8-5-2004

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August 5, 2004 Draft
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ESSAY: FACIAL CHALLENGES AND FEDERALISM

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INTRODUCTION

Tennessee v. Lane[2] is the latest installment in the Supreme Court's recent, bourgeoning jurisprudence on section five of the Fourteenth Amendment. These numerous decisions have helped clarify some of the features of the Court's section five analysis. We now know that section five "legislation is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[3] More specifically, the Court has provided greater guidance on how such determinations are to be made. The Court first "identif[ies] the constitutional right . . . that Congress sought to enforce," and assesses whether that right is "an appropriate subject for prophylactic legislation."[4] A crucial part of this inquiry is the Court's determination of whether Congress acted in light of

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[1] Associate Professor, Columbia Law School. Particular thanks to Henry Monaghan, Sam Bagenstos, and Richard Primus for their generous and insightful comments, and to Ella Campi for her helpful research assistance.

[2] 124 S. Ct. 1978 (2004).

[3] *Lane*, 124 S. Ct., at 1986 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)); *accord, Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003). While the Court applied a congruence-and-proportionality inquiry in *Boerne*, the first of its recent section five decisions, *see Boerne*, 521 U.S. at 520, 530, 533, whether this inquiry represented a new governing standard for section five challenges and what it entailed in practice were unclear. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127, 1147 (2000) (noting it was unclear from *Boerne* whether congruence-and-proportionality signaled a shift in means-ends analysis under section five); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 Yale L. J. 441, 458 (2000) (describing ambiguities of congruence-and-proportionality test set out in *Boerne*) [hereinafter Post & Siegel, *Equal Protection*].

[4] 124 S. Ct. at 1988, 1992. As the Court's recent decisions on the scope of section five have arisen in the context of states claiming Eleventh Amendment immunity to private damage actions, the Court often identifies an even prior step, namely determining "whether Congress unequivocally expressed its intent to abrogate that immunity," *id*. at 1985, an investigation not unique to the section five context, *see Atascadero State. Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985).

"evidence of a pattern of constitutional violations on the part of the States."[5] If so, the Court then determines whether the legislation "is an appropriate response to th[e] history and pattern of unequal treatment" found to exist regarding the constitutional right at issue.[6]

Most notably, the Court's decisions increasingly suggest that the key to whether section five legislation will be upheld as congruent and proportional is the standard of judicial review applicable to the underlying constitutional right itself. Legislation seeking to vindicate rights that trigger only rationality review if sued on directly is likely to exceed Congress' section five powers; by contrast, legislation aimed at securing rights receiving heightened scrutiny has a far greater chance of judicial sustainment.[7] In *Lane*, for example, a five-to-four majority upheld Title II of the Americans with Disabilities Act (ADA), which prohibits public entities from denying disabled individuals participation in or benefits of public services, programs, or activities. In so ruling, the Court stressed that Title II "is aimed at the enforcement of a variety of basic rights, including the right to access to the courts," right that trigger at least intermediate and sometimes strict scrutiny.[8] Similarly, in the prior Term, *Nevada Department of Human Resources v. Hibbs*, upheld the family leave provision of the Family and Medical Leave Act (FMLA), a provision which grants members of both sexes the right to take twelve weeks of unpaid leave to care for a family member. The Court emphasized that the gender discrimination targeted by the legislation triggers intermediate scrutiny.[9] On the other hand, the Court has invalidated section five legislation where the underlying rights ostensibly trigger only rationality review. Both *Lane* and *Hibbs* underscored that distinction.[10]

That said, grounds certainly exist to question the extent the Court's consistency in its section five decisions.[11] One salient uncertainty is the nature of the

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[5] *Hibbs*, 538 U.S. at 729; *see also Lane*, 124 S. Ct. at 1988-93 (identifying evidence of a "pattern of unconstitutional treatment in the administration of justice" and "pattern of disability discrimination" against which Congress enacted Title II of the Americans with Disabilities Act).

[6] *Lane*, 124 S. Ct. at 1992; *Hibbs*, 538 U.S. at 737-40 (describing features of the Family and Medical Leave Act (FMLA)'s family-care leave provision that led the Court to find this remedy was appropriately tailored to the targeted violation).

[7] *See Hibbs*, 538 U.S. at 735-36 (arguing that the presence of a heightened standard of scrutiny made it "easier for Congress to show a pattern of state constitutional violations"); *see also Lane*, 124 S. Ct. at 1988 (underscoring that Title II of the ADA aimed not only at remedying disability discrimination, which is subject only to rationality review, but "also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review"). On the importance of standard of review to the scope of Congress' enforcement power, *see* Samuel Bagenstos, __; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale. L. J. 1943, 1964-71 (2003)[hereinafter Post & Siegel, *Legislative Constitutionalism*].

[8] *See Lane*, 124 S. Ct. at 1992-93.

[9] *See Hibbs*, 538 U.S. at 735-36.

[10] *See, e.g. Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *see also Lane*, 124 S. Ct. at 1988 (distinguishing *Garrett* on this basis); *Hibbs*, 538 U.S. at 735-36 (distinguishing *Garrett* and *Kimmel* on this basis).

[11] *Compare* Bagenstos, *supra* note 6, *with* Post & Siegel, *Legislative Constitutionalism*, *supra* note 6, at 1974-80 (arguing that how the Court applies the congruence-and-proportionality

record of unconstitutional behavior by states that is needed before congressional remedial action is constitutionally warranted. Continuing disagreement on this front surfaced rather sharply in *Lane* (and *Hibbs*) with respect to how precisely the constitutional rights at issue must be identified. Quite clearly, the more specific the Court is identifying the unconstitutional behavior targeted by Congress, the more difficult it will be to establish the necessary pattern of unconstitutional state action.[12] This uncertainty is also evident in disputes regarding the type of evidence that the Court can properly consider in assessing whether the requisite pattern exists — for example, the relevance of judicial decisions identifying unconstitutional action as opposed to congressional findings,[13] as well as the legitimacy of congressional extrapolations from evidence of private entities' actions.[14] Indeed, one of the more amusing aspects of *Lane* was the Court's emphasis on the paucity of evidence of unconstitutional gender discrimination underlying the FMLA — this coming just one year after all five of the Justices in the *Lane* majority signed onto the opinion in *Hibbs* describing this evidence as sufficient to sustain that act's constitutionality.[15]

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inquiry depends on its sympathy for Congress' substantive agenda), *and* Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison*, and the Future of Antidiscrimination Law*, 2000 Sup. Ct. Rev. 109,153 (2001) ("[T]he test provides scant guidance for either Congress or the lower courts as to the degree of congruence and proportionality required between legislative ends and means.").

[12] *Compare Lane*, 124 S. Ct. at 1989-91(detailing evidence of "unconstitutional treatment in state services and programs, including "the administration of justice") *with id.* at 1999-2002 (Rehnquist, C.J., dissenting) (arguing that the constitutional right of access to the courts does not include the "right to make [a person's] way into a courtroom without any assistance, but only guarantees access to court proceedings, and that there was a "near-total lack of actual constitutional violations in the constitutional record"); *compare Hibbs*, 538 U.S. at 729-34 (detailing evidence of state gender discrimination in employment) *with id* at 745–46, 749 (Kennedy, J., dissenting) (arguing that the Court "sets the contours of the inquiry at too high a level of abstraction" and that the real question was "whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination in the provision of family leave benefits").

[13] *See Lane*, 124 S. Ct. at 2000, 2001 (Rehnquist, C.J., dissenting) (arguing that evidence of judicial decisions fails to establish that Congress was responding to an identified pattern of unconstitutional state action and discounting evidence submitted to a congressional task force for similar reasons); *but see Hibbs*, 538 U.S. at 729, 733-34 (Rehnquist, C.J.) (relying on judicial decisions chronicling state gender discrimination in employment and examination of state family leave policies in concluding that sufficient record of state gender discrimination in the administration of leave benefits existed to justify a congressional remedy).

[14] *See Hibbs*, 538 U.S. at 746-49 (Kennedy, J., dissenting) (arguing that evidence of gender discrimination in leave policies by the private sector and federal government, and by the states regarding parental leave, failed to justify the conclusion that the states had engaged in gender discrimination regarding family leave policies); *see also id*. at 742-44 (Scalia, J., dissenting) (arguing that a state can only be subject to section five legislation if it is shown that the state itself engaged in unconstitutional action; a pattern of such action by other states does not suffice); *Lane*, 124 S. Ct. at 2010-13 (Scalia, J.) (arguing that prophylactic measures under section five should only be upheld when used to prevent or remedy state racial discrimination).

[15] *See Hibbs*, 538 U.S. at 735; *Lane*, 124 S. Ct. at 1992 (maintaining that the "dissent's contention that the record is insufficient to justify [Title II] . . . is puzzling, to say the least," as *Hibbs* sustained the FMLA based on evidence "little of which concerned unconstitutional state conduct" and the record of constitutional violations in *Lane* "far exceeds the record in *Hibbs*") *and*

Such noticeably short-term turn-arounds do little to dispel the impression that the Court's section five jurisprudence is essentially results-driven.[16]

The dispute between the majority and dissent in *Lane*, however, goes beyond disagreement on what evidence satisfies the congruence-and-proportionality inquiry in a specific case. Instead, it centers on the general form section five analysis should take, more specifically whether a court should assess the constitutionality of section five legislation on a facial or as-applied basis. Justice Stevens, writing for the majority, insisted that appropriate approach was as-applied, and he rejected the petitioner's invitation to "examine the broad range of Title II's applications all at once."[17] For him, the only question before the Court was "whether Congress has the power under § 5 to enforce the constitutional right of access to the courts" through Title II of the ADA, not whether Title II was constitutional in all its potential applications.[18] Chief Justice Rehnquist, by contrast, insisted that an as-applied approach was inappropriate. In his view, the purpose of "the congruence-and-proportionality test . . . [is to determine] whether Congress has attempted to

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id. at 1991 n. 16 (agreeing with the characterization offered by Justice Kennedy's *Hibbs* dissent that most of the evidence of gender discrimination in the legislative record supporting the FMLA involved gender discrimination by private employers, not by states).

[16] Even accepting the claim that the underlying level of scrutiny is the linchpin to assessing Congress' powers under section five, some section five decisions remain hard to justify. *United States v. Morrison*, like *Hibbs*, involved gender discrimination; moreover, the Court acknowledged that Congress had compiled a "voluminous" record demonstrating multiple instances of unconstitutional state discrimination in addressing charges of gender-related violence. *See* 529 U.S. 598, 620 (2000). Yet the Court nonetheless ruled the Violence Against Women Act (VAWA) provision at issue in *Morrison* unconstitutional because the means Congress used to remedy this discrimination was suits against private rather than public actors, without in any way deferring to Congress' view that such suits against private actors was necessary to remedy public discrimination. *See* Post & Siegel, *Equal Protection*, *supra* note 2, at 475-81 (emphasizing the remedial nature of the VAWA and criticizing the result in *Morrison* as unjustified); *see also* Estreicher & Lemos, *supra* note 10, at 141-58 (arguing that *Morrison* deviates from other recent section five decisions by applying the congruence-and-proportionality test even where it was clear Congress was motivated by legitimate remedial concerns). Meanwhile, the characterization of the level of scrutiny applicable to claims of disability discrimination as simply rationality review is belied by the Court's actual analysis in *Cleburne v. City of Cleburne Living Center, Inc.*, 473 U.S. 432 (1995). True, the Court's stated of review there was rationality review, *see id.* at 446-47, but the level of scrutiny it applied was a far cry from the deferential rationality review of *Williamson v. Lee Optical Co*., 348 U.S. 343 (1955). *See Cleburne*, 473 U.S. at 447-50; *id*. at 458-60 (Marshall, J., dissenting) (arguing that the Court's refusal to apply one step at a time rule or acknowledge legitimacy of city's property values concerns were incompatible with ordinary rationality review).

Of course, whether degree of scrutiny offers a cogent descriptive account for the Court's recent section five decisions, the question still remains whether it should. *See Board of Trustees v. Garrett*, 531 U.S. 356, 382-85 (2000) (Breyer, J., dissenting) ("There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its s. 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations."); *see also* Michael W. McConnell, *Comment— Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153 181-94 (1997) (offering historical and institutional arguments against using judicial decisions as measure of Congress' section five power); *see generally* Post & Siegel, *Legislative Constitutionalism*, *supra* note 6.

[17] 124 S. Ct. at 1192-93.

[18] *Id*. at 1993.

statutorily redefine the constitutional rights protected by the Fourteenth Amendment."[19] Considering Title II only as applied to the narrow issue of access to state courts served "to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right."[20] Hence, he maintained that determining whether Title II represents appropriate section five legislation required that the Court examine Title II as a whole, in all its applications.

Whether the constitutionality of section five legislation should be assessed on a facial or on an as-applied basis is the focus of this Essay. The Supreme Court's oft-stated position that facial constitutional challenges are discouraged is voiced with varying degrees of intensity. The most extreme version is *United States v. Salerno*'s well-known statement that a facial challenge is "the most difficult challenge to mount successfully" and that to succeed "the challenger must establish that no set of circumstances exists under which the Act would be valid."[21] As several scholars and even some Justices have noted, however, in practice the Court accepts facial challenges far more frequently than its stated tests suggest.[22] First Amendment overbreadth doctrine is often cited as the prime example.[23] But it is far from the only one. Michael Dorf has identified several other contexts where the courts regularly apply facial analysis to constitutional challenges, including when litigants assert that a statute is unconstitutionally underinclusive, was motivated by a forbidden purpose,

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[19] *Id*. at 2005.

[20] *Id*.

[21] 481 U.S. 739, 745 (1987). Most recently, in *United States v. Sabri*, a decision this Term rejecting a facial challenge to a spending statute, the Court did not invoke the *Salerno* standard but agreed that "that facial challenges are best when infrequent,"and that facial overbreadth challenges in particular "are especially to be discouraged." 124 S. Ct. at 1948. For a discussion of the *Salerno* standard, *see* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 236-42 (1993); *see also* Richard H. Fallon, Jr., *Commentary: As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1322-23 (2000) [hereinafter, Fallon, *As-Applied*.].

[22] *See* Dorf, *supra* note 20, at 236; Fallon, *As-Applied*, *supra* note 20, at 1323; Matthew Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 Harv. L. Rev. 1371, 1390 (2000); *but see* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 395-421 (1998) (arguing that the *Salerno* standard is not as inconsistent with Supreme Court practice as critics claim). For discussions of varying standards applied to facial challenges by Supreme Court Justices, *compare City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (Stevens, J.) (*Salerno* is not the governing standard for facial challenges) *with id*., at 74-83 (Scalia, J., dissenting) (asserting that *Salerno* is the appropriate standard).

[23] *See, e.g., Sabri*, 124 S. Ct. at 1948 (identifying free speech contexts as one area where facial challenges are accepted). What is traditionally referred to as overbreadth doctrine refers to the ability of a litigant to claim that a statute is unconstitutional even though it could be constitutionally applied to her, because it prohibits a substantial amount of other constitutionally protected conduct. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 118-119 (2003). In addition to overbreadth, the Court has also been receptive to other types of First Amendment facial challenges, such as those alleging vagueness, *see City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (plurality opinion), and delegation of standardless discretionary power, *City of Lakewood v. Plain Dealer Co.*, 486 U.S. 750, 755-62 (1988).

or infringes on fundamental rights.[24] Some scholars have taken the point even further; Matthew Adler in particular has gone so far as to contend that all constitutional challenges are in some sense facial challenges.[25] Although arguing that, on the contrary, all constitutional challenges "are in an important sense as-applied," Richard Fallon similarly concurs in the assessment that facial challenges are much more frequent than the Court admits.[26]

Existing scholarship also generally agrees that the debate regarding the availability of facial challenges is really a debate about statutory severability, that is, whether unconstitutional applications of a statute[27] should be presumed severable or nonseverable in a given context. Severability's centrality follows from the basic (though rarely acknowledged) proposition that "a litigant always ha[s] the right to be judged in accordance with a valid rule of law."[28] If unconstitutional applications

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[24] *See* Dorf, *supra* note 20, at 271-76, 279-81; *see also* Henry P. Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 4 (1981) (noting that overbreadth analysis should be applicable whenever courts apply a heightened standard of review). In the abortion context, for example, the reigning standard for availability of facial challenges appears not to be *Salerno*'s no valid applications test, but rather the same substantive standard applicable to challenge on the merits: an abortion regulation is invalid if it will create a substantial obstacle to access to previability abortions in a "large fraction" of the cases where it is relevant. *See Steinberg v. Carhart*, 530 U.S. 914, 930 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (setting out undue burden standard as substantive standard for reviewing abortion regulations and invalidating husband notification requirement under this standard); *see also Tucson Women's Ctr. v. Eden*, 371 F.3d 1173, 1181 (9th Cir 2004) (holding substantive abortion standard governs availability of facial challenges).

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

[26] *See* Fallon, *As-Applied*, *supra* note 20, at 1335-41.

[27] This point is not limited to the context of facial challenges to statutes, but applies to any facial challenge to a governing rule. However, as the section five debate focuses on federal legislation, the discussion here will refer only to statutes. In addition, for the sake of readability statute as used here includes challenges only to specific statutory provisions as well as challenges to the statute as a whole.

[28] *See* Monaghan, *supra* note 24, at 3. Scholars generally agree that the valid rule requirement is a basic constitutional principle. *See, e.g.,* Dorf, *supra* note 20, at 242-44, 246-59 (accepting the valid rule requirement and offering justification of the requirement based on *Marbury v. Madison*'s theory of judicial review and resultant concept of the rule of law, as well as the Supremacy Clause); Fallon, *As-Applied*, *supra* note 20, at 1331-33 (arguing that the "valid rule requirement is fundamental" and while "it is hard to identify direct judicial affirmations of the valid rule requirement, though a doctrinal home could easily be found in the Due Process Clause"); *see also* Isserles, *supra* note 21, at 389-95 (disagreeing with Monaghan's characterization of overbreadth challenges as personal challenges based on the valid rule requirement rather than third-party challenges, but agreeing that valid rule challenges represent a basic category of facial challenges).

The most prominent attack on the valid rule requirement has come from Matthew Adler, who argues that the valid rule requirement is not reflected in Supreme Court doctrine and wrongly views constitutional rights as personal rights rather than as rights against rules. *See* Adler, *Rights, Rules*, *supra* note 21, at 1395-1406. However, the conflict between Adler's view and the valid rule requirement appears more theoretical than real. Adler acknowledges that courts may respond to an invalid rule by either facial or partial invalidation. *See* Matthew Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 Mich. L. Rev. 1, 125-32, 158 (1998). If

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, no reason exists to refuse to apply the statute to conduct that is not constitutionally protected becomes unjustified.[29] Viewed through the lens of the valid rule requirement, therefore, the Court's reluctance to entertain facial challenges is justifiable only if seen as embodying a presumption of severability — in the case of *Salerno*, as Michael Dorf has argued, a nearly irrebutable presumption.[30]

Lane thus presents an opportunity to consider what the rule should be on facial challenges and severability in section five context, as well as regarding federalism-based challenges more generally. Interestingly, in *United States v. Sabri*, an opinion issued on the same day as *Lane*, the Court also expressly rejected a facial challenge to spending clause legislation, but did so with far less fanfare.[31] More surprisingly still, *Sabri* referred to section five as an area where facial overbreadth challenges are appropriate. Adding to the confusion is that many of the Court's recent section five decisions appear (at least at first glance) to invalidate the statutes there challenged on facial grounds, as do two recent commerce clause decisions, *United States v. Lopez*[32] and *United States v. Morrison*.[33] This raises the question of not just of how the Court should approach section five challenges, but further whether distinct procedural rules should govern different in congressional power contexts, and if so, why?

This Essay begins by reviewing the Court's precedent involving claims that statutes exceed Congress' enumerated powers to determine how the Court thus far has approached the question of facial challenges and severability in that context. The dominant theme to emerge from this review is that of inconsistency. What equally becomes apparent is the confusion spawned by the Court's narrow definition

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a court invalidates the rule, then in keeping with the valid rule requirement, it will not be applied to an individual; if on the other hand, a court responds by severing the rule's unconstitutional applications, the "amended" rule is valid and thus its application, even retrospectively, does not necessarily violate the valid rule requirement. *See* Adler, *Rights, Rules*, *supra* 21, at 1405; *see also* Monaghan, *Overbreadth*, *supra* note 23, at 3, 8-10 (arguing that while a rule with unconstitutional applications is invalid in regard to any litigant, it can be applied to those engaging in unprotected conduct if it can narrowed to fit constitutional requirements. In any event, Adler agrees on the importance of severability to facial challenges. *See* Adler, *Rights Against Rules*, *supra*, at 158 ("[F]acial challenge doctrine . . . . is a doctrine that answers the question: Where a rule is constitutionally invalid, should the reviewing court *repeal* the invalid rule, or should the court *amend* the rule in some way?").

[29] *See* Monaghan, *supra* note 23, at 6 n. 22, 8, 17 (noting fair warning and vagueness concerns may still preclude application).

[30] *See* Dorf, *supra* note 20, at 238, 250; Monaghan, *supra* note 23, at 5-7; Fallon, *As-Applied*, *supra* note 20, at 1333.

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

[32] 514 U.S. 549 (1995).

[33] 529 U.S. 598 (2000).

of facial challenges *Salerno*-style as only available where the statute has no valid applications and thus resulting in total invalidation of a statute. This definition obscures both the range of forms a facial challenge can take and the important role severability plays in the Court's treatment of facial challenges. Notably, a close examination of the Court's recent section five and commerce clause precedent demonstrates that notwithstanding their facial tone, the Court in fact is not deviating from ordinary severability rules in these decisions.

The Essay then turns to assessing whether, precedent aside, a doctrine of nonseverability should govern in the section five context, and answers this question in the negative. While section five statutes should not be immune from facial attack, in assessing the merits of such challenges no reason exists to diverge from the ordinary rule that federal courts will presume unconstitutional applications of federal statutes are severable. The substantive content of the congruence-and-proportionality test, viewed simply as requiring narrow means-ends tailoring or as a search for illicit purpose, does not require formulation of a special nonseverability doctrine, nor does such a doctrine follow from the general nature of challenges to congressional power. Instrumental arguments for severability — such as ensuring that states not be chilled from asserting their constitutional prerogatives by the need to engage in piecemeal litigation, that Congress takes federalism limits on its powers seriously, and that the federal courts are protected from excessive and inappropriate burdens — are equally unavailing to justify departure from settled severability principles. Indeed, an analysis of these arguments demonstrates that a nonseverability presumption and concomitant insistence on assessing the constitutionality of a section five statute based on all its applications would represent a greater move to judicial supremacy in this area, than even the Court's recent section five decisions appear to countenance. The Essay concludes with consideration of whether federalism concerns justify a departure from ordinary practice in other congressional power contexts.

I. CONGRESSIONAL POWER CASES AND THE MEANING OF FACIAL CHALLENGES

Before turning to the normative question of whether the Court should treat section five challenges on a facial or an as-applied basis, the Court's prior practice in cases involving claims that Congress exceeded its enumerated powers warrants careful analysis. The variation in the Court's section five jurisprudence in recent years — both compared to earlier decisions that did not use the congruence-and-proportionality test and in the application of this test — might seem to call into question the utility of such an inquiry. Nonetheless, important points emerge. One is that the facial tone of recent section five decisions is misleading, and in fact the Court has no consistent practice regarding whether challenges to Congress' powers are addressed on a facial on as-applied basis. A second is the extent to which, in the recent section five decisions and congressional power challenges generally, the Court either presumed ordinary severability rules apply, or in fact severed unconstitutional applications of challenged statutes. Examination of these decisions also

demonstrates the need for greater clarity about what constitutes a facial challenge and the importance of underlying substantive constitutional law in determining whether such a challenge used and when severability is appropriate.

A. Section Five and Enforcement Power Precedent

1. Recent Section Five Precedent. Since *City of Boerne v. Flores* in 1997, the Court has issued several decisions on the scope of Congress' section five powers. Yet until *Lane*, a majority of the Court never expressly addressed the question of whether facial challenges are appropriate in that context. At first inspection, it appears the Court implicitly treated these recent decisions as *Salerno*-type facial challenges; their tone and focus suggest the Court held the statutes at issue invalid in all their applications. Indeed, both the majority and dissent in *Lane* agreed with this description.[34] On closer review, however, such a characterization of the decisions is difficult to sustain.

Boerne itself is a good example of the seemingly facial character of these decisions.[35] There, the Court addressed the constitutionality of the Religious Freedom Restoration Act (RFRA), which prohibits federal and state governments from imposing a substantial burden on the exercise of religion unless they can demonstrate the burden represents the least restrictive means of meeting a compelling government interest.[36] It held RFRA "exceed[ed] Congress' power," underscoring both the breadth of the RFRA's restrictions on the states and the paucity of evidence of religious bigotry in the legislative record.[37] According to the Court, RFRA's legislative history made clear that Congress' goal was to statutorily overturn the Court's holding in *Employment Division v. Smith*, which held that generally applicable legislation that only incidentally burdens religion, as opposed to laws that direct target religion or deny religious groups individuated assessment granted to others, does not offend the Free Exercise Clause.[38] True, theoretically suit under RFRA remains available to target intentional religious discrimination or denial of individualized treatment, claims that trigger strict scrutiny under the Free Exercise Clause.[39] The Court did not expressly address applicability of RFRA in such situations, and its brief description of the underlying facts suggests that it did not view the case as an instance of government singling out a religious entity for harsh treatment.[40] But this reading of *Boerne* is at odds with the Court's apparent

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[34] *See* 124 S. Ct. at 1992 n. 18; 2005; *see also Sabri v. United States*, 124 U.S. 1941, 1948 (2004) (noting that the Court had "recognized the validity of facial attacks" in suits addressing "legislation under [section] five of the Fourteenth Amendment"); Catherine Carroll, *Note, Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 Mich. L. Rev. 1026, 1034-04 (2003).

[35] *See also Sabri*, 124 U.S. at 1948(identifying *Boerne* as a facial challenge).

[36] *See* 521 U.S. 507, 515 (1997).

[37] *Id*. at 511, 530-36.

[38] *See Employment Div'n. v. Smith*, 494 U.S. 872, 878-79, 884-85 (1990).

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

[40] *Id*. at 511-12. According to Douglas Laycock, counsel for respondent Archbishop

lack of concern with *Boerne*'s underlying facts, and its focus instead on the legislative record and scope of RFRA's remedy.[41]

Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank also has a decidedly facial cast. *Florida Prepaid* considered whether the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), which abrogated the states' Eleventh Amendment immunity for patent infringements, exceeded Congress' section five powers.[42] According to the majority, a state violates patent holders' due process rights only when it "provides no remedy, or only inadequate remedies," for intentional or reckless patent infringement.[43] As a result, in order to assess whether the Patent Remedy Act was constitutional as applied to the case at hand, the Court would need to determine whether Florida's remedies for patent infringement were constitutionally adequate. But although the majority noted that Florida provided remedies for patent infringement in a footnote, it never undertook to assess their adequacy.[44] Instead, it emphasized that Congress failed to identify a "pattern of patent infringement by the States, let alone a pattern of constitutional violation," and had done "nothing to limit the coverage of the Act to cases involving arguable constitutional violations."[45] The facial character of *Florida Prepaid* is reinforced by Justice Stevens' criticism in dissent, joined by three other Justices, that the majority's opinion had "nothing to do with the facts of this case." Justice Stevens argued that the Court should address only the question whether the Patent Act was constitutional as "applied to willful infringement," because the case emerged out of such a charge.[46] Although the majority never directly responded to this contention, its statement "that the Patent

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Flores, evidence of selective discriminatory treatment did exist, but was not included in the record, because the parties agreed to proceed with the case a facial challenge to RFRA's constitutionality. *See* Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 775-71 (1997).

[41] One reason why the Court may have failed to address whether intentional discrimination and denial of individualized treatment claims remain available under RFRA is that RFRA adds nothing in these contexts; individuals could assert such claims in section 1983 suits or as defenses against state enforcement action and receive the same substantive protection. Congress itself was more concerned about providing protection against generally applicable laws that burden religious exercise, as demonstrated by its enactment of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2004), after *Boerne*. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236-37 (11th Cir. 2004).

[42] 527 U.S. 627, 635 (1999) (Stevens, J., dissenting).

[43] 527 U.S. at 643-45.

[44] *Id*. at 644 n.9.

[45] *Id*. at 640, 646.

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

Remedy Act cannot be sustained under [section] five"[47] is more in keeping with an across-the-board assessment of that act's constitutionality.[48]

Nor is the seemingly facial character of these decisions limited to those invalidating section five legislation. *Hibbs*, which upheld the family leave provision of the FMLA, arose out of a suit against a department of the Nevada state government. Yet the majority nowhere examines Nevada's leave provisions for state employees prior to the FMLA's enactment, even though it describes the types of leave available in other states.[49] Moreover, writing for himself in dissent, Justice Scalia stated that unlike instances where legislation is challenged as violating individual constitutional rights, in congressional power challenges "the court first asks whether the statute is constitutional *on its face*," and then assesses whether the statute is also constitutional as applied if the facial challenge fails.[50] The Court did not leave room for such an as-applied challenge, however, stating "[w]e hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provisions of the [FMLA]."[51]

On the other hand, it would be wrong to view these decisions as clearly upholding the use of facial challenges in section five litigation.[52] To begin with, the

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[47] 527 U.S. at 647; *see also id*., at 630 (same); *id*. at 654 (Stevens, J., dissenting) ("As I read the Court's opinion, its negative answer to the question [of whether the Patent Remedy Act was within Congress' section five powers] has nothing to do with the facts of this case."); *see also Lane*, 124 S. Ct. at 2005 (Rehnquist, C.J., dissenting) (arguing Court in *Florida Prepaid* did not leave open that the Patent Remedy Act might be constitutional as applied to "intentional uncompensated patent violations").

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

[49] *See* 538 U.S. 721, 733-34 (2003); *see also id*. at 755 (Kennedy, J., dissenting) (describing Nevada's leave policies).

[50] *See* 538 U.S. at 743 (Scalia, J., dissenting).

[51] *Id*. at 724 (Scalia, J., dissenting).

[52] However, Justice Stevens' attempt to distinguish this precedent in *Lane* is not particularly persuasive. He argued that "all [the] . . . recent [section] five cases[] concerned legislation that narrowly targeted the enforcement of a single constitutional right," 124 S. Ct. 1978, 1993 n. 18 (2004). This characterization of the Court's prior section five jurisprudence elides important distinctions under the rubric of "single constitutional right." Congress enacted RFRA, for example, to enforce individuals' free exercise rights, but as noted the scope of the free exercise right varies significantly depending upon whether the government is simply subjecting

Court never expressly addressed the question and thus never provided a justification as to why the ordinary rules disfavoring facial challenges should not apply here. What the decisions most clearly reveal is the Court's belief that the state actions targeted by congressional legislation in most of these cases — imposing general burdens on religion, patent infringement, or age and disability discrimination — will rarely be unconstitutional. This lack of sympathy for the alleged underlying constitutional challenges translates into the broad tenor of these decisions; part of the explanation for the Court's refusal to leave open application of Title I of the ADA to irrational age and disability discrimination in *Board of Trustees v. Garrett* is no doubt that it believed such discrimination will almost, if not always, be rational.[53] In these decisions, the Court was focused on substance and not procedure, and thus discerning a view on the appropriateness of facial challenges requires some reading between the lines.

This is true even of *Florida Prepaid* and *Hibbs*, where the dissents' seeming arguments for an as-applied approach might suggest that the facial tone of the majority opinions was intended. In fact, however, the dissents' arguments are less supportive of an as-applied than might at first appear. In particular, underlying Justice Scalia's view in *Hibbs* that Nevada must retain the ability to raise an as-applied challenge is his belief that a state could not be subjected to the FMLA absent evidence that particular state engaged in discrimination.[54] It was this substantive constitutional rule that the majority rejected, holding that a sufficient pattern of gender discrimination by states generally was sufficient to justify subjecting a particular state, Nevada, to the act.[55] While Justice Stevens' comments in *Florida*

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religion to generally applicable laws or instead targeting it for special burdens. *See supra* note 39. To the extent that *Boerne*'s language suggests that RFRA was invalid even with respect to the latter type of government action, it seems quite irrelevant that the constitutional protections against intentional religious discrimination and generally applicable legislation emanate from the same constitutional source. Moreover, it appears the plaintiffs suing under the section five legislation addressed in these decisions might have been able to allege violations of other constitutional rights. For example, one of the plaintiffs in *Lane* was a disabled court stenographer who was prevented from obtaining employment in Tennessee courthouses because they were not handicap accessible. *See Lane*, 124 S. Ct. at 1982-83. If she can make a claim for removal of the barriers under Title II of the ADA on the basis of her constitutional right of access to the courts, why can she not also make a claim on this basis under Title I, which protects against disability discrimination in employment? The judicial background and legislative record that the Court cites in upholding Title II, *see id*. at 1989-91, also applied to Title I.

[53] *See, e.g.*, 531 U.S. 356, 367 (2001) (stating it would be rational and thus constitutional for a state to refuse to make any accommodation for the disabled); *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 87-88 (2000) (concluding that "very little" of the conduct prohibited by the ADEA is likely to be unconstitutional and noting that age can be used as a proxy for other characteristics).

[54] *See* 538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting) ("The constitutional violation that is a prerequisite to "prophylactic" congressional action to 'enforce' the Fourteenth Amendment is a violation by the State against which the enforcement action is taken. There is no guilt by association.").

[55] *See id*. at 727-28 ("'Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights . . . . In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and

Prepaid are more procedural in focus, it is notable that he did not suggest that the Court limit itself to assessing whether the Patent Remedy Act was constitutional in regard to wilful patent infringements by Florida alone, but rather wilful infringements generally. As a result, even in Justice Stevens' terms, the challenge to the Patent Remedy Act went beyond the factual situation of the case at hand. This is also true of *Lane* itself. Although the majority there refused to consider the constitutionality of Title II as applied to constitutional rights other than access to the courts, it did not limit itself to assessing the constitutionality of Title II as applied to the situations of the two plaintiffs in the case — indeed, it never seriously assessed whether their rights of access to the courts were actually violated.[56]

In sum, in all these decisions — *Lane*, *Hibbs*, and *Florida Prepaid* included — both the majority and the dissents agree that assessing the constitutionality of section five legislation requires going beyond the specifics of the case before the Court. The reason for this agreement is not difficult to discern. If the constitutionality of a section five statute turns on whether a pattern of unconstitutional action exists in the states as a whole, then the Court must necessarily look beyond the actions of the state in the case before it in assessing the claim that the statute exceeds Congress' powers. Hence again, the facial tone of these decisions is really a reflection of their substantive analysis, rather than a position on whether the Court should assess the constitutionality of a challenged statute based on all its possible applications.

A second reason why these decisions are less supportive of a facial approach than they initially appear concerns severability. The standard rules governing severability are fairly well established, although the Court has not always applied these rules consistently.[57] Courts ordinarily apply a presumption of severability and sever any unconstitutional provisions or applications of a statute rather than hold it

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deter unconstitutional conduct.") (internal quotations omitted).

[56] *See* 124 S. Ct. 1978, 1988 (2004) (noting in passing only that right of access to the court grants "a criminal defendant such as respondent Lane the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings") (internal quotations omitted); *see also id*. at 200 n.4 (Rehnquist, C.J., dissenting) (providing brief argument as to why no rights of access to the court were violated in the case before the court).

[57] *Compare, e.g., United States v. Grace*, 461 U.S. 171, 173, 183-84 (1983) (holding statute prohibiting display of signs, banners, or devices in the "Supreme Court building and on its grounds" unconstitutional only as applied to public sidewalks surrounding the Court), *with United States v. Nat'l Treasury Emp'ees U.*, 513 U.S. 454, 477-79 & n.26 (1995) (enjoining enforcement of broad honoria ban covering all federal employees only as applied to executive branch employees below grade GS-16 but refusing to only enjoin enforcement insofar as employees' speech did not bear a nexus to the employees' job, holding that imposing a nexus requirement not in the statute would represent a "serious invasion of the legislative domain"), *with Wyoming v. Oklahoma*, 502 U.S. 437, (1992) (refusing to sever potential constitutional application of Oklahoma statute notwithstanding statute's severability clause which under state law created a presumption of severability, because severability clause authorized severing "any part or provision . . . held void," and did not refer to severing unconstitutional applications). For a discussion of the Court's inconsistency regarding severability in the period after the civil war through the early New Deal, *see generally* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. l. Rev. 76 (1937).

facially invalid; this approach comports with the principle that courts should avoid unnecessarily holding statutes unconstitutional and deciding cases without full factual development or adversarial presentation.[58] On the other hand, a court will "impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction."[59] Severability in regard to federal statutes is in large part a question of congressional intent and functionality: Would Congress have enacted the remaining provisions without the severed portions, and can the remaining portions function independently?[60] But severability doctrine also contains a little noticed judicial feature. Legislative intent to the side, can the court formulate a satisfying limiting principle to constrain the statute? If not, severing unconstitutional applications is not an option and the court will resort to full invalidation.[61]

The Court's failure to sever potentially constitutional applications of the challenged section five statutes might seem to signal a departure from these ordinary severability rules. In fact, however, the Court routinely presumed severability in these cases. This is clearest in *Garrett*, where the Court stated it was only addressing the constitutionality of Title I, and not other parts of the ADA.[62] More importantly,

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[58] *See Sabri*, 124 S. Ct. at 1948; *Brockett v. Spokane Arcades*, 472 U.S. 491, 501-03 (1985); *United States v. Raines*, 362 U.S. 17, 21 (1960). Although the Court has not expressly adopted such a presumption, it lies implicit in the Court's approach to severability and facial challenges. *See infra* text accompanying note 30; John Copeland Nagle, *Severability*, 72 N.C. L. Rev. 210, 218-25 (1994); *see also Champlin Refining Co. v. Corp. Comm'n*, 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provision which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

[59] *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997). Such susceptibility may turn on the availability of a "clear line" supported by statutory text or legislative intent that the Court could use to trim a statute to constitutional confines. *Id*.; *see also Morales*, 547 U.S. at 55 (plurality opinion) (severability impossible where "vagueness permeates the text of [a criminal] law"). It is also dependent on the substantive constitutional requirements that a statute must meet. *See infra* notes 119, 136 and accompanying text.

[60] *See* Richard H. Fallon, et al, Hart and Wechsler's The Federal Courts and The Federal System 182-84 (5th ed. 2003) (describing severability doctrine as applied to federal statutes) [hereinafter Hart & Wechsler]; *Alaska Airlines v. Brock*, 480 U.S. 678, 684-86 (1987) (setting out rules governing severability of federal statutes). In regard to state statutes, severability is a question of state law; while the federal courts also apply a presumption of severability and focus on legislative intent if no authoritative state construction exists, rulings on severability by a state's highest court are binding. *See* Hart & Wechsler, *supra* note 56, at 182-84 (describing presumption of severability regarding state statutes implicit in *Yazoo & Mississippi R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912)); *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*) (noting whether provisions in state statute are severable is question of state law).

[61] *See Secretary of State v. Joseph H. Munson Co*., 467 US 947, 965-66 & n. 13 (1984) (upholding facial challenge where "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits" and noting state court was unable to construe statute to address constitutional problems); Monaghan, *supra* note 23, at 10-12.

[62] *See Garrett*, 521 U.S. at 360 n. 1 (refusing to address the constitutionality of Title II of the ADA); *see also United States v. Morrison*, 529 U.S. at 613 n.5 (noting that the federal appellate courts had uniformly upheld the constitutionality of a separate provision of the VAWA that made it a federal crime to travel across state lines with the intent to injure, harass, or intimidate that person's spouse or intimate partner" and who thereby causes the spouse or partner

Garrett (like many of these decisions) addressed the constitutionality of making the states liable for money damages in private suits; the Court stressed that the duties imposed by Title I of the ADA remained binding and could be enforced by other means, such as injunctive suits or suits for money damages brought by the United States.[63] Plainly, then, in *Garrett* the Court was implicitly ruling the private suit remedy severable from Title I's substantive duties. Dissenting in *Hibbs*, Justice Kennedy advocated a similar interpretation of the FMLA.[64]

Another example concerns subsequent judicial responses to *Boerne*. *Boerne*'s language and analysis appear in keeping with a *Salerno*-style approach holding the statute invalid in all its applications. Notably, however, several federal appellate courts have since upheld RFRA's substantive requirements as applied to federal law or the federal government and territories, even though invalid as applied to the states.[65] On the one hand, these rulings might appear perfectly unexceptional; after all, the federal government relies on its Article I and other powers, not the section five enforcement power, in regulating the federal government or the content of federal law. Yet the substantive duties RFRA imposes on state and federal government come in the same statutory provision, and thus courts must find the provision's reference to state governments severable in order to find the provision can still be applied to the federal government.[66] Absent such severability, the provision's unconstitutionality in regard to state governments would render it completely unenforceable.

In *Lane* the Chief Justice Rehnquist seemingly sought to rebut the Court's use of severability in other section five decisions by characterizing Title II as an "undifferentiated" statute that "applies indiscriminately to all services, programs, or activities of any public entity."[67] The thrust of this characterization is unclear. On the one hand, his point might be that, unlike the other section five legislation the Court considered, in the case of Title II no separate statutory text existed that the Court could sever; instead, here the Court was resorting to severing applications of a single statutory provision. But the case law does not support drawing a strict distinction between text severability and application severability. The Court has applied severability in both contexts, and in both its inquiry is the same: is

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bodily injury).

[63] 531 U.S. at 374 n. 9.

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

[65] *See, e.g., Kikumura v. Hurley*, 242 F.3d 950, 958-59 (10th Cir. 2001) (holding RFRA constitutional as applied to federal government); *Sutton v. Providence St. Joseph's Medical Ctr*., 192 F.3d 826, 831-33 (9th Cir. 1999) (holding RFRA is constitutional as applied to federal law); *Young v. Crystal Evangelical Free Church*, 141 F3d 854, 858-61 (8th Cir. 1998) (same).

[66] *See City of Boerne v. Flores*, 521 U.S. 507, 515 (1997); *Kikumura*, 242 F.3d at 959-60 (holding unconstitutional application of RFRA to the states is severable); *Young*, 141 F.3d at 858-59 (same). Congress has amended RFRA to only apply to federal law. *See* 42 U.S.C. § 2000bb-3a (2004).

[67] 124 S. Ct. at 2005.

severability consistent with legislative intent? For example, in *United States v. National Treasury Employees Union*, the Court relied on its assessment of congressional intent to enjoin a ban on receiving honoraria only as applied to lower-level executive branch employees, notwithstanding that no such distinction among types of employees was contained in the text of the statute.[68] To the extent any difference lies between these two severability contexts, it is simply that, applying ordinary severability rules, the Court may be more likely to find that the legislature intended statutory text to be severed, and that a court can craft a constitutional construction without overstepping the judicial role, than in the various applications of a single statutory term.[69]

A second way of reading the Chief Justice's point is simply as the claim that Title II is not readily susceptible to having its different applications severed from one another. Perhaps so; it is certainly true that the majority offers no justification for its contrary premise that Title II can be construed in this fashion, and reference to severing applications is notably absent from the ADA's severability clause.[70] On the other hand, the majority has substantial precedential company in this regard; the Court in fact only infrequently addresses severability unless it finds a particular provision or application unconstitutional.[71] Moreover, given the presumption of severability that lies behind the Court's professed practice of addressing constitutional challenges on an as-applied basis, the onus would appear to lie on the Chief Justice to provide greater justification than simply characterizing Title II as "undifferentiated" to explain why the majority errs in its construction of Title II.

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[68] *See United States v. National Treasury Emp'ees U.*, 513 U.S. 454, 477-79 (1995); *see also United States v. Grace*, 461 U.S. 171, 173, 183-84 (1983) (invalidating statute prohibiting display of signs, banners, or devices in the "Supreme Court building and on its grounds"only as applied to public sidewalks surrounding the Court, even though provision made no separate mention of sidewalks); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-06 (1985) (partially invalidating state obscenity statute "only insofar as the word lust is taken to include normal interest in sex" after determining that such partial invalidation accorded with state legislature's intent).

[69] *See, e.g., Reno v. ACLU*, 521 U.S. 844, 882-84 (1997) (severing constitutional portion of statute that "enjoy[ed] a [separate] textual manifestation" but refusing to narrowly construe remainder of statute to avoid unconstitutional applications because "open-ended character of the [statute] provides no guidance what ever for limiting its coverage" in accordance with congressional intent); *Wyoming v. Oklahoma*, 502 U.S. 437, 460-61 (1992) (refusing to sever potential constitutional application of state statute on grounds that doing so would transform the statute into "a fundamentally difference piece of legislation" and emphasizing "it is clearly not this Court's role to rewrite a state statute").

[70] *See* 42 U.S.C. § 12213 (2004).

[71] *See, e.g.,* cases cited *supra* in notes 72-73. More commonly, the Court simply notes in rejecting a facial challenge that an as-applied challenge might still lie. *Hiibel v. Sixth Judicial Dist. Ct.* provides a recent example. There, the Court rejected the petitioner's Fourth and Fifth Amendment challenges to a Nevada law requiring that individuals identify themselves when stopped under a reasonable suspicion of having engaged in criminal activity. *See* 2004 WL 1373207, at *6-*10 (June 21, 2004). But the Court qualified its rejection of the Fifth Amendment self-incrimination claim by noting that "a case may arise where there is a substantial allegation that furnishing identity at the time of a stop" would be incriminating, and concluded — without mentioning severability by name — that if so, "the court can then consider whether the [Fifth Amendment] privilege applies." *Id*. at *10.

Regardless, even if Title II should not be construed as severable, this would not justify applying a presumption against severability in other section five challenges.

2. Earlier Enforcement Power Decisions. So much for the Court's recent precedent. But what about its earlier decisions addressing Congress' section five power: Do they cast useful illumination on how the Court should approach enforcement power challenges? Once again, it is hard to discern a clear practice. Notably, however, these earlier decisions are more as-applied in tone, and the Court even more regularly engaged in severability.

Two enforcement power challenges decided expressly on an as-applied basis are *Katzenbach v. Morgan*[72] and *United States v. Raines*.[73] In *Katzenbach*, the Court considered a challenge to section 4(e) of the Voting Rights Act of 1965 that attacked the section only insofar as it would enable New York residents who were educated in Puerto Rico to vote, notwithstanding that they were unable to read and write English as required by New York law. The Court justified its decision to consider the challenge on this limited basis on the ground that section 4(e) was adopted with "the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York," and that "in all probability the practical effect of [the section] will be limited to enfranchising those educated in Puerto Rican schools."[74] *Raines*, a decision relied on by Justice Stevens in *Lane*, addressed the facial versus as-applied question in far more detail and came down firmly on the as-applied side. In *Raines*, the federal government sought to enjoin Georgia voting officials from preventing Blacks from registering to vote under a federal statute passed to enforce the Fifteenth Amendment. The district court had dismissed the government's action on the ground that "the statute on its face was susceptible of [unconstitutional] application," namely application to private individuals, and thus should be "considered unconstitutional in all its applications."[75] The Supreme Court

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[72] 384 U.S. 641 (1966).

[73] 362 U.S. 17 (1960).

[74] 384 U.S. at 644-45 & n.3 (1966). Also meriting mention, given Justice Stevens' arguments in *Lane*, is that the Court limited its holding to being that section 4(e) was "a proper exercise of the powers granted to Congress by [section five] of the Fourteenth Amendment," and refused to assess whether section 4(e) would be constitutional if assessed as an exercise of other congressional powers. *See id*. at 644 & n.4.

[75] *See* 362 U.S. 17, 24 (1960). The district court's approach was not without precedential support. In particular, in *United States v. Reese*, 92 U.S. 214 (19875), the Court ruled that Congress' Fifteenth Amendment enforcement power authorized only federal legislation imposing criminal penalties on elections officials for refusing to accept the votes of qualified electors on account of race or color. As the statute before it contained no such state action limitation, the Court ruled it could not be enforced — even when the conduct of state elections officials was challenged precisely on this basis. *See id*. at 218-22; *see also id*., at 241-42 (Harlan, J., dissenting) (noting that the defendant was prosecuted for denying the right to vote on account of race); *see also James v. Bowman*, 190 U.S. 127, 136, 139-40 (1903) (refusing to apply a federal statute prohibiting the use of bribery to deny a qualified voter the right to vote on account of race in a case alleging bribery in federal elections). Given the Supreme Court's decision in *Raines*, however, *Reese* offers little support for deviating from ordinary severability rules in the enforcement power context today. *See United States v. Raines*, 362 U.S. 17, 24 (suggesting *Reese* may have rested on fair warning concerns but adding "to the extent *Reese* did depend on an approach inconsistent with

reversed. According to the Court, "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."[76] Significantly, the Court rejected the suggestion it should deviate from its usual rules disfavoring facial challenges and presuming severability in the congressional power context.[77]

Some notable earlier enforcement power decisions initially appear more facial, but like the recent section five decisions, their facial character becomes more questionable on closer inspection. In *The Civil Rights Cases*, for example, the Court held, *inter alia*, that sections one and two of the Civil Rights Act of 1875, which prohibited discrimination on the basis of race in places of public accommodation, exceeded Congress' powers under the Fourteenth Amendment because they were not limited to targeting state action. In so ruling, the Court emphasized that the 1875 act was not limited to states that had violated Fourteenth Amendment rights,[78] and did not undertake a detailed inquiry into whether the states where the cases before it arose — New York, Tennessee, and California — fell into the innocent state category.[79] Yet the Court also stated that "[i]nnkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them."[80] Making sense of this statement is difficult, not least because whatever the face of state laws, their administration was decidedly unequal, and addressing such discriminatory state administration was a main concern of the 1875 Act.[81] The statement could be read, however, as a rejection of the claim that

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what we think the better one . . ., we cannot follow it here"); GET *see also* Stern, *supra* note 56, at 94-106 (criticizing *Reese* and arguing that the Court deviated from its approach in subsequent decisions).

[76] 362 U.S. at 24-25.

[77] *Id*. at 22-24; *see also Griffin v, Breckenridge*, 403 U.S. 88, 104 (1971) (stating "the Court has long since firmly rejected" earlier use of "a severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad, unless its different parts could be read as wholly independent provisions").

[78] *See* 109 U.S. 3, 14 (1883) ("It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment.")

[79] *See id*. at 4-8. In this regard, *The Civil Rights Cases* stands in contrast to *United States v. Guest*, where the Court upheld federal indictments against private individuals for conspiracy to deny Blacks access to places of public accommodation on the grounds that the indictments alleged sufficient state involvement to qualify as targeting state action. *See* 383 U.S. 745, 755-57 (1966); *see also id*., at 761-62 (Clark, J., concurring). Notably, however, the Court in *Guest* disagreed on whether the federal statute in question applied to private action, and the Court's emphasis on the specific facts alleged in the indictment was as much a response to statutory authority concerns as to concerns about whether, if read to encompass private action, the statute was constitutional. *Compare id*. at 755 (reading statute as simply replicating bare terms of the Equal Protection Clause), *with id*. at 762-63 (Clark, J., concurring) (not addressing statutory question but stating Congress can reach private action) *with id*. at 777-84 (Brennan, J.) (reading statute as covering private action and arguing that the statute as so read was constitutional).

[80] 109 U.S. at 25.

[81] *See United States v. Morrison*, 529 U.S. 598, 624-25 (2000).

the laws specifically challenged in the case sanctioned discrimination in accommodations, a reading that comports with the opinion's next sentence, affirming that "[i]f the laws themselves make any unjust discrimination, . . . congress has full power to afford a remedy under [the fourteenth] amendment and in accordance with it."[82] In other words, this language suggests that the Court did not hold the 1875 act facially invalid and it remained applicable in contexts of overt discrimination in state laws.[83]

Similar ambiguities are evident in *South Carolina v. Katzenbach*, where the Court upheld several challenged provisions of the 1965 Voting Rights Act as valid exercises of Congress' Fifteenth Amendment enforcement power. Although the Court referred to evidence relating to South Carolina, it plainly did not limit its inquiry into the provisions' constitutional application to that state.[84] More importantly, many of the challenged provisions applied only to certain jurisdictions and applied identically to all the jurisdictions so covered, including South Carolina. Thus, by deciding the constitutionality of the act as applied to South Carolina, the Court necessarily also addressed its constitutionality vis-a-vis the other covered jurisdictions. Recognizing this, the Court invited other states to participate in the case, and numerous states submitted amicus briefs and participated in oral argument.[85] The case thus was really akin to a class action, in that nearly all of those to whom the statute applied were before the Court. Moreover, it is hard to generalize from the procedures used in *South Carolina* because it was a unique decision. Given the momentous nature of the question of the Voting Rights Acts' constitutionality and the need for a speedy decision, the Court took the case in its original jurisdiction, but without even referring it to a special master for development of a factual record.[86]

Significantly, however, even where the Court appeared to analyze challenges to enforcement legislation on a facial basis, it generally presumed that any unconstitutional portions of the challenged legislation could be severed. Noting that it had previously upheld the fourth section of the 1875 act in *Ex parte Virginia*, the Court in *The Civil Rights Cases* emphasized that the section there upheld was "entirely corrective in its character," and thus "differ[ed] widely from the first and second sections of the same act which we are now considering."[87] By thus reaffirming the constitutionality of the 1875 act's fourth section the Court plainly presumed that section could be severed from the other two sections the Court ruled invalid. In *Oregon v. Mitchell*, the Court similarly severed parts of a statute it

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[82] 109 U.S. at 25.

[83] This reading is certainly not mandated; another account — and one that may accord better with earlier language insisting that Congress can only target state action using its Fourteenth Amendment power, *see id*. at 10-12, 13-14— is that the Court was simply affirming Congress' power to address state discrimination when it occurs through appropriately targeted legislation, not that it was suggesting that the 1875 act could be constitutionally applied.

[84] 383 U.S. 301, 323-37 (1965).

[85] *See id*. at 307-08.

[86] *See id*.; Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 80-93 (discussing how *South Carolina* reached the Supreme Court and effect of the grant of original jurisdiction on the Court's analysis).

[87] 109 U.S. at 15-16.

deemed outside of Congress' powers rather than invalidating the statute *in toto*.[88] And in *South Carolina*, the Court emphasized that it was not considering the constitutionality of all of the 1965 Act's provisions, specifically relying on *Raines* in refusing to address the Act's criminal provisions.[89] While these are all instances of text severability, in *Raines* the Court expressly refused to limit severability to that context, instead holding that the district court had erred in considering the constitutionality of statutory applications not actually before it.[90]

At a minimum, therefore, these earlier enforcement power decisions provide some precedential support for adopting an as-applied approach in section five cases. In *Lane*, Chief Justice Rehnquist attempted to deny this support. He argued that because application of the statute to state officials in *Raines* was clearly constitutional, that decision said nothing about how the Court should proceed when the constitutionality of applying enforcement legislation to the state is at issue.[91] This is unpersuasive, given that the Court upheld Title II's constitutionality as applied to state programs and services involving the right of access to the courts, making *Raines* directly analogous. The Chief Justice also suggested that *Raines* was irrelevant because it was decided "before [the Court] enunciated the congruence-and-proportionality test."[92] True, but this point simply presumes the answer to the very question confronting the Court: Does the congruence-and-proportionality test, a test governing the substantive validity of section five legislation, also generate an approach regarding facial challenges and severability different from that which generally prevails?

B. Commerce and Spending Clause Precedent

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

The Court's willingness to entertain facial challenges holds true for both its earlier and more recent commerce power decisions. A classic example is *United*

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[88] 400 U.S. 112, 117-18, 130-31 (Black, J.) (announcing judgments of the Court and arguing that constitutional parts of of Voting Rights Act Amendments of 1970 could be severed from unconstitutional provision lowering voting age to 18 for state and local elections); *see also Raines*, 362 U.S. at 23 (describing instances where Court could justifiably conclude that Congress "would not have desired its legislation to stand at all unless it could stand in its every application" as "that rarest of cases").

[89] *See* 383 U.S. at 316-17.

[90] *See* 362 U.S. 17, 23-25 (1960).

[91] *See* 124 S. Ct. 1978, 2005 n.11 (2004).

[92] *Id*. at 2005.

States v. Carolene Products (most famous, of course, for its footnote four). There, the Court upheld a federal statute prohibiting shipment of filled milk against a facial challenge while noting that an as-applied challenge might lie: "[W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason."[93] The Court's acceptance of facial challenges was closely related to the substantive standard it has applied in judging the constitutionality of commerce power legislation in its post-New Deal decisions. Demonstrating that a particular activity did not itself affect interstate commerce was insufficient to show that it was outside of Congress' regulatory purview. Instead, Congress' power to regulate economic conduct is measured on an aggregate basis: the key inquiry is whether the class of activities of which a particular instance is part has a substantial effect on interstate commerce.[94] This class of activities analysis — which remains the Court's approach today — virtually precludes a successful as-applied attack, unless the challenger can demonstrate, as the *Carolene Products* Court put it, that "the article [regulated], although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition."[95]

Judicial willingness to entertain facial challenges to commerce power legislation was of no moment because of the deferential standard applied in assessing such legislation's constitutionality.[96] No challenge, whether facial or as-applied, had much chance of success. When the Court applied a more rigorous and formalistic analysis that limited Congress' scope of power, as it did in its early New Deal decisions, acceptance of facial challenges carried far more significance. It is worth noting, however, that the Court's practice regarding facial challenges in this period was more varied. Some facial invalidations occurred,[97] but in other decisions the Court simply held the particular statutory applications in excess of the commerce power..[98] This variation seems best explained, however, as resulting from

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[93] 304 U.S. 144, 153-54 (1938).

[94] *See Perez v. United States*, 402 U.S. 146, 151-56 (1971); *Wickard v. Filburn*, 317 U.S. 111, 125-26 (1942); *see also Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (Congress can regulate based on the total incidence of racial discrimination on interstate commerce).

[95] *See* 304 U.S. at 154.

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

[97] *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 297-(1936) (holding labor provisions of Bituminous Coal Conservation Act of 1935 regulate production and fall outside of the commerce power); *Railroad Retirement Bd. v. Alton Railroad Co.*, 295 U.S. 330, 362-74 (1935) (invalidating required retirement and pension plan for employees of interstate carriers as not a regulation of commerce); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating statute excluding products of child labor from interstate commerce)

[98] In *A.L.A. Schecter Poultry v. United States*, for instance, the Court treated a commerce clause challenge to the Live Poultry Code, adopted pursuant to section 3 of the National Industrial Recovery Act, on an as-applied basis, emphasizing that the violations of the Code with which the defendants had been charged did not involve interstate commerce. *See* 295 U.S. 495, 542-48 (1935) (concluding that "so far as the poultry here in question is concerned, the flow of interstate commerce had come to rest" and that the defendants' violations of wages and hour provisions had only an indirect affect on interstate commerce"); *see also United States v. E.C. Knight Co.*, 156

differences in statutory text, with facial challenges being largely the norm.[99] The Court's recent commerce power decisions, *United States v. Lopez* and *United States v. Morrison*, suggest some return to a more formalistic analysis of the reach of congressional authority under the Commerce Clause, insofar as the decisions insist on a judicially-imposed distinction between economic and noneconomic activity.[100] More to the point here, these decisions quite clearly continue the Court's willingness to entertain facial challenges to the constitutionality of commerce power legislation. Indeed, they provide the strongest contemporary support for the use of facial challenges to invalidate federal statutes as exceeding congressional powers.

At issue in *Lopez* was the constitutionality of the Gun-Free School Zones Act (School Zones Act), which made knowing possession of a gun in a school zone a federal offence, while *Morrison* addressed the constitutionality of the private civil remedy provision of the federal Violence Against Women Act (VAWA). In both decisions, the Court focused on the nature of the class of activities being regulated — gun possession near a school in *Lopez*, gender-motivated violence in *Morrison*[101] — as well as other facial characteristics of the challenged legislation, specifically the absence of a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm in question affects interstate commerce."[102] In both decisions, the Court concluded that the challenged provisions could not be sustained under the commerce power, indicating that they were invalid *in toto*, and thus not available even when specific facts could be alleged demonstrating sufficient connection to interstate commerce.[103] The only reference to underlying facts in the two decisions came at the end of *Lopez*, where the Court stated in passing that "[r]espondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce."[104] While this language alone might suggest that conviction under the School Zones Act could be sustained when the evidence in a particular

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U.S. 1, 16-18 (1895) (invalidating application of the Sherman Act to acquisition of a monopoly on manufacture of refined sugar).

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

[100] *See Morrison*, 529 U.S. at 610-13, 617-18; *Lopez*, 514 U.S. at 559-61; *see also Morrison*, 529 U.S. at 638-45 (Souter, J., dissenting) (characterizing *Lopez* and *Morrison* as embodying a new formalistic analysis akin to that used by the Court from the onset of national commercial legislation in late 1880s to the early New Deal).

[101] *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

[102] *See Lopez*, 514 U.S. at 561; *see also Morrison*, 529 U.S. at 613.

[103] *See Morrison*, 514 U.S. at 627; *Lopez*, 514 U.S. at 519; *see also Morrison*, 529 U.S. at 607 ("[W]e invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

[104] *See* 514 U.S. at 567.

case demonstrated an interstate commerce connection, such a reading ill accords with the rest of the opinion's emphasis on statutory text.[105]

On the spending clause front, the Court's approach is noticeably different, as evidenced by the Court's *Sabri* decision this Term. *Sabri* involved a challenge to the constitutionality of a federal statute criminalizing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds. The defendant in *Sabri* argued that the federal bribery statute was facially flawed because it did not require proof of a connection between the federal funds and the alleged bribe. The Court rejected this argument out-of-hand, stating that "[w]e simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook" and that $10,000 threshold meant no reason existed to suspect the statute would extend beyond the scope of legitimate federal interests.[106] Although the Court in fact entertained *Sabri*'s challenge, rejecting it rather summarily on the merits, the Court used the decision as an occasion to disavow such challenges to spending legislation. According to the Court, Sabri's facial challenge was particularly inappropriate because "the acts charged against Sabri himself were well within the limits of legitimate congressional concern," meaning that any facial challenge he brought would have to be of the overbreadth variety, attacking application of the statute to others as unconstitutional.[107] "Facial challenges of this sort are especially to be discouraged" and limited to "relatively few settings."[108]

Sabri is unusual in providing an express discussion of the appropriateness of facial challenges, but it does not stand alone in discouraging such challenges in the spending context. In a prior decision, *United States v. Salinas*, the Court similarly rejected a facial challenge to the bribery statute on the grounds that there was "no serious doubt about [its] constitutionality . . . as applied to the facts of this case."[109] *South Dakota v. Dole*,[110] where the Court set out its current standard for the constitutionality of conditional federal spending legislation, is harder to categorize. The decision appears proceed in largely general terms, without much reference to

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[105] *See, e.g.,* 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise"); *id*. at 567 ("[T]here is no requirement that his possession of the firearm have any concrete tie to interstate commerce."). Interestingly, in its decision below the Fifth Circuit had expressly refused to address whether the challenged section of the School Zones Act could ever be constitutionally applied based on proof of an interstate connection, holding that Lopez's conviction still had to be reversed as the indictment failed to allege an interstate commerce nexus as part of the offense. *See United States v. Lopez*, 2 F3d. 1342, 1368 (5th Cir. 1993). Congress appears to have read *Lopez* as facially invalidating the School Zones Act as it then stood, and subsequently amended the Act to include an express jurisdictional element. *See* Pub. L. 104-208, § 657 (1996), codified at 18 U.S.C. § 922(q)(2)(a).

[106] 124 S. Ct. 1941, 1945-46 (2004).

[107] *Id*. at 1948. Sabri was charged with bribing a city council member who also sat on the board of commissioners overseeing the city's community development agency; these entities received $28 million and $23 million in federal funds, respectively, in the year in which the bribery occurred. *See United States v. Sabri*, 326 F.3d 937, 939 (8th Cir. 2003).

[108] *See* 124 S. Ct. at 1948.

[109] 522 U.S. 52, 60-61 (1997).

[110] *See* 483 U.S. 203 (1987).

South Dakota's particular situation. But this seems explained by the fact that the legislation treated all the states the same, so that no meaningful distinction could exist between a facial and an as-applied challenge. To be sure, the Supreme Court has entertained and occasionally upheld facial challenges to spending clause legislation.[111] But as *Sabri* demonstrates, the current Court appears much less receptive to such challenges in spending power cases than in commerce power cases. Little objection was raised to *Sabri*'s express disavowal of facial overbreadth challenges, and the mild comment made by Justice Kennedy, joined by Justice Scalia, simply noted that the Court was not calling into question the approach followed by the Court in *Lopez* and *Morrison*.[112] Why this different receptivity to facial challenges in the spending and commerce clause contexts? The Court's sparse discussion in *Sabri* provides no clarification. One answer might be that the Court has not given much thought to the question and failed to recognize that its practice regarding these two Article I powers and facial challenges is inconsistent. However, given the majority's discussion of the appropriateness of facial challenges in *Sabri* combined with the concurrence's distinction of *Lopez* and *Morrison*, ignorance of the inconsistency seems implausible. More likely, the Court's lack of explanation reflects the fact that it is more confident about its approach in the two separate contexts than about how to reconcile the variation between them.

One way of trying to reconcile the decisions focuses on the fact that the federal bribery statute at issue in *Sabri* and *Salinas* required proof of a threshold amount of federal funds, thereby supplying the jurisdictional element that the Court found lacking in *Lopez* and *Morrison*. As a practical matter, the presence of the threshold triggering amount may explain the Court's greater willingness in *Sabri* and *Salinas* to rely on case-by-case inquiry to guard against congressional overreaching; it seems likely that *Lopez* especially would have come out differently had the School Zones Act included a jurisdictional element.[113] But this explanation cannot be easily squared with what the Court actually says in these decisions, in particular *Sabri*'s bald statement that "[w]e can readily dispose of th[e] position that, to qualify as a

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

[112] *See* 124 S. Ct. 1941, 1949 (2004).

[113] *See* 514 U.S. at 567 (emphasizing that statute did not require showing of a connection to interstate commerce); *id*. at 561-62 (same); *see also United States v. Danks*, 221 F.3d 1037, 1038-39 (8th Cir. 1999) (*per curiam*)(upholding prohibition on possession of a firearm in a school zone as amended to include a jurisdictional element); *Jones v. United States*, 529 U.S. 848, 857-59 (2000) (construing federal arson statute, which includes a jurisdictional element, to cover only "property currently used in commerce or in an activity affecting commerce" to avoid constitutional concerns). Although *Morrison* also emphasizes the importance of a jurisdictional element, *see* 529 U.S. at 613, it is hard to imagine how a jurisdictional element could be added to the VAWA's private civil suit remedy without significantly curtailing its scope.

valid exercise of Article I power, the statute must require proof of a connection with federal money as an element of the offense."[114]

An alternative explanation rests the difference on the greater breadth of the spending power, the argument being that facial challenges in the spending context make little sense unless the Court is going to impose meaningful limits on the scope of congressional action. As several scholars have noted, the Spending Clause represents one of the few areas where the Court has not yet acted to curtail congressional power out of federalism concerns.[115] Instead, under *Dole* the real protection against congressional overreaching in spending lies not in judicially-imposed constraints but rather in the states' ability to reject funds combined with clear statement requirements.[116] *Lopez* and *Morrison*, however, indicate that the Court is willing to assert judicial limits on the commerce power. They indicate that certain activities lie outside of Congress' commerce power —"the Constitution's enumeration of powers . . . presuppose[s] something not enumerated[117] — whereas the under the Hamiltonian view of the spending power, asserted by the Court in *United States v. Butler* but only actually implemented in subsequent decisions, "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through use of the spending power."[118] This explanation fits contemporary case law, and it is hard not to read *Sabri* as signaling that the Court remains reluctant to alter its current approach to the spending power.[119] The problem with this explanation is that it fails to account for the Court's willingness to entertain — albeit only to reject on the merits — facial challenges to commerce power legislation in the post-New Deal period when it left the commerce power essentially judicially unconstrained.

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[114] *See* 124 S. Ct. at 1945.

[115] *See, e.g.,* Richard W. Garrett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 Cornell L. Rev. 1, 5-33 (2003); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1057-59 (2001).

[116] On the clear statement requirement, *see South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("If Congress desires to condition the States' receipt of federal funds, it 'must do unambiguously.'") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); on states' power to decline, *see Dole*, 483 U.S. at 211 ("'[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. . . . Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis.'") (quoting Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 589-90 (1937)); *see also Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1937) (arguing State could adopt "the simple expedient of not yielding to what she urges is federal coercion").

[117] *Lopez*, 514 U.S. at 567 (paraphrasing *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 195 (1824)); *see also Morrison*, 529 U.S. at 617 ("the Constitution requires a distinction between what is truly national and what is truly local");

[118] *Dole*, 483 U.S. at 207; *see also United States v. Butler*, 297 U.S. 1,64-67 (1936).

[119] *United States v. American Library Ass'n*, 539 U.S. 194 (2003), similarly demonstrates the Court's lack of sympathy for spending power challenges. *See id*. at 210-12 (rejecting claim that internet filtering requirements attached to funding for local public libraries was unconstitutional and analyzing restriction under unconstitutional conditions doctrine applicable to restrictions on grants to private entities rather than under *Dole*).

Yet reference to the breadth of the spending power suggests a related and more persuasive explanation: that the difference in approach to facial challenges reflects the difference in the substantive constitutional law applied in each context.[120] In the commerce clause context, as noted the focus of analysis is usually on the class of activities that Congress sought to regulate and on whether these activities are economic or noneconomic in nature,[121] a focus that almost always forces the Court to adopt an analysis that goes beyond the facts of the case before it.[122] But under the Court's spending clause analysis, Congress is not limited to a particular class of activities; instead, restrictions are imposed on the manner in which Congress can exercise its spending power.[123] Moreover, given the loose relation to federal interests and high financial penalties the Court accepted in *Dole* and *Sabri*,[124] a state's only potentially viable option for arguing these restrictions are not met is an as-applied challenge that bases claims of lack of connection to federal interests and coercion on the state's peculiar situation. Spending power challenges are thus substantively ill-suited to facial treatment.

In any event, the Court's differing receptivity to facial challenges should not obscure a point of constancy in its recent commerce and spending power jurisprudence: in both, the Court appears to apply ordinary rules of severability.[125]

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[120] Several scholars, beginning with Henry Monaghan, have argued that availability of facial challenges turns on the substantive constitutional doctrines that govern in a particular area. *See* Monaghan, *supra* note 23, at 3-6 & n.22 (availability of overbreadth challenges is a question of substantive constitutional law); *see also* Dorf, *supra* note 20, at 294 (availability of facial challenges turns on substantive constitutional law and institutional concerns); Fallon, *As-Applied*, *supra* note 20, at 1337-39, 1342-51 (identifying instances where nature of constitutional test affects availability of facial challenges); Isserles, *supra* note 21, at 396-406, 430-38 (arguing that *Salerno* test is simply a statement that the governing rule embodied in a statute fails under the relevant substantive doctrinal analysis).

[121] *See Morrison*, 529 U.S. at 608-09, 613. *Raich v. Ashcroft*, a recent Ninth Circuit decision, is a prime example of this phenomenon. Noting that "'[w]here the class of activities . . . . regulated . . . is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class,'" the appeals court instead ruled that "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician" represented a distinct class of activities that fell outside the commerce power. *See* 352 F.3d 1222, 1228 (9th Cir. 2004) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971), *cert. granted*, 124 S. Ct. 2909 (2004).

[122] Congress has the power to enact legislation targeting a class of one, but such situations are quite rare. For an example, *see Nixon v. Administrator of GSA*, 433 U.S. 425, 468-73 (1977) (upholding federal statute regulating only disposition of Nixon's papers against charge against charge it unconstitutionally singled out former President).

[123] While the general welfare requirement might seem to impose a class of activities restriction on the spending power, this requirement is essentially left for legislative determination. *See Dole*, 483 U.S. at 207; *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976).

[124] *See Sabri*, 124 S. Ct. at 1946; *Dole*, 483 U.S. at 208-11.

[125] In its early New Deal decisions, the Court at points seemed less willing to find severability. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 312-16 (1936) (holding that price-fixing and labor provisions of the coal act were inseparable, notwithstanding a severability clause); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 361-21 (1935); *see also* Stern, *supra* note 56, at 110-14 (critiquing *Carter*'s approach as stemming from the Justices' substantive views regarding the legislation in question).

The question of severability arose only in *Morrison* and then implicitly, when the Court cited a separate criminal provision of the VAWA which contained a jurisdictional element as an example of legislation that was sufficiently tied to interstate commerce.[126] Although not discussing the question, the Court's comment that the federal appellate courts had uniformly upheld this provision suggests that it believed that the unconstitutional parts of VAWA could be severed and would not force invalidation of the statute as a whole.[127] *Sabri*'s argument against facial challenges in spending power cases also carries with it the implication that any unconstitutional applications of spending legislation could be severed, since otherwise a successful as-applied challenge would be indistinguishable from a facial overbreadth challenge.

C. The Meaning of Facial Challenges

The extent to which substantive law drives the shape of the Court's analysis in congressional power cases suggests the need for greater clarity regarding what constitutes a facial challenge. The distinction between facial and as-applied challenges is more illusory than the ready familiarity of the terms suggests. Indeed, as Richard Fallon has argued, "facial challenges are less categorically distinct from as-applied challenges than is commonly thought."[128] The nature of a "facial" challenge is rarely explored in the case law; when a description is provided it usually is only the unhelpful description that such a challenge targets a statute "on its face."[129] Instead, facial and as-applied challenges are more commonly differentiated by their effects. A successful facial challenge means that the "state may not enforce [a statute] under any circumstances, unless an appropriate court narrows its application" to render it constitutional; a successful as-applied challenge still allows the state to "enforce the statute in different circumstances."[130] In fact, however, ordinary rules of preclusion and *stare decisis* make this contrast in effects far less stark; the preclusive effect of a successful facial challenge will depend on the

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[126] *See* 529 U.S. at 613 & n.12 (describing 18 U.S.C. § 2261(a)(1), which makes it a crime to "travel[] across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who . . . thereby causes bodily injury to such spouse or intimate partner.").

[127] *See id*. at 613 n.12. The Court has also made clear that it will construe federal legislation and regulations to conform to commerce power limits. *See, e.g., Jones v. United States*, 529 U.S. 848, 857-59 (2000).

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

[129] *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 52 (1999);

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

level of court that issues the decision, and *stare decisis* means successful as-applied challenges often generate results that are not specific to a particular challenger.[131]

Despite the Court's failure to clarify what it means a facial challenge, it is possible to infer a definition from *Salerno*'s no valid application requirement. This requirement indicates that in the Court's view a facial challenge must target a statute's constitutionality in all its applications, whereas as-applied challenges are those that simply target the statute's application in a particular context.[132] Yet no logical reason exists as to why a litigant could not make a partial facial challenge — that is, allege that a particular statutory provision is unconstitutional or that a statute is unconstitutional in a particular range of applications, even if not unconstitutional in all or most.[133] On this view, what differentiates facial and as-applied challenges is not the breadth of the challenge, but the nature of the claim being asserted: A facial challenge is one that "puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves facts only insofar as it is necessary to establish that the rule served as the basis of decision."[134] Notably, until *Salerno* uprooted the traditional orthodoxy, facial challenges were understood to include such context-specific challenges to general rules, because as-applied challenges were defined in fairly narrow terms synonymous with claims of privilege.[135] This narrow approach is evident, for example, in *Carolene Products*. The as-applied challenge

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[131] *See* Fallon, *As-Applied*, *supra* note 20, at 1336-41.

[132] *See* 481 U.S. 739, 745 (1987) (stating that to make out a successful facial challenge "a claimant must demonstrate that no set of circumstances exists under which a statute can be constitutionally applied"); *United States v. Sabri*, 124 S. Ct. 1941, 1948 (2004) (describing facial challenges "in the strictest sense" as ones where "no application of the statute could be constitutional"); *Brockett v. Spokane Arcades*, 472 U.S. 491, 501-06 (1985) (holding partial invalidation rather than facial invalidation is appropriate where parties challenging statute seek to engage in very speech that statute is overbroad for prohibiting and partial invalidation accords with state law).

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

[134] Paul M. Bator, *et al*., Hart and Wechsler's The Federal Courts and the Federal System 662 (3rd ed. 1988); *see also Reno v. Flores*, 507 U.S. 292, 300-01 (1993) ("[T]his is a facial challenge. . . . Respondents do not challenge its application in a particular instance. . . . We have only the regulation itself and the statement of basis and purpose that accompanied its promulgation [before us."); Adler, *Rights Against Rules*, *supra* note 21, at 157 n. 541 (describing facial challenges as ones which focus exclusively on the predicate and history of a statutory rule, as contrasted with as-applied "adjudication that depends, in part, on facts about the claimant"); Monaghan, *supra* note 23, at 8 ("[A] challenge to the content of the rule applied is independent of the specific facts of the litigant's predicament. Rather, it speaks to the relationship between the facial content of the rule being applied to the facts and applicable constitutional law.").

[135] *See* Hart & Wechsler, *supra* note 139, at 662 ("Challenges to the validity of a statute as applied to specific facts, on the other hand, turn necessarily on a determination of what the adjudicative facts were . . . . [and] can always be rephrased simply as an assertion of federal right or immunity with respect to the operative facts."); *see also* Monaghan, *supra* note 23, at 5. While as-applied challenges were thus viewed as largely the equivalent of claims of privilege, how such challenges were stylized did affect the availability of review in the Supreme Court as of right; such review was available only for as-applied challenges. *See Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

the Court leaves open there is really a fact-based claim of privilege or immunity — that congressional regulation of a particular article or activity is not rational given its specific characteristics — as opposed to a challenge to the general rule embodied in the congressional regulation in question.[136]

Nothing in principle precludes defining facial challenges as operating at the wholesale level and as-applied challenges as functioning on a more retail basis, provided it is recognized that both target the constitutionality of a general rule. But the restrictive definition of facial challenges sows confusion, precisely because this crucial proviso is often overlooked. As the above examination of congressional power cases reveals, substantive law may at times necessitate looking beyond the facts of the case at hand. This does not mean, however, that the Court must consider all applications or dimensions of a statute to determine if Congress exceeded its powers. Rather, a range of challenges are possible, with *Salerno*-style facial challenges and privileged-based as-applied challenges representing polar extremes instead of mutually exclusive categories. Take *Lane* as an example: the Court there considered whether Title II was as a means of enforcing the right of access to the courts writ large, but it could alternatively have considered only the rights of access of criminal defendants or court employees. While the latter approach would be more tied to the facts of *Lane* itself, the challenge would still be "facial," in that the contours of the claims at issue are not unique to the plaintiffs in the case. Indeed, despite its contemporary assignment to the as-applied camp, *Raines* actually represents an instance where the Court entertained a facial challenge in this sense, because the Court upheld the general rule laid down by Congress, namely a prohibition on state officials depriving individuals of the right to vote based on race.[137]

Defining facial challenges in only *Salerno* terms is additionally confusing because it hides the central role played by severability doctrine. The claim that a statute is unconstitutional in all its applications is usually quite implausible; a little imagination suffices to produce at least one potentially constitutional application, indeed even a fair number of constitutional applications.[138] What underlies a litigant's claim that a statute cannot be constitutionally applied is therefore the argument that the unconstitutional and constitutional aspects of a statute cannot be severed. As a result, viewing the issue in *Lane* as the availability of facial challenges is misleading. A litigant should be able to bring a facial challenge even of the

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[136] 304 U.S. 144, 153-54 (1938).

[137] *See Sabri*, 124 S. Ct. at 1948; *Raines*, 362 U.S. 17, 25 (1960). The same is true of *Katzenbach*; although the Court there made references to discrimination against Puerto Ricans in voting and provision of services, suggesting a traditional as applied challenge, given its references to to Puerto Ricans, it never demanded any showing that such discrimination actually existed in New York. 384 U.S. 641, 652-55 (1966).

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

Salerno variety, alleging that a statute by its terms has inseparable unconstitutional applications. A court may respond by accepting the claim of unconstitutionality but disagreeing about severability, with the result that the statute is then enjoined or declared invalid in part to the extent it affects the plaintiff. But the possibility of this result at best justifies denying availability of a facial challenge in the first place only where the litigant is not herself potentially subject to the unconstitutional application and a presumption of severability applies.[139]

Or in other words, the real question raised by *Lane* is how the Court should approach severability in the section five context: should it apply its ordinary severability rules and presume unconstitutional applications are severable, or on the contrary presume nonseverability?[140] The Court's congressional power precedent seems to support applying ordinary severability rules, but the development of the new congruence-and-proportionality test may mean the Court should change its approach to facial challenges and severability in the section five context. To the extent the Court's congressional power precedent involved other standards of review, this prior practice is not determinative of how the Court should proceed today — unless, of course, no reason exists to treat the congruence-and-proportionality test differently.

II. FACIAL CHALLENGES, SEVERABILITY, AND THE CONGRUENCE-AND-PROPORTIONALITY TEST

What remains then is the pivotal normative inquiry: Precedent aside, how should the Court approach section five challenges? More particularly, do substantive concerns justify the Court in deviating from ordinary severability rules and treating section five challenges as *Salerno*-style attacks requiring examination of all a section five statute's applications?

One possible substantive argument against severability can be dismissed at the outset. The above discussion established that Congress' power to act under section five (and in other contexts) is assessed on a general basis; again, in *Hibbs* and *Lane*, the Court relied on evidence of a pattern of constitutional violations in the states generally as justifying application of section five legislation to specific states, without inquiring into whether Nevada and Tennessee were guilty as well.[141] As a

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

[140] Debate exists as to whether a special nonseverability presumption governs in First Amendment cases. *Compare* Monaghan, *supra* note 23, at 21-33 (arguing no nonseverability presumption exists), *with* Fallon, *As-Applied*, *supra* note 25, at 867-74 (arguing Court applies a nonseverability presumption and arguing that such a presumption protects First Amendment values).

[141] *See Lane*, 124 S. Ct. at 2009-10.

result, it could be argued that challenges to legislation as exceeding such power should be brought on a general basis as well. Or in other words, these challenges usually must look beyond the specific facts of the case at hand and thus be facial in character. This argument has some bite, as far as it goes. But all it justifies is judicial willingness to entertain facial challenges in the first instance, even if courts quickly dispense with such challenges on the merits. The general nature of congressional power analysis provides no reason why a court, having found application of a statute to be constitutional (or not), should deviate from applying ordinary severability rules and presumptions in determining whether this application is separable from the remainder of the statute.

Two additional arguments might be offered to justify such a deviation in the section five context. The first, focusing on the analytic requirements of the congruence-and-proportionality test, contends that applying a presumption of severability is at odds with the logic of that inquiry. The second, focusing instead on the values underlying the congruence-and-proportionality test and other constitutional concerns, offers instrumental reasons to forego application of ordinary severability rules. These two lines of argument are taken up below in turn.

A. Severability and Congruence-and-Proportionality's Substantive Requirements

Determining whether severability is compatible with the substantive content of the congruence-and-proportionality test entails returning to the discussion with which this Essay began, namely what exactly does the congruence-and-proportionality test mean? The test could be seen as simply imposing a form of heightened means-end scrutiny or narrow tailoring requirement. Alternatively, it could represent a form of illicit motive or purpose inquiry, which aims primarily at identifying instances where Congress is using Fourteenth Amendment remediation as a pretext for regulation. Both of these understandings lie implicit in Chief Justice Rehnquist's claim the logic of the congruence-and-proportionality inquiry requires the Court to consider all of a section five statute's applications:

> In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.
>
> . . . The effect [of the majority's as-applied] approach is to rig the congruence-and-proportionality test . . . . [T]he majority's approach is not really an assessment of whether Title II is "appropriate *legislation*" at all, but a test of whether the Court can

> conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.[142]

Although closely related, these two accounts of the congruence-and-proportionality suggest different justifications for deviating from ordinary severability rules, and thus will be discussed separately.

1. Congruence-and-Proportionality as a Narrow Tailoring Requirement. As it has emerged from recent decisions, with its emphasis on identifying an established pattern of state constitutional violations to which Congress could legitimately respond and on ensuring the means Congress chooses does not sweep too broadly, the congruence-and-proportionality test appears as a form of narrow tailoring analysis. The Court's continued willingness to grant Congress some wiggle room — allowing Congress to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct"[143] — suggests that the type of tailoring the test requires is more akin to intermediate than strict scrutiny.[144] The test does, however, require significantly greater tailoring than ordinary rationality review, as the amount of legislation to fail its strictures suggests.[145]

In several other narrow tailoring contexts, the Court deviates from the ordinary presumption of severability and allows *Salerno*-style facial challenges — statutes regulating abortion or restricting speech are the most acknowledged examples.[146] Such deviation may stem from prophylactic concerns, and thus be more relevant to the instrumental concerns discussed below. But it also in part reflects the fact that given the narrow tailoring requirements mandated by substantive constitutional law, a court is less likely to be able to fashion a legitimate construction of the statute that allows it to conform to constitutional limits. Moreover, as the applicable standard of constitutional review is heightened, the likelihood increases that a statute will be unconstitutional in a significant number of its applications, and accordingly that attempts to sever these invalid applications will render the statute non-functioning or excessively vague.[147] Significantly, however, where the Court is able to construe a statute to fit constitutional requirements, it frequently does so. Thus, in *Planned Parenthood v. Casey*, the Court invalidated the husband-notification and related notice requirement of Pennsylvania's abortion law that it

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[142] 124 S. Ct. at 2005 (internal citations omitted).

[143] *Tennessee v. Lane*, 124 S. Ct. 1978, 1985 (2004) (quoting *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 727-728 (2003)); *see also City of Boerne v. Flores*, 521 US 507, 518 (1997)

[144] On the degree of narrow tailoring congruence-and-proportionality requires, *compare* Laurence Tribe, American Constitutional Law 959 (3rd ed. 2000) (describing review as "something between intermediate and strict scrutiny") *with* McConnell, *supra* note 15, at 166, (standard akin to intermediate scrutiny), *with* & Post & Siegel, *Equal Protection*, *supra* note 2, at 477, 511 (test "seem[s] analogous to the narrow tailoring required for strict scrutiny").

[145] *See* Caminker, *supra* note 2, at 1132, 1153-58; McConnell, *supra* note 15, at 165-66.

[146] *See supra* text accompanying notes 22-23.

[147] *See* Fallon, *As-Applied*, *supra* note 20, at 1342, 1350-51; Dorf, *supra* note 20, at 251-64, 281-82; Monaghan, *supra* note 23, at 17-18, 24-25.

found unconstitutional and upheld the rest.[148] Similarly, in *United States v. Grace*, in response to a facial challenge to a federal prohibition federal prohibition on "carrying signs, banners or devices" on the Supreme Court's building and grounds, the Court held the prohibition was unconstitutional "as applied" to "the public sidewalks surrounding the building," thus severing this application of the statute from its other applications.[149]

Moreover, when the Court enjoins the challenged statute *in toto*, it is not because the Court rejects application of ordinary severability rules, but rather because the Court holds that under those rules unconstitutional aspects of the statute cannot legitimately be severed. Thus, in *Steinberg v. Carhart*, the Court concluded that Nebraska's statute banning "partial birth" abortions imposed an undue burden on abortion because it covered dilation and evacuation, the most common and safest method of previability abortions, as well as dilation and extraction, the method often referred to as "partial birth" abortion. Rather than imposing a narrowing construction on the statute, or certifying the question of the statute's meaning to the state supreme court, the Court ruled that the statute was unconstitutional. But the Court did not suggest that ordinary severability rules were inapplicable because the statute was subject to heightened scrutiny. Instead, it refused to sever the statute's unconstitutional applications or overbroad language on the grounds that doing so would be at odds with the standard severability requirement that a narrowing construction be "reasonable and readily apparent" on the face of the statute.[150] To take another recent example, in *City of Chicago v. Morales*, the Court held Chicago's anti-loitering statute unconstitutional "on its face" for failing to provide citizens with fair notice of what conduct was prohibited and for failing to contain adequate guidelines to prevent arbitrary enforcement. Narrowing was eschewed not because the First Amendment was involved but because vagueness "permeate[d] the

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[148] *See* 505 U.S. 833, 898, 901 (1992); *see also Tennessee v. Garner*, 471 U.S. 1, 4, 11 (1985) (invalidating state provision authorizing police to use all necessary means to effect arrest of fleeing defendant only as applied to use of deadly force against unarmed, nondangerous suspects).

[149] 461 U.S. 171, 183-84 (1983); *see also United States v. National Treas. Emp'ees U.*, 513 U.S. 454, 478 (1995) (enjoining application of broad honoraria ban for federal employees only as applied to lower-level executive branch employees); *Brockett v. Spokane Arcades*, 472 U.S. 491, 504-05 (1985) (refusing to facially invalidating state obscenity law but instead partially invalidating provision insofar as it reached constitutionally protected activity); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld."); *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982) (noting that faced with an overbreadth challenge, a federal court "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction" and in any event, "if it is severable, only the unconstitutional portion is to be invalidated").

[150] 530 U.S. at 944 (internal quotations omitted); *see also Reno v. ACLU*, 521 U.S. 844, 884-85 (1997) (facially invalidating statutory provisions found unconstitutionally because provisions were not readily susceptible to a saving construction). Moreover, in *Steinberg* the Court also held that absence of a health exception also rendered the statute constitutionally infirm, so adopting a narrowing construction would not have led the Court to sustain it in any event. *See* 530 U.S. at 946.

ordinance."[151] In addition, *Morales* came to the Court from the Illinois Supreme Court, which had not narrowed the ordinance's scope and instead had held it facially unconstitutional.[152] As a result, the Supreme Court's similar refusal to sever accorded with the established rule that state court rulings on the meaning of state statutes are binding on the Supreme Court.

This question of whether a state or federal statute is involved deserves emphasis. When the Court refuses to sever the unconstitutionally overbroad aspects of a state statute, the state is still able to seek the needed curative construction from its own courts. But where federal statutes are involved, no such option exists; if the Court refuses to sever, then the burden falls on Congress to amend the statute to fit constitutional requirements. Section five legislation is, of course, federal legislation, and thus whatever willingness the Court displays to presume nonseverability in First Amendment overbreadth challenges to state statutes does not necessarily carry over.[153]

This is not to say that the congruence-and-proportionality test imposes no substantive limits on the extent to which a court can engage in severability. The fact that the test represents a form of narrow tailoring may justify deviating from the presumption of severability to allow states to bring what are in essence facial overbreadth challenges to the constitutionality of section five legislation. More importantly, as noted above, the recent section five decisions make the constitutionality of section five legislation turn on the nature of the constitutional right in question and on the presence of a pattern and history of states violating this right.[154] As a result, the congruence-and-proportionality test appears to preclude considering the constitutionality of section five legislation only in the context of a traditional as-applied challenge, where the court simply assesses whether a statute can be applied to the particular facts before it. Indeed, the majority in *Lane* acknowledged this, assessing whether Title II was constitutional "as it applies to the class of services implicating the accessibility of judicial services" in the states generally, rather than limiting itself to considering whether Tennessee had violated the plaintiffs' particular rights of court access to the court.[155]

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[151] 527 U.S. at 55 & n.22.

[152] *See City of Chicago v. Morales*, 687 N.E.2d 53, 64 (Ill. 1997) ("[T]he gang loitering ordinance is not reasonably susceptible to a limiting construction which would affirm its validity.").

[153] It also merits notice that the congruence-and-proportionality test differs from other instances of narrow tailoring in that the test is aimed at identifying unconstitutional overinclusiveness, not underinclusiveness. The Court focuses on whether section five legislation is excessive — either because no pattern of state constitutional violations exists, or because the remedial means Congress chose sweeps too broadly. Underinclusiveness appears only to be seen as a virtue. *See, e.g., Hibbs*, 538 U.S. at 739-40 (using fact that Congress did not extend the FMLA's protections to high-ranking employees and in other ways limited the scope of FMLA protections as evidence of the FMLA's remedial character). As a result, the Court's willingness to deviate from a presumption of severability in underinclusiveness challenges, *see* Dorf, *supra* note 20, at 251-61, would again not apply to justify such a deviation here.

[154] *See supra* text accompanying notes 4-9.

[155] 124 S. Ct. 1978,1993 (2004).

But these limitations are relatively minor, and narrow tailoring alone does not justify the move of courts' refusing to apply ordinary severability analysis in responding to these challenges on the merits. *Lane*, moreover, is really an instance of the latter use of severability. The Court did not avoid the constitutional challenge asserted by Tennessee; instead, having found Title II constitutional in regard to enforcing the right of access to the courts, it applied the presumption of severability to avoid considering whether Title II was also constitutional in regard to other rights. Or more precisely, *Lane* affirms the ability of states to bring challenges alleging that section five legislation is unconstitutional on its face because insufficiently tailored to remedying a constitutional violation. All *Lane* rejects is the proposition that a court, having found section five legislation to be constitutional (or unconstitutional) in the context before it, must proceed to consider whether the legislation is constitutional in all its applications. In addition, although the *Lane* Court identified the right at issue in general terms, *i.e*. as the right of access to the courts writ large, nothing in congruence-and-proportionality appears to mandate such a generalized definition.[156] Thus a court could define the right in question on a more specific level, *i.e.* as involving only criminal defendants' rights of court access, and not reach the constitutionality of the challenged statute's application even to contexts involving other dimensions of the right.

2. Congruence-and-Proportionality as a Purpose Inquiry. Another way of understanding the congruence-and-proportionality test is as a purpose or motive inquiry, because its underlying concern is to ensure that Congress does not use section five as a pretext for imposing substantive regulations on the states that otherwise would be outside of Congress' powers.[157] Support for understanding congruence-and-proportionality as ultimately a purpose inquiry comes from the Court's consistent insistence that valid section five legislation must aim at remedying, not redefining, Fourteenth Amendment violations.[158] This view of the test represents an additional spin on the narrow tailoring account more than a separate interpretation: the reason for imposing such scrutiny is to "smoke out" illegitimate congressional intent.[159]

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[156] As noted above note 11 and accompanying text, debate exists on the Court regarding how precisely the right in question should be identified.

[157] For accounts of the congruence-and-proportionality test as a purpose inquiry, *see, e.g.,* J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-Ends Relationships*, 36 U.C. Davis L. Rev. 407, 432-46 (2003); Richard H. Fallon, *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 131-32 (1997) [hereinafter Fallon, *Foreword*]; *see also* Post & Siegel, *Equal Protection*, *supra* note 2, at 457-58, 460-63, (noting the ways the Court appears to be using congruence-and-proportionality as a means of uncovering illicit congressional purpose).

[158] *See, e.g., Tennessee v. Lane*, 124 S. Ct. 1978, 1986 (2004); *Hibbs*, 538 U.S. at 729; *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

[159] Smoking out illegitimate purpose is a prominent justification for use of strict scrutiny in the equal protection context. *See, e.g., Grutter v. Bollinger*, 509 U.S.306, 326 (2003) ("We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.") (quoting *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 493 (1989)).

Viewing congruence-and-proportionality as a purpose inquiry might at first glance indeed seem to justify deviating from ordinary severability rules. According to some commentators, claims of unconstitutional purpose are another instance where the Court has allowed facial challenges, and more importantly responded by refusing to sever unconstitutional applications. Moreover, they argue that this refusal is appropriate because "[i]f a statute serves an unconstitutional purpose, ... [t]he unconstitutional purpose pervades all of the provision's applications."[160]

It is important, however, to distinguish between two separate types of purpose inquiries. On the one hand, the Court might focus on discerning Congress' actual intent in enacting a section five statute. On the other, it might focus on assessing whether the statute objectively appears remedial, and presume that Congress' actual motivation was legitimate (or illegitimate) based on that assessment. Viewing the congruence-and-proportionality test as a purpose inquiry justifies deviating from ordinary severability rules only under the subjective version; only if the Court determines that Congress actually enacted the legislation out of nonremedial concerns does it follow that the entire statute is tainted by illegitimate ends. If purpose is viewed in objective terms, however, little reason exists to deviate from severability once the Court determines that some of a statute's applications are objectively remedial. On the contrary, by cutting section five legislation down to objectively remedial parameters the Court can protect states against congressional overreaching while also deferring to what it has found to be plausible congressional concerns regarding unconstitutional state actions.

The recent section five decisions are hard to square with an understanding of congruence-and-proportionality as an inquiry into Congress' actual motivation.[161] The Court's insistence on independently scrutinizing whether a pattern of state constitutional violations existed and whether a section five measure is adequately tied to remedying those violations is more in keeping with the objective account.[162]

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

[161] *See* Estreicher & Lemos, *supra* note 10, at 132-41 (describing congruence-and-proportionality as applying only where congressional purpose is unclear and Court wants to give Congress the benefit of the doubt); Beck, *supra* note 176, at 415-17, 432-36 (describing congruence-and-proportionality and *McCulloch v. Maryland* as objective inquiries into pretext); Post & Siegel, *Equal Protection*, *supra* note 2, at 459-60, 477, 510-11 (describing both *Kimel* and *Morrison* as going beyond an investigation into whether Congress intended legislation to be remedial and arguing the congruence-and-proportionality test is an "an odd and awkward way" to identify "legislation enacted for the purpose of defining the substantive meaning of the Equal Protection Clause").

[162] *See, e.g., Hibbs*, 538 U.S. at 728-37; *Board. of Trustees v. Garrett*, 531 U.S. 356, 365-

So too is the Court's willingness to look at judicial evidence of state constitutional violations not identified by Congress, and to apply the congruence-and-proportionality test with full vigor to legislation enacted before *Boerne*.[163] In the latter case, a subjective inquiry would more sensibly focus on whether the legislation appeared sufficiently remedial under then-existing standards.

This leaves the possibility that the congruence-and-proportionality test has *both* objective and subjective dimensions: legislation must objectively appear remedial and Congress must subjectively intend it as such.[164] Such a dual account better accords with the Court's applications of congruence-and-proportionality, insofar as the Court alternates between independently assessing section five legislation and assessing the legislative record compiled by Congress. But what remains unexplained is why section five legislation must be both objectively and subjectively legitimate to be constitutional. In this regard, it worth noting that in the commerce clause context, the Court has long ruled that Congress' purpose is irrelevant where Congress is clearly regulating interstate commerce.[165] Even under the Court's pre-New Deal restrictive view of the commerce power, it held Congress' motivation in enacting regulations to be irrelevant when Congress targeted interstate commerce on the face of a statute.[166] The emphasis on jurisdictional elements in *Lopez* and *Morrison*, as well as their continued willingness to allow Congress broad room to regulate economic activity (and reaffirmance of the constitutionality of federal legislation motivated by non-commercial concerns, such as the Civil Rights Act), indicate that the Court continues to adhere to this view.[167] The Court plainly believes that the difference in scope of Congress's commerce and section five powers necessitates more rigorous means-ends scrutiny of the latter. But it has never offered a justification for why legislation that in part satisfies this scrutiny should be rendered entirely invalid on the basis of congressional subjective intent.[168]

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73 (2000); *see also* McConnell*, supra* note 15, at 166 (describing Court as independently assessing the remedial character of section five legislation under congruence-and-proportionality test); Post & Siegel, *Legislative Constitutionalism, supra* note 6, at 1964-65 (same).

[163] The congruence-and-proportionality test first appeared in *Boerne* in 1997. RFRA, there addressed, was enacted in 1993, *see City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). The ADA was enacted in 1990, *see Lane* 124 S. Ct. at 1982; the FMLA in 1993, *see Nevada Dept Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003); the VAWA in 1994, *see United States v. Morrison*, 529 U.S. 598, 605 (2000); the Plant Remedy Act in 1992, *see Florida Prepaid Postsecondary Educ. Exp Bd. v. College Savings Bank*, 527 U.S. 627, 630 (1999), and the ADEA was extended to the states in 1974, *see Kimel v. Florida Dept of Regents*, 528 U.S. 62, 68 (2000).

[164] Chief Justice Rehnquist's repeated reference in *Lane* to the record before Congress as well as his undertaking to independently assess that record suggests he takes such a view. *See Lane*, 124 S. Ct. at 1999-2003.

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

[166] *See Hoke v. United States*, 227 U.S. 308, 491-92 (1913); *Champion v. Ames*, 188 U.S. 321, 355-56 (1903).

[167] *See Morrison*, 529 U.S. 598, 609, 611 (2000); *Lopez*, 514 U.S. 549, 558, 562 (1995).

[168] In addition, while constitutional tests frequently include purpose inquiries, these often take an objective form. Rather than probing for evidence of unconstitutional subjective purpose, for example, the Court often relies on the presence of facial classifications as justification for applying heightened scrutiny, and a subjectively benign purpose does not suffice to lower the level

Most importantly, viewing the congruence-and-proportionality test as entailing, even in part, an assessment of Congress' actual intent has significant ramifications for Congress' institutional independence. Some have criticized the recent section five decisions as judicial power grabs, arguing that the Court is illegitimately arrogating to itself the power to determine the scope of Fourteenth Amendment rights.[169] The Court has responded by maintaining that it is simply adhering to *Marbury v. Madison*'s insistence that the judicial role is to say what the law is.[170] If congruence-and-proportionality is viewed in subjective terms, then the Court is going substantially beyond simply asserting the power to ensure that section five legislation confirms to judicial understandings of Fourteenth Amendment rights. Instead, the Court in essence would be requiring Congress to adhere to these judicial understandings in its deliberations or risk having its enactments invalidated — even if, objectively assessed, these enactments do not add to the scope of judicially established Fourteenth Amendment rights. Such a move represents an extraordinary degree of judicial control of Congress' exercise of its enumerated powers.[171]

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of scrutiny. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-29 (1995) (applying strict scrutiny to racial classifications regardless of specific race targeted); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd*., 502 U.S. 105, 117 (1991) (applying strict scrutiny to content-based speech regulation notwithstanding legitimate legislative motivation); *see also* Fallon, *Foreword*, *supra* note 176, at 90-102. On the use of purpose tests in constitutional analysis, *see generally* Ashutosh Bhagwat. *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297 (1997).

[169] *See, e.g.,* Caminker, supra note 2, at 1168-86; Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword*: *We the Court*, 115 Harv. L. Rev. 5, 136-53 (2001); McConnell, *supra* note 15, at 181-92; Post & Siegel, *Legislative Constitutionalism*, *supra* note 6, at 1966-71, 1980-84.

[170] *See Marbury v. Madison*, 1 Cranch. (5 U.S.) 137, 177 (1803); *see, e.g., Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ("It falls to this Court, not Congress, to define the substance of constitutional guarantees."); *see also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("when the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*.").

[171] *See* Kramer, *supra* note 189, at 13 (distinguishing between judicial supremacy and judicial sovereignty on similar grounds). Robert Post and Reva Siegel have suggested that on the contrary, it is the Court's independent inquiry into whether section five legislation is remedial, and not its investigation into whether Congress' subjective purpose, that represents the greatest intrusion on congressional power. *See* Post & Siegel, *Equal Protection*, *supra* note 2, at 459-62, 511. This might follow if the subjective inquiry was limited to whether Congress intended its legislation to be remedial, given its own understanding of the rights involved. But given the Court's insistence that Congress lacks power to deviate substantively from judicial pronouncements regarding the scope of Fourteenth Amendment rights, any subjective inquiry would appear to be an investigation into whether Congress intended its legislation to remedy violations of such rights *as judicially defined*. Indeed, a subjective inquiry would appear to preclude precisely the kind of policentric constitutional interpretation they advocate, as they appear to acknowledge. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 6, at 2023; *see also id*., at 2020-45 (setting out policentric model).

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

In addition to arguments from precedent and the substantive content of congruence-and-proportionality, the Chief Justice also offered instrumental reasons for denying severability. He maintained that assessing the constitutionality of section five legislation on an as-applied basis "eliminates any incentive for Congress to craft [section five] legislation for the purpose of remedying or deterring actual constitutional violations." Instead, it will fall to the courts "to sort out which hypothetical applications of an undifferentiated statute . . . may be enforced," with the result that "States will be subject to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights."[172] These claims parallel the standard instrumental arguments for facial challenges and nonseverability in First Amendment overbreadth cases, specifically that requiring individuals to challenge overbroad statutes on a case-by-case basis risks "chilling" exercise of First Amendment rights and undermines legislative incentives to draft statutes that take First Amendment concerns seriously.[173] To these two instrumental arguments could be added a third, also raised by the Chief Justice: allowing severability in the section five context imposes significant burdens on the federal courts and thus deviates from "the proper role of the Judiciary."[174] But as was true regarding the substantive claims discussed above, none of these arguments suffices to justify deviating from ordinary severability rules.

1. Nonseverability and Deterrence of States Asserting Their Constitutional Rights. Undoubtedly, an as-applied approach to section five challenges, under which the Court only considers the constitutionality of legislation in regard to the case at hand and severs other applications, will lead to "piecemeal" litigation. States will not be able to procure a determinative assessment of a section five statute's constitutionality in a single proceeding. But this is true whenever a court denies a facial challenge or severs applications of a statute not directly before it. In fact, in its justifications for limiting the availability of facial challenges, the Court usually describes forcing constitutional litigation to proceed in a "piecemeal" fashion as a virtue, not a vice.

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[172] *See Tennessee v. Lane*, 124 S. Ct. 1978, 2005 (2004).

[173] *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (describing First Amendment overbreadth doctrine as resting on "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech" because "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from speech."); *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (same); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L. J. 853, 867-75, 884-89 (1991) (describing chill and legislative incentive arguments); *see also* Monaghan, *supra* note 23, at 31-33 (describing the incentive argument for overbreadth regarding federal statutes but concluding it fails to justify nonseverability). For an initial and influential academic analysis of the chill argument for overbreadth, *see Note, The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 852-58, 865-82 (1970).

[174] *See Lane*, 124 S. Ct. at 2005-06.

The question therefore is whether something unique to the section five context renders concerns about piecemeal proceedings more salient. One distinguishing feature of section five litigation is that it overwhelmingly involves a State as a party, and does so universally when the underlying issue is whether a congressional abrogation of Eleventh Amendment immunity is constitutional.[175] Moreover, in ordinary overbreadth challenges, the litigant wants to attack application of a statute to a hypothetical third-party, making it speculative whether such an application will occur. But in the section five context, it is plausible to expect that a State attacking other applications of a statute will itself be subject to those applications, so the as-applied approach not only forces piecemeal assessment of a statute's constitutionality, but also piecemeal assessment of a particular party's rights.

On the other hand, states are better positioned than most to handle such repeated litigation. While defending challenges takes resources, states have attorney general offices and staffs already in place to handle litigation on their behalf. Increasingly state attorney generals are collaborating on section five challenges and other litigation, lessening the resource burden.[176] Moreover, states often have a financial incentive to litigate section five challenges, because success on such challenges serves to remove their liability for money damages in private suits. And states do not face criminal penalties for engaging in conduct prohibited by section five legislation. These latter two features in particular serve to distinguish section five and First Amendment challenges and make claims of chill much harder to justify in regard to the former.[177]

This leaves the claim that federalism values should make the Court especially solicitous of imposing litigation burdens on states. The states' distinctive role in the constitutional order might seem to justify distinctive treatment in the form of denying severability when congressional legislation is challenged as treading on their constitutional prerogatives. But if so, then severability should also be denied

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[175] The cases that do not involve states as parties are those where section five legislation targets private action, a category rendered perhaps a null set by *United States v. Morrison*, 529 U.S. 598, 620-26 (2000), and those where the legislation authorizes actions against individual state officials, *see, e.g., United States v. Raines*, 362 U.S. 17, 24-25 (1960).

[176] *See* Jason Lynch, *Note, Federalism, Separation of Powers, and the Role of the State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 1998, 1999-2009 (2001) (detailing substantial increase in state attorney general cooperation and multistate litigation since 1980); Steven Andersen, *Power of the States: The Rise of the State Attorneys General*, Corp. Litig. Times, Aug. 2003 (describing rise in activity and power of state attorney generals); David Bank, *States to Investigate Oracle Bid; Attorneys General Agree to Cooperate, Share Costs to Review PeopleSoft Offer*, Wall St. J., Aug. 1, 2003, at A2 (noting attorneys general from 30 states formally agreed to cooperate in antitrust investigation).

[177] *See* Carroll, *supra* note 34, at 1061-62 (similarly arguing states will not be deterred from asserting their rights). Moreover, several scholars have questioned the empirical basis for the chill argument even in regard to the First Amendment, given that citizens are unlikely to be sufficiently aware of how a statute is written to be chilled from engaging in expressive activities, and even less likely to be aware of curative constructions claimed to reduce such chilling effect. *See* Fallon, *Making Sense*, *supra* note 180, at 885-88 (describing and responding to criticisms of chill justification for First Amendment overbreadth doctrine).

whenever states challenge congressional legislation, and perhaps whenever congressional legislation is challenged as violating state autonomy or intruding into the states' proper sphere. Yet the rejection of facial challenges in the spending clause context announced in *Sabri*, as well as the rejection of judicial protection against direct federal regulation of the states announced in *Garcia v. San Antonio Metro Transit*,[178] indicate that such special solicitude for the "states as states" does not apply across the board. Moreover, recognition of the distinctive position of the states might instead counsel for the Court limiting itself to considering the constitutionality of section five statutes only as implicated by the case before it, as a state may prefer to take a more discriminating approach and not challenge all of the statutes' applications.[179]

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

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[178] *See* 469 U.S. 528, 547 (1985).

[179] Numerous states, for example, signed onto amicus briefs in *Lane* and *Hibbs* arguing that the statutes challenged in those cases were constitutional, at least in some applications. *See* Brief of Minnesota *et al* as Amici Curiae in support of Respondents, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667), 2003 WL 22733906, at *1 (arguing that Title II is constitutional in all its application and noting "[a]lthough the states more typically advocate the application of Eleventh Amendment immunity, this case is different. . . .The states should support every effort to eradicate the effects of the documented long-term, pervasive and invidious discrimination against people with disabilities in the provision of public services."); Brief of Kansas and Delaware as Amici Curiae in support of Respondents, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667), 2003 WL 22733907 at 1(arguing Title II constitutional as applied to pursuit and enforcement of fundamental due process rights); Brief of New York *et al*. as Amici Curiae in support of Respondents, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (No. 01-1368), 2002 WL 31427565 at 1 ("[A]llowing our citizens to enforce their FMLA rights without restriction is consistent with the obligation of attorneys general of the amici curiae States to protect the public interest by ensuring that workplace gender discrimination against our citizens, with all of its vestiges, is eliminated.); *see also United States v. Morrison*, 529 U.S. 598, 661-62 (2000) (noting that an "overwhelming majority of States (38) supported" the VAWA). Other states argued that Title II of the ADA and the FMLA were unconstitutional. *See* Brief of Alabama *et al* as Amici Curiae in support of Petitioners, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667), 2003 WL 22176110; Brief of Alabama *et al*. as Amici Curiae in support of Petitioners, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (No. 01-1368), 2002 WL 1974391.

2. Nonseverability and Congressional Incentives. The incentive argument might appear at first glance to justify prioritizing respect for the states over Congress. On this argument, the reason to prioritize protecting the states is that Congress is in a position to protect its own interests by framing its legislation with greater care; the states, however, have no resort but the courts. Denying severability gives Congress a needed incentive to take constitutional limits on its section five powers seriously; otherwise, as the Chief Justice maintained, Congress will just rely on the courts to do its work.

But reliance on the courts to ensure section five legislation fits constitutional limits cannot be facilely dismissed as congressional irresponsibility. To begin with, the scope of Fourteenth Amendment rights is not always so clear. For instance, the Court has vacillated tremendously in setting out the constitutional right of access to the courts, even acknowledging dispute as to whether the substantive basis of the right rests in equal protection or due process.[180] As a result, Congress in good faith may not be able to discern clearly the bounds of its section five authority. In addition, the Court sometimes invokes one standard but in practice appears to apply another, suggesting greater constitutional protection than it may be willing to overtly acknowledge. *Cleburne Living Center v. City of Cleburne*'s rigorous use of supposed rationality review in addressing equal protection claims brought by the disabled is a prime example.[181] It seems unfair to penalize Congress for not guessing correctly that the Court meant the standard it formally evoked, not the standard actually applied. And of course, the Court's recent section five decisions all involved statutes enacted before the Court adopted the congruence-and-proportionality test and at a time when the Court was instead far more deferential in its review of section legislation.[182] That these statutes do not hew to the test's requirements is hardly Congress' fault.

The most serious flaw in the incentive argument, however, is that the effect of denying nonseverability would be to unduly narrow Congress' section five power. According to the Court, Congress has some room to maneuver and has the power to prohibit some state conduct that is not unconstitutional: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."[183] Indeed, all but Justice Scalia agree that Congress' section five power has some prophylactic scope.[184] Accepting *arguendo* the logic of the

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[180] *See M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996); *compare Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding due process "prohibit[s] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages") *with United States v. Kras*, 409 U.S. 434, 444-46 (1973) (holding due process does not require waiving fees in bankruptcy proceeding) *and Ortwein v. Schwab*, 410 U.S. 656, 660-61 (1973) (holding due process does not require waiving fee to obtain review of welfare benefits termination).

[181] *See supra* note 15.

[182] *See supra* note 169.

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

[184] *See, e.g., Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 727 (2003) (same); *id*. at 756 (Kennedy, J., dissenting) (same); *Lane*, 124 S. Ct. at 2010-12 (Scalia, J.,

incentive argument,[185] it follows that this room only realistically exists if the Court is willing to sever congressional excesses. Otherwise, the risk of total invalidation may well lead Congress to err on the side of caution and stick closely to prohibiting only clearly unconstitutional conduct. Or to put the point differently, the effect of nonseverability is to unjustifiably chill Congress in exercising the full scope of its section five power.

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

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

C. Other Congressional Power Contexts

This leaves the question of whether deviation from ordinary severability rules is appropriate in other congressional power contexts. The greater rigor of the congruence-and-proportionality test compared to Article I analysis, which applies a far more deferential review even when federalism concerns are at stake,[186] makes the claim for federalism-based nonseverability outside of section five a particularly

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dissenting) (arguing that section five "does *not* authorize . . . so-called prophylactic measures" but accepting such measures where aim is to remedy racial discrimination).

[185] The incentive argument assumes that members of Congress are more concerned with ensuring the legislation they enact withstands judicial challenge then with the political benefits gained simply by enacting legislation that their constituents or interest groups desire. This seems a highly dubious assumption, *see, e.g.,* Neal Devins, Lee Epstein; *contra* Fallon, *Making Sense*, *supra* note 180, at 888-89 & n. 221, thus raising an additional reason to reject this argument for nonseverability.

[186] *See* Caminker, *supra* note 2, at 1134-41, 1186-96; *see also Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) (refusing to apply the congruence-and-proportionality test outside of the section five context).

doubtful proposition. Notably, when the Court has employed a more restrictive analysis in reviewing Article I legislation, such as the anti-commandeering rule, it still responds to finding unconstitutionality by severing the offending provisions.[187]

What then to make of *Lopez* and *Morrison*? Again, the absence of any express discussion of facial challenges or severability in these decisions cautions against reading too much into their text. But their seeming refusal to sever potentially constitutional applications of the statutes therein challenged and resort to total invalidation is striking. Again, justifying this result on a distinction between text and application severability is implausible; not only does the Court not generally distinguish analytically between these two forms of severability, but also its avowed lack of concern with actual intent in the commerce clause context removes illicit subjective motive as a reason for drawing such a distinction.[188]

The best response thus seems that *Lopez* and *Morrison* are in error, insofar as their mode of analysis deviates from ordinary severability doctrine. But the Court's refusal to sever unconstitutional applications in these decisions may be explicable on other grounds. In *Lopez*, due process arguably prevents a defendant from being convicted for violating a statute where the class of activities being regulated lies generally outside of Congress' power and the government failed to allege and prove some interstate commerce connection in the particular case.[189] And one way of making sense of *Morrison* is to view the Court as concluding (perhaps implausibly) that interposing an interstate commerce element into VAWA's civil remedy provision would stray over the line from judicial narrowing to judicial rewriting of a challenged statute. Congress did include such an element in the act's criminal enforcement provision, suggesting that its absence in the civil remedy provision was intentional.

CONCLUSION

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

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[187] *See, e.g., New York v. United States*, 505 U.S. 144, 186-87 (1992).

[188] *See* supra notes 70-71, 167-68, and accompanying text.

[189] *See Lopez v. Morrison*, 2 F.3d 1342, 1368 (5th Cir. 1993) (refusing to reach question of whether Gun Free School Zones Act could be constitutionally applied to Lopez on this basis); *see also Russell v. United States*, 369 U.S. 749, 763-66 (1962) (holding indictment must contain the elements of the offense charged and sufficiently apprise the defendant "of what he must be prepared to meet") (internal quotations omitted).

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

The one qualifier is that under the ordinary rules of severability, a court should only sever section five legislation in this fashion if it determines that the statutes are readily susceptible to such a construction. Where the *Lane* majority erred was in never engaging in such an inquiry and instead simply relying on a tacit presumption of severability (although that is often the Court's standard practice). Moreover, satisfying severability analysis can be a significant hurdle. At a minimum, severability case law demonstrates that the Court has varied in its willingness to read statutes as supporting curative constructions.[190]

Thus, a final question is whether denying the propriety of facial challenges and a nonseverability principle in the section five context will make much difference, given that the Court can reach the same result through express application of severability analysis. The answer is yes. No doubt, the same separation of powers and federalism concerns identified by many as animating the Court's recent section five decisions would lead it to take a stingy approach to severability in some cases, and conclude that severing potentially unconstitutional applications would represent illegitimate judicial rewriting of a congressional statute. Critically, however, control over severability lies largely with Congress.[191] Provided it makes its intent clear that not just unconstitutional provisions but unconstitutional applications are to be deemed severable,[192] the Court's ability to nonetheless facially invalidate section five legislation will be significantly curtailed.

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[190] *See infra* note 60 and accompanying text.

[191] *See* Nagle, *supra* note 61, at 241-44 (describing evidence that Congress is aware of severability and the impact of severability clauses).

[192] *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 460-61 (1992).