Drake University

From the SelectedWorks of Luke Meier

March 4, 2009

Facial Challenges and Separation of Powers

Luke Meier, Drake University

Available at: https://works.bepress.com/luke_meier/1/
Facial Challenges and Separation of Powers

Luke Meier

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. The issue has prompted abundant academic discussion. Recently, scholars have noted a preference within the Roberts Court for as-applied constitutional challenges. However, the cases cited as evidence for the Roberts 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. Of course, this is not the only type of constitutional challenge to a statute; some constitutional challenges attack the underlying power of the legislative branch 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 to statutes when discussing facial and as-applied constitutional challenges. In glossing over this difference, considerations which 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

1 Copyright © Douglas Luke Meier. Assistant Professor of Law, Drake University Law School. J.D., University of Texas School of Law. B.S., Kansas State University. The author would like to thank Rick Duncan, Mark Kende, and Kris Kobach for their valuable comments on earlier drafts of this Article, and Jacob Mason and Adam Price for their research assistance.

2 See, e.g., Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (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).


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 *I.N.S. v. Chadha* and *Clinton v. New York*, federal courts are not free to ignore the “finely wrought” procedures described in the Constitution for the creation of federal law by “picking and choosing” 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 *I.N.S.* 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.10

The organization of this Article is as follows: 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 which can guide courts in resolving the “facial-versus-as-applied” question. In Part II of this Article, I will examine the attempts of contemporary scholars 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 question of severability. The conventional wisdom wrongly 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 for 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 towards 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.

---

8 Chadha, 462 U.S. at 951.
10 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 for a challenge to Congress’ authority to pass the 2006 extension of Section Five of the Voting Rights Act. See 573 F.Supp.2d 221, 235-36 (D.D.C. 2008). The Supreme Court recently noted probable jurisdiction in the case. See *Northwest Austin Municipal Utility District Number One v. Mukasey*, 08-322 (Jan. 9, 2009).
Table of Contents

I. The Current Confusion as to When Courts Should Use Facial or As-Applied Analysis
   A. The Problem
   B. Descriptive Explanations of the Court’s Jurisprudence
      1. A Pleading Issue
      2. Judicial Deference
      3. Different Constitutional Clauses

II. Legal Scholarship on the Availability of Facial Challenges
   A. The Modern Conventional Wisdom
   B. Shortcomings of the Modern Conventional Wisdom
      1. As a Descriptive Theory
      2. Overbreadth Challenges
      3. Conclusions

III. The Unconstitutionality of As-Applied Adjudication in Congressional Power Cases
   A. Chadha, Clinton, and the ABA Task Force on Presidential Signing Statements
   B. Applying Chadha, Clinton, and the ABA Task Force to the Judiciary
   C. Statutory Severance Verses Application Severance
   D. Applying the Principles of Chadha, Clinton, and the ABA Task Force Report to Constitutional Challenges Other Than Challenges to Congress’s Power to Enact Legislation

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.11 Much of the attention regarding this confusion has been directed toward the question of what standard a court should apply when a statute has been challenged on its face.12 In

---

11 See Metzger, supra note 3, at 878 (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).
12 See Fallon, supra note 3, at 1321 (attempting to clarify when facial challenges are appropriate); Dorf, supra note 3, at 239 (same).
United States v. Salerno, the Supreme Court wrote 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." The Salerno standard has been questioned, however, by both the courts and a multitude of academics.

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 and Gonzales v. Raich represent two different approaches to this question. In Lane, the Court answered the question whether Title II of the Americans with Disabilities Act ("ADA") "exceed[ed] Congress' power under § 5 of the Fourteenth Amendment." 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, which generally requires that government entities make reasonable accommodations for the disabled in all public services. The paraplegic plaintiffs sought both damages and equitable relief.

Because Tennessee had claimed immunity pursuant to the Eleventh Amendment, it was necessary in Lane to determine whether Congress had abrogated that immunity pursuant to its § 5 power to enforce the Fourteenth Amendment. To

---

14 Id. at 745.
15 See, e.g., Dorf, supra note 3, at 238 ("This article argues that the Salerno principle is wrong.").
17 545 U.S. 1 (2005).
19 See Lane, 541 U.S. at 513. Although Justice Stevens, in his majority opinion for the Court, framed the issue as involving Congress's power to enact legislation under § 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. See id. at 374 n.9. The Court determined in Garrett that the abrogation analysis must be different than the analysis to determine whether Congress validly enacted the statute pursuant to § 5 of the Fourteenth Amendment; the abrogation analysis must exclude evidence of Fourteenth Amendment constitutional violations by non-state 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 (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 to be decided 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 1991 n.16.) Thus, for purposes of this Article, I will take the Supreme Court at face value 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.
22 See Lane, 541 U.S. at 514.
23 See Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 59-73 (1996) (holding that Congress can abrogate Eleventh Amendment immunity only through its § 5 power to enforce the Fourteenth Amendment).
answer this question, the Court (sans Justice Scalia) continued to use the “congruent and proportional” test first articulated in *City of Boerne v. Flores*. 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. In *Lane*, however, the Court disagreed on the manner in which the congruent and proportional test should be employed. To dissenting Justices Rehnquist, Kennedy, and Thomas, the congruence and proportional 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. 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*. Under this global approach, the dissenters determined that Title II, as a whole, was not a valid abrogation of Tennessee’s Eleventh Amendment immunity.

The *Lane* majority, however, framed the issue to be decided 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. 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 Five 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 to apply the statute to the facts of the case before the Court.

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*. *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”). 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

---

24 In his *Lane* dissent, Justice Scalia explained that he would not continue to apply the “flabby” congruence and proportional test. *See Lane*, 541 U.S. at 557-58 (Scalia, J., dissenting).
26 See *Boerne*, 521 U.S. at 530-32 (explaining the congruent and proportional test).
27 See *Lane*, 541 U.S. at 551-52 (Rehnquist, C.J., dissenting).
29 *Lane*, 541 U.S. at 553-54.
30 Id. at 530.
31 Id. at 530-31.
33 Id. at 5.
power.” 34 Instead, the CSA was challenged as it applied to two California citizens who used 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 in the form of 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 One powers. 37 The majority in Raich reasoned that the “as-applied” approach advocated by the challengers was inappropriate and inconsistent with prior Court precedent, stating: “(W)e 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 The Raich majority relied in particular on its recent decisions in United States v. Lopez 39 and United States v. Morrison, 40 to justify its approach in Raich. 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 in dissent. In Raich, Justice Thomas reasoned as follows:

(1)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 “the facial-verses-as-applied” to refer to these two contrasting approaches. How a court resolves the facial-verses-as-applied question can be outcome determinative, not only for the litigants involved in the case before the court, but

34 Id. at 15.
35 Id.
36 Id.
37 Id. at 18-20
38 Id. at 23 (internal quotations omitted).
41 Lopez, 514 U.S. at 551
43 Morrison, 529 U.S. at 601.
44 Id. at 613; Lopez, 514 U.S. at 567.
45 545 U.S. at 72-73 (Thomas, J., dissenting).
for the statute in question as well. In Lane the Court proceeded with an as-applied analysis of the challenge to Congressional authority to 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. 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 of Justice Rehnquist’s dissent. In Raich, the majority used a facial analysis to uphold the power of Congress to pass the CSA. 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 verses Title II of the ADA. In Board of Trustee of the University of Alabama v. Garrett, 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. The decision was made on the face of the statute; the Court determined that Title I was not a valid abrogation of State sovereign immunity in any situation. 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. In United States v. Georgia, the Court took this as-applied approach one step further by holding that claims asserted under Title II were always valid insomuch as the Title II claim also represented a valid constitutional claim under the Fourteenth Amendment. 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. 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, because that provision was invalidated on its face by the Court in Garrett in regard to the sovereign immunity abrogation issue, even in situations in which the plaintiff had suffered unconstitutional discrimination. Thus, a plaintiff suffering unconstitutional discrimination can sue for money damages under Title II of the

---

46 Morrison, 529 U.S. at 613.
48 Id. at 374.
49 Id. at 372-74.
50 Lane, 541 U.S. at 524.
52 Id. at 159.
53 Id.
54 Garrett, 531 U.S. at 372-73.
ADA but not under Title I of the ADA; this discrepancy appears to be based solely on the Court’s different approach to the facial-versus-applied-question in considering the constitutional challenges to the statutes.  

Another illustrative, and historical, pair of cases on the importance of the facial-versus-as-applied issue is *United States v. Reese* 56 and *United States v. Raines*. 57 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. 58 The Court used a facial approach to strike the statute in question down on its face. 59 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 as servitude. 60 Although the statute in question had been used to prosecute election officials who had denied voting access to an African-American, 61 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. 62 Because the statute had a wider scope, it was invalid on its face, even though the statute was being applied in the case before the court to a situation involving racial discrimination. 63 In *Raines*, however, the Court rejected a conceptually-identical argument with regard to the Civil Rights Act of 1957. The case before the Court involved racial discrimination by a state actor, 64 clearly within Congress’s power to prohibit under the Reconstruction amendments. However, the state-actor defendant asserted a facial challenge to the statute because the statute arguably applied to discrimination by non-state actors as well. 65 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. 66 Had the Court used the approach from *Reese*, however, it would have had to strike down the statute on its face because the 1957 Act applied to conduct (racial discrimination by non-state actors) that was not covered by the Fourteenth and Fifteenth Amendment.

**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 the importance of this issue, then, it is imperative that the issue be decided according to a clear framework. If no doctrine controls the resolution of this

---

55 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.

56 92 U.S. 214 (1875).

57 362 U.S. 17 (1960).

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

59 *Id.* at 221-22.

60 *Id.* at 227.

61 *Id.* at 219-20.

62 *See id.* (reasoning that the statute could leave an election official open to punishment for reasons not contemplated by the statute).

63 *Id.* at 227.

64 *Raines*, 362 U.S. at 17.

65 *Id.* at 20.

66 *Id.* at 25.
question, the issue can be manipulated to achieve a certain result in a case and a certain disposition on the constitutionality of a congressional enactment, and scholars have already noted this occurrence. Unfortunately, however, there exists no simple doctrine which explains the Court's jurisprudence on this issue. In the following section, I will show that a host of doctrines which 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 in *City of Chicago v. Morales*. According to Justice Scalia, the litigant making the constitutional challenge to the statute will either challenge the statute on its face or as it applies to the litigant under the facts of the case. Under this view, then, the litigant will determine the proper framework by which the Court will analyze the constitutional challenge being made. 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 at a facial challenge. 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 under Article I to pass the statute. 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, but at oral argument seemed to stress the facial challenge. Nevertheless, the

69 Id. at 77-78 (Scalia, J., dissenting).
70 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 in order to mount a successful facial challenge. This question was the primary issue addressed by Justice Scalia in his *Morales* dissent. See id.
71 See *Raich*, 545 U.S. at 8 (arguing the CSA did not apply because the marijuana was grown for a private medical use).
72 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).
73 See Reply Brief of Petitioner, *Tennessee v. Lane*, 541 U.S. 509 (2004) (arguing that the Title is unconstitutional under either a facial or as-applied approach).
74 See Transcript of Oral Argument at 4, *Tennessee v. Lane*, 541 U.S. 509 (2004) (“[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 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.”).
Lane majority used an as-applied approach to resolve the issue. In both Raich and Lane, then, 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 it 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 their constitutional challenge, the Court would have been obligated to consider Tennessee’s facial challenge after disposing of Tennessee as-applied challenge. 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 the 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, 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 their analysis of the constitutional challenge according to the pleadings of the challenger.

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—which 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, as have some commentators. 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, so the Court instead viewed the constitutional challenge as one that must be decided facially in order to preserve the entire CSA. Conversely, in Lane, a facial approach would

75 See Lane, 541 U.S. at 524.
76 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.
78 See David H. Gans, Severability as Judicial Lawmaking, 76 GEO. WASH. L. REV. 651-62 (2008) (discussing facial and as-applied challenges and the desire to preserve as much of a statute as possible from invalidation).
79 See Raich, 545 U.S. at 73 (Thomas, J., dissenting) (using an as-applied analysis to conclude that the constitutional challenge was valid in the case before the Court).
80 Id. at 22-24.
probably have required striking down Title II of the ADA, 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 their 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, 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. And, again, the Court refused to consider the issue facially, instead holding that claims asserted under Title were valid in so much as the Title II claim also represented a valid constitutional claim under the Fourteenth Amendment.

Unfortunately, however, 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; 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 in the case before the Court had actually travelled in interstate commerce, which would have at least presented a colorable argument that the Act was constitutional as applied to Lopez if his gun that had actually moved in interstate commerce. Similarly, in Board of Trustee of the University of Alabama v. Garrett, the Supreme Court determined that Title I of the Americans with Disabilities Act, 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. 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. Recent cases like Lopez and Garrett, then, demonstrate that the Court has not always strived to preserve as much of the statute as possible when considering how to frame the constitutional challenge before the Court. This theory, then, falls to descriptively account for the Court’s jurisprudence on the facial-versus-as-applied question.

---

81 See Lane, 541 U.S. at 551-52 (Rehnquist, C.J., dissenting) (applying a facial analysis and concluding that Title II was unconstitutional).
83 Id. at 157-58.
84 Id. at 159.
85 Lopez, 541 U.S. at 567-68.
86 See Raich, 545 U.S. at 73 (Thomas, J., dissenting) (using an as-applied analysis to conclude that the constitutional challenge was valid in the case before the Court).
88 Id. at 367.
89 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 Zone Act of 1990 as struck down on its face.90 Other Supreme Court Commerce Clause decisions, however, use an as-applied analysis, again with differing conclusions. For example, in *Katzenback v. McClung*,91 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.92 In *United States v. E.C. Knight Co.*,93 the Court used the same type of as-applied analysis but reached a different conclusion: In *Knight*, 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.”94

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>
<thead>
<tr>
<th>Commerce Clause</th>
<th>Strike Down</th>
<th>Uphold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facial</td>
<td><em>Lopez v. United States</em></td>
<td><em>Gonzales v. Raich</em></td>
</tr>
<tr>
<td>As-Applied</td>
<td><em>United States v. E.C. Knight Co.</em></td>
<td><em>Katzenback v. McClung</em></td>
</tr>
</tbody>
</table>

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 statute being challenged.95 In *Nevada Department of Human Resources v. Hibbs*,96 however, the Supreme Court upheld the Family and Medical Leave Act on its face as a valid abrogation of Eleventh Amendment immunity pursuant.97 As has already been discussed, the Court used an as-applied analysis in *Lane* and *Georgia* to uphold Title II as a valid

90 *Raich*, 545 U.S. at 17-20; *Lopez*, 514 U.S. at 567.
92 Id. at 304-05.
93 156 U.S. 1 (1895).
94 Id. at 17.
95 See *Garrett*, 531 U.S. at 374 (holding a contrary outcome “would allow Congress to rewrite the Fourteenth Amendment”).
97 See id. at 726.
abrogation of sovereign immunity, at least as applied to the facts of the case before the court.\textsuperscript{98} And, although this Author had 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 

\textit{Lane} and \textit{Georgia}. If Title II of the ADA is a valid 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 as-applied analysis in \textit{Lane} and \textit{Georgia} but have come to different conclusion as to the statute’s constitutionality as-applied to the facts of the case before the court. For instance, in \textit{Simmang v. Texas Board of Law Examiners},\textsuperscript{99} the court for 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.\textsuperscript{100} 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 analysis to both uphold and strike down statutes.

**Enforcement Power**

\begin{tabular}{|c|c|}
\hline
Facial & Uphold \\
\hline
Board of Trustees v. Garrett & Nevada Department of Human Resources v. Hibbs \\
\hline
Simmang v. Texas Bd. of Law Examiners & Tennessee v. Lane \\
\hline
\end{tabular}

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-verses-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.\textsuperscript{101} Nevertheless, the Court has failed to develop a coherent doctrine as to when the Overbreadth Doctrine should be employed,\textsuperscript{102} and there are a plethora of cases that fit into each of the four categories of cases identified above. In \textit{Watchtower Bible and Tract Society v. Village of

\textsuperscript{98} See infra notes 43-53.
\textsuperscript{100} See \textit{id.} at 874 (holding that Title II was not a valid abrogation of sovereign immunity as applied to claim for accommodation on Texas bar exam).
\textsuperscript{101} See \textit{Broadrick v. Oklahoma}, 413 U.S. 601, 623 (1973) (explaining that under the Overbreadth Doctrine litigants “are permitted to challenge a statute not because their own right 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”).
Stratton, the Supreme Court struck down an ordinance on its face which prohibited door-to-door advocacy without first applying for and receiving a permit from the village’s mayor. In United States v. O’Brien, the Supreme Court upheld, on its face, a federal law prohibiting the destruction or mutilation of draft cards. In Spence v. Washington, 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. The Supreme Court also used an as-applied analysis in Adderley v. Florida, 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.

<table>
<thead>
<tr>
<th></th>
<th>Free Speech</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facial</td>
<td>Strike Down</td>
</tr>
<tr>
<td></td>
<td>Uphold</td>
</tr>
<tr>
<td>Watchtower Bible &amp; Tract Soc. v. Stratton</td>
<td>United States v. O’Brien</td>
</tr>
<tr>
<td>Spence v. Washington</td>
<td>Adderley v. Florida</td>
</tr>
</tbody>
</table>

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

---

103 536 U.S. 150 (2002).
104 Id. at 169.
106 Id. at 372.
108 Id. at 405.
110 Id. at 46-48.
facial-verses-as-applied decision head-on. Only after deciding the proper 
framing by which to analyze the constitutional challenge presented in the case 
would a severability analysis become relevant, but even here there is no 
indication that the Court is engaging in the analysis which has been assumed by 
modern scholars. In essence, modern conventional wisdom confuses the cause 
and effect relationship between the facial-verses-as-applied question and 
severability. 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-verses-as-applied question has been 
answered. In addition, the modern 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 
types of analysis. 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.”111 Along the same 
lines, Professor Fallon argues that “facial challenges are less categorically distinct from 
as-applied challenges than is often thought.”112 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.”113 For these scholars, then, questions of facial-
verses-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 Gillian 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 has 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

111 Dorf, supra note 3, at 294.
112 Fallon, supra note 3, at 1341.
113 Metzger, supra note 3, at 880.
protected becomes unjustified.\textsuperscript{114} Professor Metzger has, by and large, accurately portrayed modern thinking on facial challenges and severability. In his widely influential Article \textit{Overbreadth},\textsuperscript{115} Henry Monaghan first put forward the view that every litigant has a right to be judged by a constitutionally valid rule of law.\textsuperscript{116} Under this view, any statute is void in its entirety if it is capable of being enforced unconstitutionally under any set of facts.\textsuperscript{117} 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.\textsuperscript{118} 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.\textsuperscript{119} In \textit{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: "Viewing the issue in \textit{Lane} as the availability of facial challenges is misleading. . . . The real question raised by \textit{Lane} is instead how should the Court approach severability in the Section 5 context."\textsuperscript{120}

The modern conventional wisdom was partially attacked recently in an Article by David Franklin.\textsuperscript{121} Franklin, like myself, doubts the role that severability plays in the facial-versus-as-applied: "(T)he centrality of severability analysis to the distinction between facial and as-applied review has been overstated by these commentators."\textsuperscript{122} 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 face—what he terms (borrowing from Mark Isserles) a "valid-rule facial challenge."\textsuperscript{123} 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

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 887-88 (quoting Henry Paul Monaghan, \textit{Overbreadth}, 1981 SUP. CT. REV. 1, 3 (1981)).
  \item \textsuperscript{116} \textit{Id.} at 1-5. \textit{See Dorf, supra} note 3, at 243-44 (identifying both his and Professor Fallon's agreement with Monaghan's premise).
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{See, e.g.}, Richard H. Fallon, Jr., Commentary, \textit{As-Applied and Facial Challenges and Third-Party Standing}, 113 HARV. L. REV. 1321, 1331-33 (2000) [hereinafter Fallon, Commentary] (describing the process of severing invalid "subrules" of a statute); Dorf, \textit{supra} note 3, at 235 ("[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."); Monaghan, \textit{supra} note 113, at 1-4 (articulating the view that no person may be judged by an unconstitutional rule of law).
  \item \textsuperscript{119} Dorf, \textit{supra} note 3, at 294 (discussing courts’ avoiding constitutional questions by, inter alia, severing unconstitutional provisions of statutes); Fallon, \textit{supra} note 3, at 1333-34 (describing severing unconstitutional provisions without crossing the vague line of judicial lawmaking); Metzger, \textit{supra} note 3, at 931-92 (concluding there is no reason to abandon the presumption of severability with regards to Section 5 statutes).
  \item \textsuperscript{120} Metzger, \textit{supra} note 4, at 889-90.
  \item \textsuperscript{121} David L. Franklin, \textit{Article: Facial Challenges, Legislative Purpose, and the Commerce Clause}, 92 IOWA L. REV. 41 (2006).
  \item \textsuperscript{122} \textit{Id.} at 64.
  \item \textsuperscript{123} \textit{See Id.} at 66 (commenting that severability and facial-versus-applied questions stand on distinct grounds).
  \item \textsuperscript{124} \textit{Id.} at 44 n.9.
\end{itemize}
applies in various situations—what Isserles and Franklin call the “overbreadth assumption.”

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. Assume further that the Court has upheld 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) can be severed from constitutional applications of the statute (against those dancing barefoot). 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 the barefoot dancer under the statute because he is being judged by a valid rule—the newly severed second part of the statute.

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, and then engaging in a severability analysis.

125 Id. at 65, 65 n.127.
126 See Monaghan, supra note 108, at 9-10 (explaining the barroom dancing hypothetical).
127 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.
128 Dorf, supra note 4, at 248.
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 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 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 re-written 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. 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. As an analytical manner, it is impossible to refute this assertion.

B. The Shortcomings of the Modern Conventional Wisdom
   1. As a Descriptive Theory

129 Dorf, supra note 3, at 249-50.
130 Id. at 250 (discussing the Marbury Court’s implicit analysis of severability).
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 Metger can explain valid-rule-facial challenges as instances where the severability analysis was done implicitly by the Court. 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.”

The problem with the modern conventional wisdom is not an analytical shortcoming, as Professor Franklin suggests, but rather is a descriptive, or empirical, shortcoming. Legal scholarship is at its best when it synthesizes a seemingly incoherent body of law by identifying and articulating the underlying principles which govern the cases. And, 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 Court’s (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. 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 act while guns which had existed purely within the State of Texas would be an unconstitutional application of the act.

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. In this sense, then, the ease of severability was high: What was at issue was a constitutional

131 Metzger continues this defense of the conventional wisdom later in her Article: “[T]he Court rarely discusses severability when it upholds a statute’s constitutionality, and thus the practice . . . is usually implicit.” Metzger, supra note 3, at 892 n.83.
132 See Metzger, supra note 4, at 917 (stating the Lane Court presumed severability to avoid considering the constitutionality of other aspects of Title II).
133 This is the as-applied analysis essentially advocated for by Justice Thomas in his Raich dissent. See Raich, 545 U.S. at 72-73 (Thomas, J., dissenting).
134 Lane, 541 U.S. at 531.
right that was protected in a different manner than other less-protected constitutional rights to accommodations for the disabled in different circumstances. 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 Pittsburg? 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 from unconstitutional applications can presumably be more easily done in the Lane context as opposed to the Lopez context.

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, implicitly or explicitly, claimed by the severability proponents. 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 towards the end of the opinion. The opinion does not mention severability. The closest the Court comes to engaging in a severability analysis is in footnote 18, where the Court distinguished 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. 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. 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.

Perhaps the Court makes no mention of a severability analysis in Lane and Lopez because the analysis was done implicitly or without “acknowledgment” 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. In terms of an “ease of severance” analysis, the Georgia case is somewhere between Lopez and Lane.

---

135 Id.
136 Id. at 530-31.
137 Id. at 531.
139 See id. at 561-62 (assuming that the statute’s constitutionality will be determined on the fact of the statute).
140 Metzger, supra note 4, at 887.
141 See Georgia, 546 U.S. at 157-58.
Lopez, we postulated, 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 travelled, 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 will require 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 in my view, however. What is important is this: 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 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 you would expect the Court to engage in a discussion distinguishing Georgia from Lopez. In addition, remember 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 which 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-verses-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-verses-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-verses-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 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 rested 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-verses-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” 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 to a statute based on how the statute applies in various situations, which is the type of analysis the Court rejected in cases such as *Raich*, *Garrett*, and *Lopez*. This 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. As such, the doctrine is an exception to normal rules regarding standing. 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. Rather, a statute is unconstitutional under the Overbreadth Doctrine if the number of unconstitutional verses constitutional applications of the statute crosses some threshold standard.

Under the Overbreadth Doctrine, then, 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 verses 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 anti-war 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

---

142 Id.
143 *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.”).
144 *See id.* (stating that the overbreadth doctrine is an exception to traditional rules of standing).
145 *See City Counsel of Los Angeles 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.); *Mass. v. Oaks*, 491 U.S. 576, 594 (1989) (Brennan, J., dissenting) (“We will not topple a statute merely because we can conceive of a few impermissible applications.”).
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 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.\textsuperscript{146} 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-verses-as-applied decision does not depend on notions of severability, what does explain the Court jurisprudence in this area? In his excellent article, Professor Franklin argues that the Supreme Court’s Commerce Clause decisions, which all scholars agree has been mostly facial in nature, can be explained based on an implicit reliance by the Court in Commerce Clause cases on legislative purpose. 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 which 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 determinations 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 will be the focus of Part III of this Article. Like other modern scholars in this area, I fail in terms of offering a descriptive theory which can explain all of the Court’s

\textsuperscript{146} See \textit{Salerno}, 481 U.S. at 751.
jurisprudence regarding the facial-verses-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 power. 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 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 towards 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, 147 Professors Adler and Dorf distinguish between “existence conditions” and “application conditions” in describing Clauses of the Constitution. 148 An “existence condition,” they posit, is a condition that, if it is not satisfied, precludes a law from having legal validity. 149 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, Section of the Constitution. 150 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. 151

The focus of Professor Adler and Dorf’s paper is on the importance of the two concepts they identified to the overall concept of judicial review under Marbury v. Madison. 152 But, obviously, their ideas have import on the facial-verses-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.” 153 I wholeheartedly agree with Professors Alder and Dorf 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, 154 Adler and Dorf limit the application of this concept to when the law in question has failed an “existence condition.” 155

In addition to identifying this important concept, Professors Adler and Dorf proceed to analyze which portions of the Constitution constitute existence conditions. 156 The authors conclude that, as a matter of precedent, subject matter limitations on Congressional power have developed such that they are, in fact, 147 Matthew D. Adler and Michael C. Dorf, Article: Constitutional Existence Conditions and Judicial Review, 89 Va. L. Rev. 1105 (2003).
148 Id. at 1108.
149 Id. at 1109-14.
150 Id. at 1117.
151 Id. at 1109-14.
152 See id. at 1109 (discussing the distinction between application and existence conditions with regard to Marbury).
153 See Franklin, supra note 114, at 58-59 (quoting Monaghan, supra note 108, at 8).
154 See Adler & Dorf, supra note 141, at 1114-15 (stating that existence conditions determine what counts as nonconstitutional law).
155 Id. at 1136.
existence conditions.\textsuperscript{157} The support for this descriptive claim comes from the Court’s historical practice of considering challenges to Congress’s power on their face,\textsuperscript{158} a trend that, at least with respect to the Commerce Clause, Professor Franklin also indentified in his recent Article.\textsuperscript{159} 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 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.\textsuperscript{160} 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 low courts, as well as Justice Thomas, took an as-applied approach that Adler and Dorf stated was non-existent in the Supreme Court’s caselaw.\textsuperscript{161}

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-verses-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. In order to make utility of the existence condition theory on the facial-verses-as-applied question, then, a normative case needs to be made for treating Congress’s enumerated powers as ones that are, in fact, existence condition. That is the aim of this Section of the Article. By offering a normative account, the inconsistent and contradictory results discussed in Part I of the Article can be avoided, at least with regard to constitutional challenges involving claims that Congress has exceed an enumerated power: When a litigant challenges whether a legislative enactment fell within Congress’s enumerated powers, the Court would be required, under the arguments advanced herein, 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 I.N.S. v. Chada\textsuperscript{162} and Clinton v. New York.\textsuperscript{163} That the facial-verses-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-verses-as-applied issue. In his dissent from the majority’s facial validation of the Controlled Substances Act in

\begin{flushright}
\textsuperscript{157} Id. at 1151.
\textsuperscript{158} See id. at 1151-52 (describing the Court’s historical jurisprudence in treating enumerated powers as existence conditions).
\textsuperscript{159} Franklin, supra note 114, at 68.
\textsuperscript{160} Adler & Dorf, supra note 141, at 1154-55.
\textsuperscript{161} See id. at 1155 (stating that “[t]he Justices all regarded the enumerated powers as setting forth existence conditions”).
\textsuperscript{162} 462 U.S. 919 (1983).
\textsuperscript{163} 524 U.S. 417 (1998).
\end{flushright}
Raich, Justice Thomas stated: “There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress’s overreaching on a case-by-case basis.”\textsuperscript{164} In his dissent from the Court’s as-applied analysis in Lane, Chief Justice Rehnquist seemed to answer Justice Thomas’ statement by pondering that there might, in fact, be a constitutional reason why the as-applied approach advocated for 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, U.S. Const., Amdt. 14, § 5 (emphasis added), 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.\textsuperscript{165}

Both 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-verses-as-applied challenges: What does the Constitution require with regard to facial and as-applied challenges? When Justice Rehnquist speaks in terms of his “grave doubts” \textsuperscript{166} of the propriety of an as-applied analysis in Lane and the “proper role of the Judiciary,” \textsuperscript{167} 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 Part III of the Article, I will argue that all federal courts are required to decide on its face whether a statute passed by Congress was within its enumerated powers under the Constitution. Based on the separation of powers principles enunciated in \textit{I.N.S. v. Chada} and \textit{Clinton v. New York}, and relied upon recently by an American Bar Association Task Force examining presidential signing statements, federal courts are 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.

\textsuperscript{164}\textit{Raich}, 545 U.S. at 73.
\textsuperscript{165}\textit{Lane}, 541 U.S. at 551-52.
\textsuperscript{166}\textit{Id.} at 551.
\textsuperscript{167}\textit{Id.} at 552.
A. Chada, Clinton, and the A.B.A. Task Force on Presidential Signing Statements

In *I.N.S. v. Chadha*, the Supreme Court considered the constitutionality of the “legislative veto” provision\(^{168}\) contained in the Immigration and Nationality Act ("Immigration Act").\(^{169}\) The Immigration Act established a procedure for the deportation of aliens from the United States.\(^{170}\) As part of this procedure, immigration judges were permitted to exercise their discretion to suspend deportation of a deportable alien, assuming that certain criteria were satisfied.\(^{171}\) When an immigration judge exercised her discretion to suspend deportation of an alien, the Act required that a report of this action be sent to Congress specifying the reasons that deportation had been suspended.\(^{172}\) After receiving this report, either branch of Congress, within a specified time period, could “veto” the suspension of deportation through a simple resolution passed by majority vote.\(^{173}\) This legislative veto would become effective upon passage in either the House or the Senate, and presentment to the President was not necessary.\(^{174}\)

After resolving a host of justiciability issues,\(^{175}\) the Supreme Court struck down the legislative veto provisions contained in the Immigration Act.\(^{176}\) 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”\(^{177}\) provided for in the Constitution. This procedure for legislative action included both the Presentment Clause,\(^{178}\) in which legislation is first presented to the President before becoming law, and the bicameral requirement of Article I,\(^{179}\) 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 Senate could “veto” the Executive Branch’s decision to not deport an alien) nor compliance with the 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.\(^{180}\) The Court acknowledged that the type of legislative veto in the Immigration Act had been incorporated into hundreds of other Congressional enactments,\(^{181}\) and that this “political invention”\(^{182}\) allowed for an efficient sharing of power between the Executive Branch and Legislative Branch,\(^{183}\) but reasoned that the strictures of the

\(^{168}\) See *Chadha*, 462 U.S. at 923.

\(^{169}\) Immigration and Nationality Act, Pub. L. No. 82-414 § 244, 66 Stat. 163, 214-218.

\(^{170}\) *Chadha*, 462 U.S. at 924-25.

\(^{171}\) Id. at 924.

\(^{172}\) Id. at 925.

\(^{173}\) Id.

\(^{174}\) Id. at 927

\(^{175}\) See id. at 930-44.

\(^{176}\) Id. at 959.

\(^{177}\) Id. at 951.

\(^{178}\) U.S. CONST. art. I, § 7, cl. 2.

\(^{179}\) U.S. CONST. art. I, § 1.

\(^{180}\) See. id. at 956.

\(^{181}\) See id. at 944.

\(^{182}\) Id. at 950.

\(^{183}\) See id. at 958.
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 . . . ."  

Given the Court’s analysis in Chadha, its decision in Clinton v. New York was predictable. In Clinton, the Court struck down as unconstitutional the “line item” veto made available under the Line Item Veto Act. Under the Act, the President was given authority, in certain circumstances, to “cancel” certain provisions of a bill without vetoing the entire bill. 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. 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. 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 a couple respects. First, the cancellation took place after a bill became a law, while a veto is exercised before a bill becomes a law. Second, a veto is of the entire bill passed by Congress, while a cancellation was allowed for individual provisions of a bill. The Court reasoned that this deviation in 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." 

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. Presidential signing statements are an official statement by the President upon signing a bill into law. Presidents have been issuing signing statements since the beginning of the 19th century, 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

\[184\] Id. at 944.
\[185\] See Clinton, 524 U.S. at 448.
\[187\] See id. at 436.
\[188\] Id. at 436-37.
\[189\] Id. at 439.
\[190\] Id.
\[191\] Id.
\[192\] Id.
\[193\] Id. at 440.
\[196\] ABA Report, supra note 186, at 7.
of the legislation. For the last twenty years, presidential signing statements have been included by West in the United States Code Congressional and Administrative News.

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, the ABA Task Force was commissioned to study the practice of presidential signing statements. 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," are "contrary to the rule of law and our constitutional system of separation of powers."

The concern driving the opinions in both Chadha and Clinton, and the conclusions of the A.B.A. 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."

The exact and laborious procedures described in the Constitution for the creation of legislation, which both the legislative and line-item veto's 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 cumbrosomeness 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.

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

---

197 Id. at 6-7.
198 Id. at 10.
199 Id. at 5.
200 Id. at 3.
201 Id. at 5.
202 Id. at 5.
203 Clinton, 524 U.S. at 438, 448-49
204 Chadha, 462 U.S. at 959.
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 A.B.A. 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 court houses 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 non-enforcement, would be unconstitutional according to the ABA Task Force Report. By deciding not to enforce 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 A.B.A. 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 non-enforcement in the context of a hockey rink, the Supreme Court agrees with the A.B.A. Task Force report that the non-enforcement 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 A.B.A. 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.”205 In litigation before the Supreme Court, however, the Court takes the exact

205 ABA Report, supra note 186, at 5.
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,”206 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 non-enforcement 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.207 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 actually 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,208 but the Court ignored this technicality.209 Perhaps more on point are the conclusions of the ABA Task Force, which reasoned that the President did not enjoy unfettered discretion to enforce, or not enforce, a particular provisions 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.210 Thus, from a technical legal standpoint, the separation of powers principles from the Chadha and Clinton 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 ABA Task Force Report. There is no reason that judicial action under Article III should also not be immune to these constitutional principles.

Of course, the Task Force might simply be wrong on presidential signing statements and executive non-enforcement of provisions which the President believes are abhorrent to the Constitution. Most legal analysts appear to agree with the ABA report that Presidents cannot refuse to enforce particular laws merely because of

206 Id.
207 U.S. CONST. art. III, § 2.
208 Clinton, 524 U.S. at 445-46.
209 See id. at 446 (finding the effect of a “cancellation” would result in an alteration of the legislation based on the Presidents own policy).
210 U.S. CONST. art. II, § 3, cl. 4.
disagreement on policy grounds. 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 “Signing and Denouncing,” is a much closer question. Most scholars seem to agree with the ABA Report’s conclusion that the President’s choice is either to veto the entire bill or enforce the entire provision. But, contrary legal opinions can be found. Thus, although the Task Force consisted of a bipartisan team full of great, and widely respected, legal minds, it is conceivable that they are wrong on the question of non-enforcement 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 laws which will govern the constituents’ conduct. 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. 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 in executing the laws. 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

211 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 signing statement to avoid enforcement of allegedly unconstitutional law, but seemingly assuming that signing statement used to indicate non-enforcement based solely on policy grounds would be impermissible).
212 I borrow this phrase Saikrishna Prakash. See Saikrishna Prakash, Why the President Must Veto Unconstitutional Bills, 16 WM & MARY BILL RTS. J. 81, 85 (2007).
213 Id. at 85-87.
215 ABA Report, supra note 192, Appendix.
216 See Clinton, 524 U.S. at 448 (holding the Line Item Veto Act subverts the constitutional process); Chadha, 462 U.S. at 957 (determining the act would expand the limited role of Congress).
217 Clinton, 524 U.S. at 447.
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 . . . ."218 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 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,219 In Reese, the Court considered a prosecution under a Civil Rights law aimed at preventing voter intimidation and invalidation.220 The prosecution in question was against two voting officials in Kentucky who had refused to receive and count the vote of an African-American.221 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 intimidation or invalidation based on race, color, or previous condition of servitude,222 the subjects addressed in the Fifteenth Amendment.223 The Court conceded that Congress had power to prevent the racial discrimination involved in the case before the Court,224 but nevertheless struck down the statute because it was not limited to the type of voting discrimination prohibited by the Fifteenth Amendment.225 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

218 Chadha, 462 U.S. at 944.
219 92 U.S. 214 (1876).
220 Id. at 216.
221 Id.
222 Id. at 216-17.
223 U.S. CONST. amend. XV, § 1.
224 Id. at 218.
225 Id. at 219.
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.

It is easy to dismiss Reese as another instance of an overly formalistic Supreme Court attempting to frustrate the purposes of Reconstruction. 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 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 neither judicial “conservatives” or “liberals.” As Professor Metzger adeptly noted in her Facial Challenges and Federalism piece, both conservatives and liberals Justices have used this issue to achieve particular results in certain cases. For instance, Chief Justice Rehnquist advocated for a facial approach in Lane, but Justice Thomas advocated for

---

226 Reese, 92 U.S. at 216-17 (emphasis added)
227 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).
228 Metzger, supra note 4, at 875-76.
229 See Lane, 541 U.S. at 551 (Rehnquist, C.J., dissenting).
an as-applied approach in *Raich*.

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 Verses 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. 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 question raises 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 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.

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.”

---

230 *See Raich*, 545 U.S. at 59 (Thomas, J., dissenting).
231 Metzger, *supra* note 4, at 885.
232 *Id.*
intuition, and not her conclusion, is correct. 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 it does not apply to situation 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. 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 Section 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, or 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 different. The second bazooka statute’s text reads as follows:

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

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 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 test 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 our 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 than “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 caselaw. 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. 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 E.C. Knight, 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. Similarly, in Georgia, the Court distinguished between claims asserted under Title II which involved unconstitutional discrimination against the disabled, and claims which involved only a failure to make reasonable accommodations but not constitutional discrimination, even though the text made no such distinction. On the other hand, the Court has rejected distinguishing between constitutional and unconstitutional applications in cases such as Garrett, Kimel, Lopez, Raich, and Morrison. 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. 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, 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.

233 Adler & Dorf, 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).

234 See Dorf, supra note 4, at 249 (explaining the severability doctrine).

235 156 U.S. 1 (1895).

236 See id. at 13.

237 See Georgia, 546 U.S. at 159.

238 See Garrett, 531 U.S. at 374.

239 See Kimel, 528 U.S. at 62.

240 See Lopez, 514 U.S. at 551.

241 See Raich, 545 U.S. at 22.

242 See Morrison, 529 U.S. at 601.

243 See Metzger, supra note 4, at 930 (discussing potentially unconstitutional applications of a statute); but see Adler & Dorf, supra note 141, at 1156-57 (discussing the limited practice of application severability).

244 The few cases that would need to be overruled include United States v. Raines, E.C. Knight, Tennessee v. Lane, and United States v. Georgia.
Indeed, the severability doctrine would seize 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 political 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 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, 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, does not invalidate the entire United States Code. Although I think this carries the argument too far, the point is well-taken: Court regularly distinguishes between separate sections of statutory text, and 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. 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 Justice Rehnquist’s dissent, which was joined in by Justices Kennedy and Thomas. The Court was making a distinction that had possible 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

---

245 See Garrett, 531 U.S. at 364 (reasoning the ADA can apply if it is found to be “appropriate legislation”).
246 Metzger, supra note 4, at 887 (thanking Dorf for this point).
247 Garrett, 531 U.S. at 374.
248 Lane, 541 U.S. at 551-52 (Rehnquist, C.J., dissenting).
249 Id.
clear about which portions of the statute have been invalided 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.250 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”251 and cases involving “constitutional violations.”252 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 non-lawyers. The distinctions made in statutory text, however, are 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 traditionally severability doctrine, which attempts to ascertain Congressional intent with regard to the textual portions of the statute which are unconstitutional.253 In the cases in which the Court has distinguished between unconstitutional 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.254 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 the 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 importance point is that this analysis is

250 See Georgia, 546 U.S. at 159.
251 See Lane, 541 U.S. at 533-34.
252 See Georgia, 546 U.S. at 159.
254 See, e.g., Clifton v. Georgia Merit System, 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).
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, with its focus on legislative intent, in the Court’s application distinction decisions, 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 caselaw 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. As I will make reiterate in the following section, 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 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 Congress’s 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 which enumerate Congress’s power should be treated as “existence conditions,” to borrow the phrase from Professors Adler and Dorf. In other words, if Congress has exceeded their 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 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, intuitive we think of “individual rights” cases as involving something other than existence conditions, meaning that a statute does not seize to be a valid law despite the fact that it cannot be applied to individuals under certain circumstances. 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

255 Metzger, supra note 4, at 886 n. 55.
256 See generally Adler & Dorf, supra note 141.
257 See id. at 1162 (suggesting that rights typically function as application conditions).
258 Id.
law school. The classic law school curriculum separates between a Constitutional Law class which 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 which 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 separate of power principles to those cases. The thesis advanced herein, if adopted, would help to 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.