing the law even if there were misgivings about the constitutionality of some of the applications of the law.

Now, assume that in a challenge to the executive branch's nonenforcement in the context of a hockey rink, the Supreme Court agrees with the ABA Task Force report that the nonenforcement is unconstitutional. However, the Court also agrees with the essence of the President's objections. Following the as-applied approach from *Lane* and *Georgia*, the Court determines that Title II is unconstitutional in some contexts. The Court proceeds to strike down Title II "as-applied" to the facts of the case involving the government-owned hockey rink.

What the Court has done in our hypothetical, which is very similar to what the Court actually did in *Lane* and *Georgia*, is the functional equivalent of what the ABA Task Force condemned as unconstitutional in its report. The President, acting under her Article II duty to "preserve, protect, and defend the Constitution," refused to enforce Title II in certain circumstances. According to the ABA Task Force report, however, this action is "contrary to the rule of law" and a violation "of our system of separation of powers."²¹² In litigation before the Supreme Court, however, the Court takes the exact same approach, with the exact same effect in terms of the viability of Title II of the ADA. The President's action violated "our system of separation of powers,"²¹³ according to the Task Force report, but the Supreme Court's approach is supported by precedent such as *Lane* and *Georgia*. If the President's nonenforcement of certain applications of Title II is, in fact, unconstitutional, is not the Court's decision to nullify these same applications also unconstitutional under the same principles?

One response to this question would be to point out that the federal courts are given the authority under Article III of the Constitution to decide cases and controversies.²¹⁴ If Article III requires, or at least permits, federal courts to decide cases and controversies, and if a particular case requires the court to determine the constitutionality of a statute, are not the courts acting within their constitutionally delegated role when they decide an actual case or controversy, regardless of the legal outcome of the actual case? How can a court violate separation of powers when it decides a case or controversy?

It must be remembered, however, that what was condemned as violating separation of powers by the Court in *Clinton*, and by the ABA Task Force report, was *executive* action under Article II of the Constitution. In *Clinton*, the line-item veto process was not immune from separation-of-powers arguments based on the fact that the law whose items were being "cancelled" had already passed through the constitutional procedures for the creation of a law. This argument was advanced by the United States in defending the Line Item Veto Act's "cancellation" procedures,²¹⁵ but the Court rejected this technicality.²¹⁶ Perhaps more on point are the conclusions of the ABA Task Force,

212. *Id.*

213. *Id.*

214. U.S. CONST. art. III, § 2.

215. *See Clinton v. City of New York*, 524 U.S. 417, 438, 445–46 (1998).

216. *See id.* at 446–47 (finding the effect of a "cancellation" would result in an alteration of

which reasoned that the President did not enjoy unfettered discretion to enforce, or to not enforce, a particular provision based on her beliefs about the constitutionality of the statute in certain applications, despite the fact that the President is clearly given the enforcement power in the Constitution.²¹⁷ Thus, from a technical legal standpoint, the separation-of-powers principles from the *Chadha* and *Clinton* cases cannot be ignored simply because the statute in question was passed by a majority of each branch of Congress and signed into law by the President. The separation-of-powers principles do not apply only to “purely legislative” activity, as the *Chadha* opinion, standing alone, might indicate. The executive action involving the line-item veto and presidential signing statements violated this principle, under the *Clinton* precedent and according to the analysis of the ABA Task Force report. There is no reason that judicial action under Article III should not also be subject to these constitutional principles.

Of course, the ABA Task Force might simply be wrong on presidential signing statements and executive nonenforcement of provisions that the President believes are abhorrent to the Constitution. Most legal analysts appear to agree with the ABA Task Force report that Presidents cannot refuse to enforce particular laws merely because of disagreement on policy grounds.²¹⁸ Refusing to enforce laws based solely on policy would violate the constitutional obligation to enforce the laws, which the President swears to perform when taking the oath of office. However, the question of whether the constitutional obligation to enforce the law (and protect the Constitution) requires a President to veto, as opposed to “Sign[ing] and Denounc[ing],”²¹⁹ is a much closer question. Most scholars seem²²⁰ to agree with the ABA Task Force report’s conclusion that the President’s choice is either to veto the entire bill or enforce the entire provision.²²¹ But, contrary legal opinions can be found.²²² Thus, although the Task Force consisted of a bipartisan team full of great, and widely respected, legal minds,²²³ it is conceivable that they are wrong on the question of nonenforcement based on constitutional objections.

But, even if the Task Force is incorrect, the principles of *Chadha* and *Clinton*, standing alone, condemn the Court’s practice of invalidating particular applications of a statute as beyond Congress’s power. The essence of the *Chadha* and *Clinton* holdings is that the Constitution provides a very specific framework for the process of making

the legislation based on the President’s own policy).

217. U.S. CONST. art. II, § 3, cl. 4.

218. See Charlie Savage, *Introduction: The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1, 6–10 (2007) (summarizing recent academic literature on presidential signing statements, which tends to focus on whether the President has power to use a signing statement to avoid enforcement of allegedly unconstitutional law, but seemingly assuming that a signing statement used to indicate non-enforcement based solely on policy grounds would be impermissible).

219. Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM & MARY BILL RTS. J. 81, 81 (2007). I borrow this phrase from Saikrishna Prakash.

220. See, e.g., A. Christopher Bryant, *Presidential Signing Statements and Congressional Oversight*, 16 WM. & MARY BILL RTS. J. 169, 181 (2007) (“The ABA Task Force correctly characterizes recent use of presidential signing statements as a threat to the rule of law.”).

221. See *id.* at 85–86.

222. See Memorandum from Walter Dellinger, Assistant Att’y Gen., U.S. Dep’t of Justice, to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), available at <http://www.usdoj.gov/olc/signing.htm>.

223. See ABA REPORT, *supra* note 172, at app.

laws that will govern the constituents' conduct.²²⁴ This process involves various different political checks to ensure that various political viewpoints are represented. As a result of these various viewpoints being expressed, most legislation is the compromise of various competing interests. As the Court clearly stated in *Clinton*, when considering the line-item veto, allowing the executive branch, pursuant to a line-item veto, to alter the product of this delicate balancing warps the "finely wrought" process delineated in the Constitution.²²⁵ A new law, the provisions of the statute which the President will enforce, is substituted for the old law, which was the statute as voted on by both houses of Congress and signed by the President. There is no reason this principle should not apply with equal force to judicial activity under Article III as it does executive activity under Article II. When the Court, in a case such as *Lane*, carves out a specific application of the Title II "reasonable accommodations" requirement, and presumably strikes down other applications of the law, it creates a new law, which was not passed by both houses of Congress and was not signed by the President.

The separation-of-power principles of *Clinton* and *Chadha* are no less applicable to the judiciary under the notion of cooperative governance and preserving as much of a congressional enactment as possible. In *Lane*, for example, the as-applied approach can be normatively supported by the desire to preserve the reasonable accommodation requirement desired by Congress, in at least some settings such as access to courthouses. This argument in favor of cooperative governance, however, was advanced and rejected in *Chadha*. The Court was abundantly clear in *Chadha* that practical considerations are trumped by separation-of-powers doctrines: "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government"²²⁶ The Supreme Court, and even Congress, might prefer an as-applied approach in a case such as *Lane* where that approach might save some applications of the statute, but *Chadha* illustrates that the coalescence of two branches of government is irrelevant when constitutional separation-of-powers principles have been violated.

The constitutional separation-of-powers concepts are what drove Chief Justice Rehnquist to argue that the Court's approach in *Lane* exceeded the scope of the judiciary. In fact, however, the Court had long ago made the same conclusion in *United States v. Reese*.²²⁷ In *Reese*, the Court considered a prosecution under a civil rights law aimed at preventing voter intimidation and invalidation.²²⁸ The prosecution in question was against two voting officials in Kentucky who had refused to receive and count the vote of an African American.²²⁹ The defendants argued that Congress was without power, under the Enforcement Clause of the Fifteenth Amendment, to pass the laws on which the prosecution was based because the laws were not restricted to voter

224. See *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (holding the Line Item Veto Act subverts the constitutional process); *INS v. Chadha*, 462 U.S. 919, 957 (1983) (determining the Immigration and Nationality Act would expand the limited role of Congress).

225. *Clinton*, 524 U.S. at 447.

226. *Chadha*, 462 U.S. at 944.

227. 92 U.S. 214 (1876).

228. *Id.* at 216–17.

229. *Id.* at 215.

intimidation or invalidation based on race, color, or previous condition of servitude²³⁰—the subjects addressed in the Fifteenth Amendment.²³¹ The Court conceded that Congress had power to prevent the racial discrimination involved in the case before the Court,²³² but nevertheless struck down the statute because it was not limited to the type of voting discrimination prohibited by the Fifteenth Amendment.²³³ The Court's analysis nicely summarizes the constitutional principles implicated:

We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments upon the reserved power of the States and the people.

*To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.*²³⁴

It is easy to dismiss *Reese* as another instance of an overly formalistic Supreme Court attempting to frustrate the purposes of Reconstruction.²³⁵ To do so, however, would be to ignore the underlying logic first identified by the Court over one hundred years ago, and since affirmed by the Court in *Chadha* and *Clinton*. Courts are

230. *Id.* at 218.

231. U.S. CONST. amend. XV, § 1.

232. *See Reese*, 92 U.S. at 218.

233. *See id.* at 219–21.

234. *Id.* at 221 (emphasis added).

235. *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 432–33 (1999) (discussing *Reese* as part of the Supreme Court's attack on "democratic institutions" in the nineteenth century).

prohibited by the Constitution from affirming individual applications of a statute that Congress did not have the power to pass in the first place, such as occurred in *Reese* and probably *Lane*. Courts are also prohibited from accepting as-applied challenges to individual applications of a statute that Congress did have the power to enact, as Justice Thomas would have done in *Raich*. When the Court does so, it is encroaching upon the “finely wrought” procedures provided for in the Constitution for the creation of federal law.

The effect of recognizing this constitutional principle will be to provide some stability, predictability, and doctrine to these congressional power cases. It will not work to the advantage of either judicial “conservatives” or “liberals.” As Professor Metzger adeptly noted in her *Facial Challenges and Federalism* piece, both conservative and liberal Justices have used this issue to achieve particular results in certain cases.²³⁶ For instance, Chief Justice Rehnquist advocated for a facial approach in *Lane*,²³⁷ but Justice Thomas advocated for an as-applied approach in *Raich*.²³⁸ Without a doctrine to govern a question such as the facial-versus-as-applied question, the issue can be manipulated to achieve a certain result in a certain case. Applying the constitutional principles of *Chadha* and *Clinton* to the judiciary, and thus requiring challenges to statutes based on Congress’s power to be adjudicated on their face, would insert doctrine into this area of the law and remove this issue as one that can be manipulated to achieve a particular result.

C. Statutory Severance Versus Application Severance

A straightforward objection to the theory posed above is that it proves too much: If the Court, at least in congressional-power cases, is precluded from considering an as-applied challenge to a statute because of the separation-of-powers principles of *Chadha* and *Clinton*, is the Court also precluded from excising particular text of a statute? Is the Court required to give a determination on the constitutionality of a statute only as the law was passed by Congress and signed into law by the President? In *Clinton*, the Court struck down a law which would have given the President the power to veto particular sections of text of one bill.²³⁹ If the *Clinton* and *Chadha* decisions apply with equal force to the courts, does it follow that the courts must determine Congress’s power to pass the statute only as it was passed by Congress and signed by the President? After all, the ADA was passed as one large bill, and all of the distinct Titles of the statutes were signed into law by the first President Bush in one act. Was it error for the Court, then, to even distinguish between Title I’s constitutionality and Title II’s constitutionality? If *Clinton* and *Chadha* apply to the judiciary, was not the Court required to consider the bill wholly, as it was passed and signed into law?

The above questions raise the difference between what commentators have referred to as “statutory severability” and “application severability.” In her work considering facial challenges to statutes in cases involving a challenge to the power of Congress to enact a particular provision, Professor Metzger recognizes that the decision to either

236. See Metzger, *supra* note 2, at 875–76.

237. See *Tennessee v. Lane*, 541 U.S. 509, 551 (2004) (Rehnquist, C.J., dissenting).

238. See *Gonzales v. Raich*, 545 U.S. 1, 59 (2005) (Thomas, J., dissenting).

239. See *Clinton v. City of New York*, 524 U.S. 417, 436–37 (1998) (describing the Line Item Veto Act).

strike down a statute facially or as applied (a process she attributes to “severability analysis”) can involve either distinctive text or various applications of the statute. Metzger writes:

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. But frequently the question instead will be one of application severability: whether a court can sever unconstitutional applications of a single statutory provision. 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.²⁴⁰

Professor Metzger ultimately concludes that there is no important distinction between application and statutory severability, despite her acknowledgement that application severability is intuitively of “more dubious legitimacy.”²⁴¹ I believe her intuition is correct, but not her conclusion. The *Chadha* and *Clinton* principles apply in a situation such as *Lane* in which the Court has used an as-applied approach based on different applications of the statute not identified in the text, but the principles do not apply to situations in which Congress’s dearth of power can be cured by severing specific portions of text in the statute.

To facilitate my argument, consider the following hypothetical statute based loosely on the facts of *Lopez*: “It is illegal to possess a bazooka in places of public accommodation.” It is clear, based on legislative intent, that Congress intended the statute to apply, at least, to planes, trains, automobiles, and schools. Suppose a student carries a bazooka to school and is charged with a violation of the statute. The student argues that the statute is not constitutional because it exceeds Congress’s power to regulate interstate commerce, which is the only enumerated power asserted as a justification for the statute. As the analysis in Part III.B illustrates, the Court is required to consider the constitutional question—Congress’s power to pass the statute—on the face of the statute. It cannot separate Congress’s power to regulate bazookas at schools from Congress’s power to regulate bazookas on planes, trains, and automobiles. The analysis must be facial in character like the majority’s approach in *Raich*. Of course, deciding that the statute must be analyzed on its face does not answer the question whether the statute is within Congress’s powers or not. That interesting question, which is beyond the scope of this Article, must be answered by Commerce Clause doctrine. But the answer to the question will be a generic affirmation or denial by the federal court of congressional power to pass the bazooka statute.

Now, however, consider a very similar bazooka statute, but one written slightly differently. The second bazooka statute’s text reads:

It is a felony crime against the United States to possess a bazooka:

- (a) on an airplane
- (b) on a train
- (c) in an automobile
- (d) in a school

240. Metzger, *supra* note 2, at 885.

241. *Id.*

Again, assume that a student carries a bazooka into school and is arrested and prosecuted for violating the bazooka statute, and again the student challenges Congress's constitutional power to pass the statute (and, again, the United States defends the statute based solely on the Commerce Clause). With the first bazooka statute, we concluded that the separation-of-power principles from *Chadha* and *Clinton* required a facial adjudication of the statute. For the second bazooka statute, is the Court also required, under the same principles, to consider the constitutionality of the statute as a whole, even though the text of the statute is bifurcated into different factual scenarios in which the statute will apply? After all, if what is being protected is the sanctity of the process in which both houses of Congress agree on a final version of the text, and the President signs that bill into law, why should the second bazooka statute be treated differently than the first bazooka statute? Both were the product of one final bill, whose final text was voted on by both houses of Congress, and which was signed into law by the President with one swish of the presidential pen.

Despite these persuasive arguments, I believe that the Court is not precluded by the *Chadha* and *Clinton* principles from considering Congress's power to pass the bazooka law only in the context of possession in a school when the statutory *text* makes that distinction, as is the case with our second bazooka hypothetical statute. The Court should be free to strike down section (d) of my second bazooka statute in the context of school possession, even though it is precluded from separately considering this factual scenario in the first bazooka statute. The constitutional separation-of-power principles of *Chadha* and *Clinton* apply differently to a distinction made in the text of the statute than a distinction that is not reflected in the text of the statute. To use the terminology of Professor Metzger, "application severability" is constitutionally different from "textual severability."

In the first place, the practice of distinguishing between constitutional and unconstitutional textual provisions of a statute is firmly rooted in Supreme Court precedent—regardless of the type of challenge being made to the statute—while the practice of distinguishing between constitutional and unconstitutional applications of a statute is hardly established in the Court's case law.²⁴² The firmly entrenched severability doctrine rests on the practice of whether unconstitutional textual language of a statute can be severed from the remainder of the statute without doing violence to congressional intent.²⁴³ But the Court has had mixed views as to whether unconstitutional applications of a statute can be distinguished from constitutional applications of a statute, at least when the challenge is made to Congress's power to pass the statute. In *United States v. E.C. Knight Co.*,²⁴⁴ the Court distinguished between Congress's power to reach manufacturing under the Sherman Act and Congress's power to reach distribution or sales, even though the Sherman Act made no such distinction in the text.²⁴⁵ Similarly, in *Georgia*, the Court distinguished between claims asserted under Title II which involved unconstitutional discrimination against the

242. See Adler & Dorf, *supra* note 150, at 1157 (stating, while discussing subject-matter limitations on Congressional power, that the Court rarely attempts to distinguish between unconstitutional and constitutional applications of a statute).

243. See Dorf, *supra* note 2, at 249 (explaining the severability doctrine).

244. 156 U.S. 1 (1895).

245. See *id.* at 13.

disabled, and claims which involved only a failure to make reasonable accommodations but not unconstitutional discrimination, even though the text made no such distinction.²⁴⁶ On the other hand, the Court has rejected distinguishing between constitutional and unconstitutional applications in cases such as *Garrett*,²⁴⁷ *Kimel*,²⁴⁸ *Lopez*,²⁴⁹ *Raich*,²⁵⁰ and *Morrison*.²⁵¹ In fact, as other commentators have noted, the Court's jurisprudence on this issue has been mostly in favor of facial adjudications that do not distinguish between different applications of the statute.²⁵² In short, applying the separation-of-powers principles to preclude federal courts from distinguishing between constitutional and unconstitutional applications of a statute would involve "overruling" the approach of a very small handful of cases,²⁵³ while applying the approach to preclude the courts from distinguishing between constitutional and unconstitutional textual provisions of text in one statute would be a major reworking of existing Supreme Court jurisprudence. Indeed, the severability doctrine would cease to function as a relevant concept. Of course, the fact that a certain approach has been used in hundreds of cases is no excuse to ignore a constitutional doctrine, but it should give one pause before accepting the doctrine's validity to those cases.

Apart from questions of precedent, the process of distinguishing between separate portions of text and separate applications of the statute involves a conceptually different role for the federal courts. When a court relies on textual distinctions made in the text of the statute, the court is relying on distinctions identified by the politically responsive branches of government. Even if a portion of that statute is determined unconstitutional, and even if the Court, applying the traditional severability doctrine, determines that the other portions of the statute should remain, what is left is statutory text that was part of a bill passed by Congress and signed by the President. From this perspective, then, it is easier to recognize the remaining portion of the statute as a product of the "finely wrought" machinery established in the Constitution. In *Garrett*, when the Court framed the issue as the constitutionality of Title I of the ADA, as opposed to the entire ADA,²⁵⁴ the Court was relying upon a distinction made by Congress and the President. It is hard to view a textual severance, such as occurred in *Garrett* when the Court severed Title I from the remaining provisions of the ADA, as a situation in which the Court is compromising the principles of *Chadha* and *Clinton*. In fact, one commentator has noted that, at a certain level, courts must always make a textual severance because an invalid provision of a bill, or a completely invalid bill,

246. See *United States v. Georgia*, 546 U.S. 151, 159 (2006).

247. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

248. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 62 (2000).

249. See *United States v. Lopez*, 514 U.S. 549, 551 (1995).

250. See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

251. See *United States v. Morrison*, 529 U.S. 598, 601 (2000).

252. See Metzger, *supra* note 2, at 930 (discussing refusal to sever potentially unconstitutional applications of a statute and resort to invalidation in whole); *but cf.* Adler & Dorf, *supra* note 150, at 1156–57 (discussing the limited practice of application severability).

253. The few cases that would need to be overruled include *Raines*, *E.C. Knight Co.*, *Lane*, and *Georgia*.

254. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (reasoning that the ADA can apply if it is found to be "appropriate . . . legislation").

does not invalidate the entire *United States Code*.²⁵⁵ Although I think this carries the argument too far, the point is well-taken: the Court regularly distinguishes between separate sections of statutory text—sometimes within the same bill—and sometimes in cases in which the constitutionality of the provision is in question.

With application severability, however, the principles of *Chadha* and *Clinton* are much easier to perceive. The Court's recent jurisprudence demonstrates this. The textual severance made in *Garrett*, which framed the issue as the constitutionality of Title I as opposed to the constitutionality of the entire ADA, was consented to by the entire Court.²⁵⁶ When the Court moved outside the realm of textual severance as opposed to application severance, however, the "intuition" discussed by Professor Metzger—that this practice was of "dubious legitimacy"—surfaced in Chief Justice Rehnquist's dissent,²⁵⁷ which was joined by Justices Kennedy and Thomas.²⁵⁸ The Court was making a distinction that had possibly never been discussed or anticipated by Congress or the President, let alone linguistically separated in the text of the statute.

The distinction between distinguishing portions of statutory text from differing applications of the statute also has practical implications. From the perspective of the citizen attempting to comply with the law, it is easier for citizens to follow a court's invalidation of unconstitutional *textual* portions of the statute as opposed to unconstitutional *applications* of the statute. The citizen (or citizen's lawyer) who reads a court opinion striking down a textual portion of a statute will, in most cases, be relatively clear about which portions of the statute have been invalidated and which remain in force. But, when a court distinguishes between invalid and valid applications of a congressional statute, that same citizen will not be able to rely on textual distinctions adopted in the statute. Instead, an understanding of the redrafting of the statute, per the federal court opinion distinguishing between constitutional and unconstitutional applications of the statute, will be necessary. Although, of course, ambiguities can arise even when a statute's unconstitutional textual portions are considered, this level of uncertainty will usually pale in comparison to the ambiguities that can arise based on applications of a statute. Take, for instance, the application distinction made by the Court in *Georgia*, when it determined that Title II was a valid abrogation insofar as the constitutional claimant had asserted a constitutional violation.²⁵⁹ From *Lane* and *Georgia*, then, a state employee considering his requirements under Title II of the ADA will know that he is potentially subject to suits for money damages if a reasonable accommodation is not made for the disabled in the context of "access to the courts"²⁶⁰ and cases involving "constitutional violations."²⁶¹ The state employee, and indeed his lawyer, will probably be unsure as to when, exactly, he is subject to money damages for a violation of the reasonable accommodation requirement. In short, when courts make application distinctions, they will often be based on complicated legal distinctions that are difficult to follow, particularly for nonlawyers. The distinctions made in statutory text, however, are

255. Metzger, *supra* note 2, at 887 (thanking Dorf for this point).

256. See *Garrett*, 531 U.S. at 374 n.9.

257. See *Tennessee v. Lane*, 541 U.S. 509, 551–52 (2004) (Rehnquist, C.J., dissenting).

258. *Id.* at 538.

259. *United States v. Georgia*, 546 U.S. 151, 159 (2006).

260. See *Lane*, 541 U.S. at 533–34.

261. See *Georgia*, 546 U.S. at 159.

probably more likely to be based on distinctions that can be understood and followed with relative certainty in everyday life.

Another troubling aspect of the Court's limited use of application severability in *Lane* and *Georgia* is the Court's failure to appreciate the legislative reworking that is occurring. In cases involving textual distinctions within one bill, the Court will carefully apply traditional severability doctrine, which attempts to ascertain congressional intent with regard to the textual portions of the statute that are unconstitutional.²⁶² In the cases in which the Court has distinguished between constitutional and unconstitutional applications of a statute, the Court has made no apparent attempt to apply the traditional severability doctrine to determine if Congress would approve of the distinctions being worked on the law by the Court. Take *Lane*, for example. The clear signal given by the majority's decision is that Title II of the ADA is constitutional in the context of access to courts, but unconstitutional in the context of locally owned hockey rinks; lower courts have interpreted the *Lane* opinion in this manner.²⁶³ In distinguishing between these constitutional and presumably unconstitutional applications, the Court made no effort to ascertain if Congress would approve of this "redrafting" of the law, as the Court would undoubtedly do if distinctions based on textual provisions in the law were being relied upon. Would Congress want Title II of the ADA to apply to courthouses if it did not also apply to hockey rinks? Of course, the answer in this instance is probably yes, but the important point is that this analysis is not part of the *Lane* opinion. When a court relies on application severability, the actual reworking of the statute tends to be ignored, such that the emphasis on ascertaining legislative intent on the reworked statute tends to be forgotten. The dearth of traditional severability analysis in the Court's application distinction decisions, with its focus on legislative intent, is another reason to distinguish those cases from the Court's use of textual distinctions, where the severability analysis necessarily rises to the forefront of the Court's analysis.

Professor Metzger's attempt to describe the case law as equally supportive of both text severability and application severability fails. The cases she relies on to demonstrate the use of application severability involve constitutional challenges other than challenges to Congress's power to enact the statute in question.²⁶⁴ As I will reiterate in the following Part, my thesis relates only to constitutional challenges based on a lack of congressional power. Severing constitutional from unconstitutional applications in cases involving challenges to congressional power is much more problematic than in cases where a litigant has asserted an individual right protected by the Constitution. Thus, Professor Metzger's use of free speech and other individual rights cases to demonstrate the ubiquity of application severability is irrelevant to the issue of application severability in the context of challenges to Congress's power to pass the statute in question, which is the focus of my thesis. In the arena of cases involving challenges to Congress's power to pass a statute, the number of cases in which the Supreme Court has used an as-applied approach based on distinctions not

262. See *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (describing how legislative intent governs the textual severance analysis).

263. See, e.g., *Clifton v. Ga. Merit Sys.*, 478 F. Supp. 2d 1356 (N.D. Ga. 2007) (finding that Title II was not a valid abrogation of Eleventh Amendment immunity in a case outside the "narrowly crafted" contours of the *Lane* opinion).

264. See Metzger, *supra* note 2, at 886 n.55.

made in the text of the statute has been exceedingly rare. Thus, my thesis, limited to the congressional power context, would actually necessitate the overruling of only a very few Supreme Court cases.

D. Applying the Principles of Chadha, Clinton, and the ABA Task Force Report to Constitutional Challenges Other Than Challenges to Congressional Power to Enact Legislation

The thesis advanced in this Article does not necessarily apply to constitutional challenges to statutes other than a challenge to Congress's power to pass the law in question. My thesis is based on a normative argument that the clauses of the Constitution that enumerate Congress's power should be treated as "existence conditions," to borrow the phrase from Professors Adler and Dorf.²⁶⁵ In other words, if Congress has exceeded its power in passing the statute, the statute is not a law. And, if it is not a law at all (like Adler and Dorf's hypothetical involving the make-believe statute relied upon by the litigant), it seems uncontroversial that the law need be struck down on its face. Outside the context of congressional power cases, however, the terrain changes. It is not so easy to label other clauses of the Constitution as existence conditions. As Adler and Dorf point out, intuitively we think of "individual rights" cases as involving something other than existence conditions,²⁶⁶ meaning that a statute does not cease to be a valid law despite the fact that it cannot be applied to individuals under certain circumstances.²⁶⁷ Although this intuition flies in the face of Monaghan's valid-rule thesis, it finds support in the way the Constitution is taught to prospective lawyers in law school. The classic law school curriculum separates between a constitutional law class that focuses on the powers of each branch and separation-of-powers issues, often a required course during the first year of law school or the first semester of the second year of law school, and an "advanced" constitutional law class that focuses on individual liberties and rights, often an elective course available during the second or third year of law school.

In any event, I make no claim about the applicability of my thesis outside the context of congressional power cases and, intuitively at least, it seems that the Court's proper functioning in individual rights cases might preclude the application of the *Chadha* and *Clinton* separation-of-powers principles to those cases. My thesis, if adopted, would help produce some stability and predictability to the facial-versus-as-applied question in constitutional litigation challenging congressional power. The doctrine, however, might not be of much use to resolving the facial-versus-as-applied question in constitutional litigation involving other types of claims. That important topic is beyond the scope of this Article.

CONCLUSION

To this point, the scholarly discussion regarding facial and as-applied constitutional challenges to statutes has ignored the constitutional principles that might shape this

265. See generally Adler & Dorf, *supra* note 150.

266. See *id.* at 1162 (suggesting that rights typically function as application conditions).

267. See *id.*

issue. In this Article, I have demonstrated how constitutional separation-of-powers concerns dictate that a federal court use a facial analysis when considering a challenge to Congress's Article I power to pass a law. As scholars strive for doctrinal clarity on the question of facial and as-applied challenges outside the specific context that is the focus of this Article, constitutional principles should be considered and applied to the analysis.