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## *ARTICLES*

### SEVERABILITY FIRST PRINCIPLES

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*The United States Supreme Court has decided a number of cases involving severability in the last decade, from NFIB v. Sebelius and Murphy v. NCAA to Seila Law v. CFPB, Barr v. AAPC, United States v. Arthrex, California v. Texas, and Collins v. Yellen. The analysis has not been consistent, the Justices have not been able to agree, and the results have not been intuitive. Some of the Justices have proposed a revisionist approach, but they too have been unable to agree on what it requires.*

*This Article proposes a return to first principles. Severability is a question of what the law is. Severability also includes two principles of constitutional law: that judges should enforce the law, and that the Constitution displaces ordinary law that is repugnant to it. And it also includes principles of non-constitutional law: that validly enacted statutes are law if they are not repugnant to the Constitution, that*

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*unenacted hopes and dreams are not, and that Congress may legislate for contingencies.*

*Much of the time, these principles lead to a simple bottom line: effectively complete severability, rebutted only by an inseverability clause or something else with the force of law. There are also harder cases where the bottom line is not so simple, but where the first principles of severability will nonetheless lead the way—the relevance of unconstitutional removal restrictions, the non-constitutional law that resolves unconstitutional combinations, and the relevance of severability to standing and other procedural questions.*

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## INTRODUCTION

When part of a statute is unconstitutional, the courts engage in severability analysis. According to the cases, this analysis couples a presumption with a possible rebuttal. The presumption is one of severability: “[T]he invalid part may be dropped.”<sup>1</sup> The presumption is rebutted based on either an objective analysis, asking whether “what is left is fully operative as a law,”<sup>2</sup> or a subjective analysis, asking whether “it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.”<sup>3</sup> Slightly more controversially, the same seems to be true for a single provision with constitutional and unconstitutional applications.<sup>4</sup>

There have been many calls to abandon or reform severability doctrine.<sup>5</sup> But there is no consensus about what the problem is or what to do instead. At least one problem, though, is methodological: the modern approach to statutory interpretation is heavily influenced by formalism generally and textualism specifically. Such judges have extra reason to be skeptical of current doctrine. They doubt the coherence or the relevance of counterfactual inquiries into legislative intent and also tend to resist the normative analysis that sometimes lies behind particular severability arguments. And severability can look uncomfortably like “rewriting” a statute, which most judges today know they are not supposed to get caught doing. So, we need an account of severability that makes formal sense.

<sup>1</sup> *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).

<sup>2</sup> *Id.* (quoting *Buckley*, 424 U.S. at 108).

<sup>3</sup> *Id.*

<sup>4</sup> *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006).

<sup>5</sup> See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring) (“[O]ur modern severability precedents are in tension with longstanding limits on the judicial power.”); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 742 (2010) (calling for a “displacement-based approach”); Tom Campbell, *Severability of Statutes*, 62 *Hastings L.J.* 1495, 1497 (2011) (proposing a “complete abolition of the severability doctrine”); Lisa Marshall Manheim, *Beyond Severability*, 101 *Iowa L. Rev.* 1833, 1838 (2016) (advocating for the replacement of severability with a broader inquiry into legislative intent).

This is a natural occasion for a return to first principles, and some have tried. Several recent articles make promising contributions,<sup>6</sup> and recent opinions by Justices Thomas and Gorsuch have attempted to synthesize them into a new revisionist account of severability.<sup>7</sup> But their work is incomplete. Justices Thomas and Gorsuch cannot even agree among themselves in several recent cases, and throughout they may be trying to squeeze more certainty out of the literature than it can supply. We still need a clearer account of the first principles that answer the severability problem and of what those principles do and do not imply.

Returning to first principles also requires us to determine whether severability analysis comes from the Constitution or instead from statutory interpretation or other non-constitutional law. In truth, it is both. Severability principles are a combination of both constitutional and non-constitutional law. The Constitution tells us that it displaces ordinary law that is inconsistent with it. It also tells us that judges (among others) are supposed to apply the law. But these constitutional principles are not all there is to severability. We also need to know what *is* the law, when some part of a statute has been found to be constitutionally repugnant? Ordinary principles of statutory interpretation fill in this answer. Federal law is what has been enacted by Congress and not otherwise displaced, including any fallback law. And, of course, any non-federal legal rules also continue to apply.

Much of the time, these principles lead to a simple bottom line: judges should enforce a statute except in the specific cases where its application is unconstitutional. But this simplicity is deceptive. The bottom line becomes more difficult to see in the case of unconstitutional combinations: when two statutory requirements are unconstitutional if taken together, which one should be disregarded? These difficult cases—more widespread than many realize—illuminate an aspect of the Constitution that has been there all along: the Constitution tells us what the law *isn't*, but not always what it *is*. Solving the severability problem in these cases—saying what the law is—requires going beyond the text of the statute, whether formalist judges like it or not.

Other difficulties come up in the context of standing and other threshold questions. When can a plaintiff establish standing on the basis

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<sup>6</sup> Especially noteworthy are Walsh, *supra* note 5; John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 *Geo. Wash. L. Rev.* 56 (2014); and Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 *Va. L. Rev.* 933 (2018).

<sup>7</sup> See *infra* Section II.B.

of an inseverability argument, and when can a severability argument defeat standing? These questions have proven difficult for the courts, but this time it is the difficulty that is deceptive. Once we straighten out our severability analysis, it drives us to straightforward answers in these cases.

This Article puts forward the first principles of severability and then applies them, first to the easy cases and then to the hard ones. Part I argues that severability is a question of law; that the Constitution displaces repugnant law; and that all non-repugnant law should be enforced, including fallback law such as severability and inseverability clauses. Part II describes how these principles would reframe severability doctrine, how Justices Gorsuch and Thomas have come close to restating these principles, and how the principles also clarify facial challenges and national injunctions. Part III tackles the harder cases, such as unconstitutional combinations and severability procedure.

## I. PRINCIPLES

Fundamentally, severability is a question of law. What is the combined legal effect of the Constitution and one or more statutory provisions when there is a conflict between them? It is partly a question of constitutional law—the Constitution tells us what the law cannot be. And it is partly a question of statutory or sub-constitutional law—these materials fill out what the law is.

Throughout, I will elaborate using some broadly formalist premises: The text is the part of a statute that is law, not its purposes or policies. The Constitution is also law—indeed, supreme law—and so it controls over a contradictory statute. And the job of judges is to apply these laws, but not to change them or to make law of their own. But you don't have to share exactly these premises. The same general principles can accommodate some different approaches to interpretation and adjudication, as I will discuss on occasion.

### *A. Severability Is a Question of What the Law Is*

Courts and executive officials must enforce the law as a matter of course. The “severability” question arises when there are conflicting legal commands. It is common ground that higher law, like the Constitution, prevails over more ordinary law, like a federal statute. That is, we know what the law *is not*—not the unconstitutional thing. The severability

question tries to answer what the law is—what *is* the law, in light of what the law *is not*?<sup>8</sup>

This means that the question of severability is really a question of legal interpretation and of the conflict of laws. The judge takes two legal provisions, a statute and the Constitution, and asks what the combined legal effect of the two documents is. If a statute is constitutional, the answer is usually easy. The statute and Constitution are the law. If part of the statute is unconstitutional, the question is what the law is. The judge’s answer is supposed to reflect the content of these two legal provisions and any rules for resolving their conflict.

But many approaches to severability instead start from a different kind of law—the law of remedies. In our era of judicial supremacy, people sometimes think of the problem this way: a plaintiff identifies a constitutional violation, and the court reacts to fix the constitutional violation by “severing” the bad part of the statute, like slicing a blemish off a piece of fruit. If this were right, one might incorporate many principles of the law of remedies into the law of severability.<sup>9</sup>

But it is not right. First of all, it is inconsistent with basic principles of legalism and the separation of powers.<sup>10</sup> Judges do not actually “strike down” statutes, and they do not issue “writs of erasure.”<sup>11</sup> The invalidity of an unconstitutional statute is caused by the Constitution; it is not caused by a judge. Even if the judge’s decision is what causes many people to be aware of, or to pay heed to, the provision’s invalidity, that invalidity precedes the decision rather than following it. That must be so, since the power of judicial review is premised on a judge’s ability to discern and apply existing legal norms, not on a power to craft them.<sup>12</sup>

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<sup>8</sup> I owe this way of thinking about the problem, which recurs throughout, and many other insights to conversation with John Harrison.

<sup>9</sup> See, e.g., Eric S. Fish, *Choosing Constitutional Remedies*, 63 *UCLA L. Rev.* 322, 330–33 (2016); Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 *Yale L.J.* 1185, 1186 n.3 (1986); David H. Gans, *Severability as Judicial Lawmaking*, 76 *Geo. Wash. L. Rev.* 639, 643 (2008); *Planned Parenthood of N. New Eng.*, 546 U.S. at 328–30; see also Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 *Tex. L. Rev.* 215, 257–58 (2020) (“The Supreme Court has repeatedly used this terminology, as have commentators. But referring to severance as a remedy invites confusion.” (footnote omitted)); Brian Charles Lea, *Situational Severability*, 103 *Va. L. Rev.* 735, 755 n.116 (2017) (“Many scholars, understandably following the Court’s lead, couch their discussions of severability in terms of remedial discretion . . .”).

<sup>10</sup> See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008).

<sup>11</sup> Mitchell, *supra* note 6, at 935–36.

<sup>12</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

Second, this orthodox picture is confirmed by the reality of judicial rulings. Though courts may now *label* severability as a remedy, even today, severability doctrine does not actually *operate* as if judicial decisions can invalidate and repair unconstitutional statutes. For instance, when a lower court decision rules that a statute is unconstitutional, that ruling is not treated as a writ of erasure.<sup>13</sup> This is why some lower courts feel the need to issue nationwide injunctions to expand the effect of their constitutional decisions, and why people bother to debate the propriety of such nationwide injunctions<sup>14</sup>—the injunction, the actual remedy, is adding something not inherently present in a ruling of unconstitutionality. The severability question is present in the ruling, not just the remedy.

To be sure, severability questions often *arise* when a court is deciding remedial questions. If a court agrees that a plaintiff is entitled to relief on a constitutional claim, it may need to understand what other legal provisions are in force before crafting an injunction or the like. Similarly, to decide standing the court may also need to understand how the constitutionality of one provision relates to the enforceability of another. But this does not make severability a question of remedies or a question of standing. It is a question of legal interpretation, and legal interpretation is often relevant to standing, remedies, and other parts of a case.<sup>15</sup>

One final point: the argument that severability is a remedy often assumes that if severability is a remedy, that will make its application tailored, discretionary, and generally equitable. But it is not at all clear that this would follow. Not all remedies are tailored, discretionary, or equitable.<sup>16</sup> There is no writ of erasure, but if there were, why do we assume it would be an equitable writ instead of a remedy at law? So, labeling severability as a remedy misunderstands severability, but it probably also misunderstands remedies.

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<sup>13</sup> See Harrison, *supra* note 6, at 97–100 for a great example.

<sup>14</sup> See, e.g., Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 *Harv. L. Rev.* 417, 418 (2017); Amanda Frost, In Defense of Nationwide Injunctions, 93 *N.Y.U. L. Rev.* 1065, 1090 (2018); Mila Sohoni, The Lost History of the “Universal” Injunction, 133 *Harv. L. Rev.* 920, 921 (2020).

<sup>15</sup> See Lea, *supra* note 9, at 756–57, 756 n.128.

<sup>16</sup> See Samuel L. Bray, The System of Equitable Remedies, 63 *UCLA L. Rev.* 530, 544–50 (2016).

*B. Disregarding Repugnant Law*

Severability problems begin with validity problems. Ordinarily, we know what the law is because we take the statute's word for it. But when a statute conflicts with the Constitution, the statute cannot be taken at face value. This is nothing new to anybody who knows about judicial review, although, as noted above, it is a problem confronted outside the courts, too.

These basic lessons have implications for severability. The first step in thinking about severability is understanding this basic rule about *what the law is not*: an unconstitutional law simply doesn't govern in any instance where it is unconstitutional. It brings with it a related principle about *what the law is*: laws generally remain valid and enforceable in the absence of such a constitutional problem.

In the language of modern severability doctrine, one might say that this is effectively a very strong rule of severability: every application of a statute is by default severable from every other application of the statute. But the point is more fundamental than the doctrine and more fundamental than the terminology. For instance, Kevin Walsh uses the terminology of “displacement” and “repugnancy” in his foundational work on partial unconstitutionality.<sup>17</sup> The Constitution displaces any other legal rules that are repugnant to it—bumping them out of the way to the extent, *but only to the extent*, that they are at odds.<sup>18</sup>

This rule also fits the way that constitutional officers actually apply the Constitution. Judges were not given the general law-vetoing power of a council of revision.<sup>19</sup> They were given judicial review only as an incident of their principal power and duty to decide particular cases according to law. Hence, Chief Justice Marshall explained judicial review by arguing that those who are sworn to uphold the Constitution must apply it to their own conduct.<sup>20</sup> In any particular instance where judges are called upon to

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<sup>17</sup> Walsh, *supra* note 5, at 755. The terms have not always been well-understood. Cf. Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 Harv. L. Rev. 30, 34 n.17 (1927) (“The meaning of repugnant is not clear; it would almost seem that it meant no more than distasteful to the court . . .”) (wrong).

<sup>18</sup> For a great formulation, see Walsh, *supra* note 5, at 765 n.124 (“In the case of . . . a conflict [with federal law], the Supremacy Clause dictates that ‘to the extent of such collision and repugnancy, the law of the State must yield, and to that extent and no further, it is rendered by such repugnancy, inoperative and void.’” (quoting *Commonwealth v. Kimball*, 41 Mass. (24 Pick.) 359, 361 (1837))).

<sup>19</sup> Mitchell, *supra* note 6, at 956–59.

<sup>20</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803).



act, they must examine the Constitution and refuse to do anything contrary to it.<sup>21</sup> These duties are what yield judicial review. So judicial review, and hence judicial determinations of invalidity, are implemented in a case-by-case fashion. (And the same goes for executive review under departmentalist principles, which is similarly incidental to the executive's duty to uphold the law in every act it takes.)<sup>22</sup>

These first principles are also consistent with the practice of constitutional interpretation in and after *Marbury v. Madison*. In *Marbury*, of course, the Court found that part of Section 13 of the Judiciary Act provided the Court with original jurisdiction in cases where the Constitution forbade it. So, the Court refused original jurisdiction in such cases. It disregarded the Judiciary Act to the extent it was repugnant to the Constitution. But it continued to apply Section 13 of the Judiciary Act, and certainly the Act more generally, in cases where the Constitution did not intercede.<sup>23</sup>

Cases throughout the first sixty-some years of the Republic reflected the same understanding.<sup>24</sup> One can find occasional explicit statements about this, for instance from Justice Trimble's statement in *Ogden v. Saunders*:

It is not the terms of the law, but its effect, that is inhibited by the constitution. A law may be in part constitutional, and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution, but it may not, when applied to a case differently circumstanced, produce such prohibited effect.<sup>25</sup>

Let me now provide a more systematic review.<sup>26</sup> Most Supreme Court cases say nothing explicit about severability, but upon closer investigation, however, they are all consistent with the classic approach of repugnancy and displacement. There are twelve identified Supreme

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<sup>21</sup> *Id.* at 178–79.

<sup>22</sup> On executive review and departmentalism, see Frank H. Easterbrook, Presidential Review, 40 *Case W. Rsv. L. Rev.* 905, 905–06 (1990); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 *Geo. L.J.* 217, 219–20 (1994).

<sup>23</sup> Mitchell, *supra* note 6, at 965–66.

<sup>24</sup> John Copeland Nagle, Severability, 72 *N.C. L. Rev.* 203, 212–13 (1993); Walsh, *supra* note 5, at 758–61.

<sup>25</sup> *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 316 (1827) (opinion of Trimble, J.).

<sup>26</sup> Cf. William Baude, Adam S. Chilton & Anup Malani, Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews, 84 *U. Chi. L. Rev.* 37, 51–54 (2017) (describing systematic reviews of legal doctrine).

Court opinions recognizing constitutional limits on federal statutes before 1850.<sup>27</sup> All of them are consistent with the repugnancy framework. We have already discussed *Marbury*. Beyond that:

*Mossman v. Higginson* narrowed the jurisdictional grant in the Judiciary Act of 1789, which gave jurisdiction “where an alien is a party.”<sup>28</sup> The Court concluded this must be confined to the limits of the Constitution, which extended federal jurisdiction only between one alien and one citizen, not two aliens.<sup>29</sup> It did not, of course, eliminate the jurisdictional grant entirely as inseverable. *Hodgson v. Bowerbank*<sup>30</sup> and *Jackson v. Twentyman*<sup>31</sup> did the same.

*United States v. Cantril* rejected as “repugnant” a federal bank fraud indictment emanating from a badly worded federal statute.<sup>32</sup> It is ambiguous whether this was really a case of unconstitutionality, though Whittington classifies it as one, and either way, the reporter noted that the law had already been amended by Congress.<sup>33</sup> There was no occasion for the Court to use inseverability for the same task, and indeed, the point of error described the statute as being unconstitutional only “so much thereof as relates to the charge set forth in the indictment.”<sup>34</sup>

*Reynolds v. M’Arthur* refused to give retroactive effect to a law dealing with a military land grant in the new state of Ohio.<sup>35</sup> But that refusal did not stop the law from having prospective effect, assuming Congress had the power to pass the law in the first place (a question the court

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<sup>27</sup> The cases are identified in the future-canonical Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (2019) [hereinafter Whittington, *Repugnant Laws*], and the database available at Keith E. Whittington, *Judicial Review of Congress Database*, Princeton (Aug. 14, 2022), <https://scholar.princeton.edu/kewhitt/publications/judicial-review-congress-database> [https://perma.cc/2J6Y-8WKK] (filter spreadsheet). I pick 1850 because it roughly marks the general origins of inseverability doctrine, see *Eason v. State*, 11 Ark. 481, 501–03 (1851); *Washington v. State*, 13 Ark. 752, 763–64 (1853); *Warren v. Mayor of Charlestown*, 68 Mass. (2 Gray) 84, 99–100 (1854) (Shaw, C.J.); *Walsh* supra note 5, at 769 n.145, though the Supreme Court’s first inseverability decision was not until *United States v. Reese*, 92 U.S. 214 (1875).

<sup>28</sup> 4 U.S. (4 Dall.) 12, 14 (1800) (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78).

<sup>29</sup> *Id.*

<sup>30</sup> 9 U.S. (5 Cranch) 303, 304 (1809).

<sup>31</sup> 27 U.S. (2 Pet.) 136, 136 (1829).

<sup>32</sup> 8 U.S. (4 Cranch) 167, 168 (1807). The two points of error were that the indictment was inconsistent with the statute and that the statute was inconsistent with the Constitution. *Id.* at 167–68.

<sup>33</sup> *Id.* at 167, 168 n.\*.

<sup>34</sup> *Id.* at 168.

<sup>35</sup> 27 U.S. (2 Pet.) 417, 434–35 (1829).

reserved).<sup>36</sup> Similarly, *United States v. Percheman* refused to read federal laws as abrogating previously vested property rights in the acquired territory of Florida, with no hint that the laws were otherwise invalid.<sup>37</sup>

*Parson v. Bedford* concluded that a law about federal procedure in the civil law state of Louisiana had to be limited by the principles of the Seventh Amendment, which insulated jury findings from appellate review.<sup>38</sup> The law otherwise remained operative.<sup>39</sup>

*United States v. Phelps (Ex Parte United States)*<sup>40</sup> concluded that a law requiring a government collection suit to be tried promptly<sup>41</sup> could not stop the courts from granting additional continuances to obtain evidence from overseas—otherwise, according to Justice McLean, “It would be depriving the party of his right to a trial by jury.”<sup>42</sup>

*New Orleans v. United States* concluded that the federal government could not retain jurisdiction over a quay in New Orleans after Louisiana’s statehood.<sup>43</sup> This decision was “echoed”<sup>44</sup> by a more notable decision a decade later in *Pollard’s Lessee v. Hagan*, which recognized limits on Congress’s power to grant land post-statehood.<sup>45</sup> In both cases, the rest of the cessions and reservations took effect as proscribed.

With *Marbury*, that makes eleven. None of these eleven cases even paused over the question of the validity of other parts of the laws—the grant and cession laws, the procedural and jurisdictional provisions, or the other statutes at issue.

That leaves the earliest example, the 1794 unreported case of *United States v. Yale Todd*.<sup>46</sup> Because the decision was only rediscovered

<sup>36</sup> *Id.* at 435.

<sup>37</sup> 32 U.S. (7 Pet.) 51, 85–89 (1833).

<sup>38</sup> *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447–48 (1830).

<sup>39</sup> *Id.* at 449.

<sup>40</sup> 33 U.S. (8 Pet.) 700, 703 (1834).

<sup>41</sup> Act of March 2, 1799, ch. 22, § 65, 1 Stat. 627, 677 (“[A] continuance may be granted until next succeeding term and no longer.”).

<sup>42</sup> *Phelps*, 33 U.S. (8 Pet.) at 702 (statement of McLean, J.).

<sup>43</sup> *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736–37 (1836).

<sup>44</sup> Whittington, *Repugnant Laws*, *supra* note 27, at 99.

<sup>45</sup> 44 U.S. (3 How.) 212, 223–24, 230 (1845). For discussion, see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *Yale L.J.* 1738, 1771–74 (2013).

<sup>46</sup> The case documents are now available in 6 *Documentary History of the Supreme Court of the United States, 1789–1800*, at 370–86 (Maeva Marcus et al. eds., 1998) [hereinafter *Documentary History*]. The record was reprinted and the case was discussed earlier in Wilfred J. Ritz, *United States v. Yale Todd* (U.S. 1794), 15 *Wash. & Lee L. Rev.* 220 (1958).

decades later<sup>47</sup> and the Court wrote no opinion, we do not know exactly what happened. But its resolution gives us some further clues about the application of partly unconstitutional statutes.

As for the background, in an earlier set of correspondence and opinions reported as part of *Hayburn's Case*, the Supreme Court Justices generally concluded that the Pension Act was partly unconstitutional.<sup>48</sup> The Supreme Court's resolution of *Hayburn's Case* itself confronted some ancillary procedural and jurisdictional issues. But three groups of judges sitting on circuit—including among them Justices Jay, Cushing, Wilson, Blair, and Iredell—had all concluded that they couldn't be required to perform duties under the Pension Act because it assigned non-judicial duties to federal judges. One of the groups, however, sitting as the circuit court for the district of New York, expressed willingness to volunteer to “execute this act in the capacity of commissioners.”<sup>49</sup>

*Yale Todd* brought the merits issue back to the Supreme Court by considering the consequences of this choice. The Connecticut Circuit Court did indeed act as volunteer commissioners under the Act and awarded a pension to a wounded veteran named Yale Todd.<sup>50</sup> The Attorney General then sued Todd in the Supreme Court to recover the money on the theory that it was invalidly paid. On February 17, 1794, the Supreme Court agreed with the Attorney General.<sup>51</sup>

The best guess from the historical record is that the Court had concluded that the statute was partly unconstitutional and that, as a

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<sup>47</sup> Secretary of War Henry Knox reported it to Congress at the time, but it seems to have then been forgotten. 6 Documentary History, supra note 46, at 381–82. For instance, Chief Justice Taney only belatedly learned about the case and had a discussion of it inserted into *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52–53 (1851). The editors of the *Documentary History of the Supreme Court* noted that they “have had to use the copy of the case papers in *United States v. Yale Todd* that is filed with the records of *United States v. Ferreira* because the original papers no longer exist.” 6 Documentary History, supra note 46, at 380.

<sup>48</sup> *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). For discussion, see William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1818–20 (2008).

<sup>49</sup> That was Chief Justice Jay, Justice Cushing, and District Judge Duane. 2 U.S. (2 Dall.) at 410 n.†; see also id. (“As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *personal* descriptions. That the Judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office.”).

<sup>50</sup> 6 Documentary History, supra note 46, at 378–79. This time Jay and Cushing were joined by a district judge named Richard Law. Id. at 379.

<sup>51</sup> Id. at 381.

consequence, the United States was entitled to recover.<sup>52</sup> The statute could not constitutionally assign non-judicial duties to judicial officers, as all of the Justices had already said, and for whatever reason,<sup>53</sup> the Supreme Court refused to accept the circuit court's workaround.

And it has lessons for severability: As with the other cases, there was no hint that the constitutional problem in *Yale Todd* invalidated anything else in the pension act.<sup>54</sup> But the remedy that *Yale Todd* did recognize is also noteworthy. In modern cases, there is some dispute about whether the action of a government official should be treated as void if there are constitutional difficulties surrounding his statutory authority.<sup>55</sup> In the context of *Yale Todd*, the Justices apparently thought the answer was "yes."

To be sure, we should not squeeze too much precedent out of the *Yale Todd* case. We do not know the Court's precise reasons. But for whatever weight it is worth, the Supreme Court seemed to think that an adjudication made pursuant to an invalid grant of power should be set aside, though the rest of the statute need not be.

Finally, stepping back, it is worth noting that the Court's general framework for judicial review during this time fit seamlessly with the repugnancy framework. The Court was frequently ambiguous or equivocal about whether it was holding a statute unconstitutional and then refusing to apply it or instead holding that the statute should not be interpreted to do something because that thing would be unconstitutional.<sup>56</sup> Under modern doctrine, these two things—constitutional avoidance and severability analyses—may be quite

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<sup>52</sup> Ritz, *supra* note 46, at 227; Whittington, *Repugnant Laws*, *supra* note 27, at 68–69.

<sup>53</sup> This reason might have been another constitutional objection, that the judges hadn't received separate appointments and commissions that complied with the constitutional requirements, or a statutory objection, that the statute simply didn't permit this kind of workaround. See William Michael Treanor, *Judicial Review Before Marbury*, 58 *Stan. L. Rev.* 455, 537 n.423 (2005); James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 *Mich. L. Rev.* 1, 36 & n.185 (2008).

<sup>54</sup> See Robert L. Nightingale, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 *Yale L.J.* 1672, 1705 (2016) ("The history of *Hayburn's Case* and *Todd* demonstrates that the judges of the new federal courts understood limits to exist on their power of judicial review: severability was the default. The Justices did not put into question the validity of the rest of the 1792 pension scheme; they only nullified the unconstitutional eligibility determinations.").

<sup>55</sup> See *infra* Section III.A.

<sup>56</sup> Whittington, *Repugnant Laws*, *supra* note 27, at 23–24; see also Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 *Notre Dame L. Rev.* 55, 90–103 (2020) (giving examples of this practice in early nineteenth-century cases).

different.<sup>57</sup> But at the time, under the classic doctrine of avoiding unconstitutionality and under repugnancy analysis instead of modern severability doctrine, these two holdings were functionally equivalent.<sup>58</sup> This further evidences the deep roots of the repugnancy principle.

### *C. Applying Fallback Law*

If the repugnancy of a statutory provision is an obstacle to Congress's goals, it can always attempt a new legislative solution. But it also does not need to wait. If Congress anticipates constitutional challenges, it can preemptively pass what Michael Dorf calls "fallback law," a statutory rule that kicks in on some contingency, such as the unconstitutionality of another provision of law.<sup>59</sup> Just as judges should enforce valid law that is not repugnant to the Constitution, they should enforce valid fallback law as well.

The simplest cases of fallback law are severability and inseverability clauses. Severability clauses are the most common and the simplest.<sup>60</sup> In providing that some provisions or applications of the statute should be severed from some others, they generally restate part of the first principle of severability. Were the first principle universally followed, they might be entirely unnecessary. And even under modern severability doctrine they are often unnecessary since modern doctrine also employs a presumption of severability.

Inseverability clauses are less common but more interesting. These deviate from the classical rules of severability by yoking two provisions together. In essence, an inseverability clause makes legal provisions contingent, providing that a given rule will cease to have legal force if the unconstitutionality of another is discovered. The trigger can be formulated in different ways. It could be triggered by one part of a law *being* unconstitutional. Or more commonly the trigger is having one part of a law *found* unconstitutional by a court.<sup>61</sup> These differences have

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<sup>57</sup> Adrian Vermeule, *Saving Constructions*, 85 *Geo. L.J.* 1945, 1946 (1997) ("Although older forms of the two doctrines were indeed compatible, as currently articulated avoidance and severability stand in severe reciprocal tension.").

<sup>58</sup> *Id.*

<sup>59</sup> Michael C. Dorf, *Fallback Law*, 107 *Colum. L. Rev.* 303 (2007).

<sup>60</sup> Caleb Nelson, *Statutory Interpretation* 144 (2011).

<sup>61</sup> See, e.g., Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 *Harv. J. on Legis.* 227, 243 n.76 (2004) (offering two examples that take this form); Abbe R. Gluck, *Reading the ACA's Findings: Textualism, Severability and the ACA's Return to the Court*, 130 *Yale L.J.F.* 132, 159 & n.97 (2020) (offering a few more).

important consequences for retroactivity, for executive adjudication, and other things. But either way, they reflect Congress’s choice about what kind of contingencies to legislate.<sup>62</sup>

Finally, and rarer still, is the possibility of what Dorf calls “‘substitutive’ fallback law.”<sup>63</sup> This is fallback law that goes beyond tying and untying particular statutory provisions from one another and instead provides a new rule that takes effect only after a contingency occurs. The most famous example (whose details are too complicated and irrelevant to recount here) was enacted as part of the Balanced Budget and Emergency Deficit Control Act and given effect by the Supreme Court’s opinion in *Bowsher v. Synar*.<sup>64</sup>

All of these forms of fallback law should be enforced to the extent that they are constitutionally permissible. And they are generally constitutionally permissible.

To be sure, there may be some specific constitutional constraints on Congress’s ability to enact fallback law, but any such constraints are likely quite broad. One possible constraint is the non-delegation doctrine. Contingent fallback law is unlikely to violate today’s non-delegation doctrine (because almost nothing does).<sup>65</sup> And even the most plausible revisionist theories of the non-delegation doctrine would also uphold a law whose effect is simply contingent on a future fact, such as a determination of unconstitutionality.<sup>66</sup>

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<sup>62</sup> Tobias Dorsey argues that there are important differences between “what [he] would call a sunset clause” and a true “nonseverability clause,” focusing on retroactivity and prospectivity as a possible example. Tobias A. Dorsey, *Sense and Severability*, 46 U. Rich. L. Rev. 877, 892 n.64 (2012). He also argues that true nonseverability clauses violate the separation of powers, *id.*, but it seems more accurate to see them simply as another form of contingent legislation with retroactivity issues.

<sup>63</sup> Dorf, *supra* note 59, at 305.

<sup>64</sup> 478 U.S. 714, 735 (1986) (falling back to Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, § 274(f), 99 Stat. 1038, 1100).

<sup>65</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2123–24 (2019); see also Dorf, *supra* note 59, at 326 (“Accordingly, there is no plausible argument that Congress violates federal nondelegation principles whenever it enacts a substitutive fallback provision.”). Dorf also notes that courts’ occasional skepticism of severability and severability clauses may reflect submerged non-delegation concerns, *id.* at 326–27, but I think those concerns are in fact misplaced, see *infra* Subsection II.A.2.

<sup>66</sup> *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1516–17 (2021); Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, in *The Administrative State Before the Supreme Court 195, 203–04* (Peter J. Wallison & John Yoo eds., 2022); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 363–64 (2002); Michael W. McConnell, *The President Who Would Not Be King* 107–08, 326–35 (2020).

The other major category of possible constraints are seemingly coercive fallback rules. For instance, Dorf argues that using fallback law to retaliate for an undesired judicial ruling might be unconstitutional.<sup>67</sup> In *Heckler v. Mathews*, the Court reserved the question of whether an anti-funding fallback provision would be unconstitutional if it destroyed the plaintiff's standing to sue.<sup>68</sup> And in *United States v. Klein*, the Court held unconstitutional a jurisdictional provision that can be seen this way: as stripping the Court's jurisdiction if the Court made particular substantive decisions that Congress did not want.<sup>69</sup>

On a formalist account of judicial duty, however, some of this coercion can be brushed aside. True, there may be something unseemly about a legislature saying: *uphold our dubious statute, or we will take money from needy children*.<sup>70</sup> But if judges are *obligated* to decide the constitutionality of the statute without fear or favor, then the threat can have no lawful effect. If the legislature is allowed to take money from needy children, then the judges must not worry about that when deciding the constitutionality of a separate law. And it may be true that the legislature will dissemble, claiming that the funding cuts are really the courts' fault, but that is not a justification for a constitutional constraint.<sup>71</sup>

Even on this account, there would be some constraints. If the legislature is not allowed to take money from needy children because that violates some independent constitutional requirement, then it is unconstitutional regardless of why it is threatened. This is why the legislature couldn't

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<sup>67</sup> Dorf, *supra* note 59, at 328–42; see also Fred Kameny, Are Inseverability Clauses Constitutional?, 68 Alb. L. Rev. 997, 997–99 (2005) (criticizing a state law that made inseverable judicial salary increases and a controversial legislative expense increase).

<sup>68</sup> *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984). The lower court judge had found the clause “an unconstitutional usurpation of judicial power by the legislative branch of the government.” *Mathews v. Schweiker*, No. 79-G-5251-NE, 1982 U.S. Dist. LEXIS 18124, at \*11 (N.D. Ala. Aug. 24, 1982). (Hat tip to Bruce K. Miller, Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of *Heckler v. Mathews*, 20 Harv. C.R.-C.L. L. Rev. 79 (1985).)

<sup>69</sup> See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–46 (1871). For more on this reading of *Klein*, see Brian Kulp, Counteracting *Marbury*: Using the Exceptions Clause to Overrule Supreme Court Precedent, 43 Harv. J.L. & Pub. Pol’y 279, 289–90 (2020).

<sup>70</sup> Dorf, *supra* note 59, at 332–33 (describing a hypothetical fallback that cuts school lunch funding).

<sup>71</sup> Dorf, by contrast, argues that these accountability concerns, plus concerns about judicial independence, justify a rule against coercive fallback law. *Id.* at 335–36. I think judicial independence simply requires judges to ignore lawful but undesirable consequences, as noted above, and I do not think accountability concerns justify an expansion of judicial power.



threaten summary executions of the deciding judges or anybody else.<sup>72</sup> Similarly, the fallback rules in *Klein* and *Mathews* have the effect of denying litigants access to the very court attempting to adjudicate their claim—the constitutionality of such rules depends on the power to regulate jurisdiction and access to courts.<sup>73</sup> But the bottom line is that the threat of merely undesirable policies would be permissible while the threat of illegal ones would not.

Regardless of where precisely one draws these lines, they leave plenty of space for the enactment of valid fallback law. This returns us to the more fundamental point: if fallback law is not repugnant to some provision of the Constitution, a court must enforce it, just as it enforces other law.

## II. IMPLICATIONS

### *A. Severability Doctrine*

These basic principles provide a better way to approach the legal effect of partly unconstitutional statutes. They have not always been followed by our courts. At times the distance has been great, but at other times our courts, using the modern language of “severability,” have come to approximate some of them. If we tried to restore severability to first principles, it would be much closer to a conclusive rule of severability rebutted only by fallback law.

#### *1. The Presumption of Severability*

The current rule is that a statute is presumed to be severable, even if Congress did not enact a severability clause.<sup>74</sup> The fact that this is a presumption rather than a rule reflects a turn-of-the-century meander. After the Court first followed the fundamental principles of displacement and repugnancy, it veered into inseverability doctrines in the late 1800s and early 1900s, at one point even implying that statutes were presumed

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<sup>72</sup> But see *Kameny*, supra note 67, at 1003 (assuming, quite contrary to the above, that a judicial salary inseverability clause would be “impermissible even if there had been no constitutional provision specifically forbidding reductions in judicial salaries”).

<sup>73</sup> *Lea*, supra note 9, at 760 n.142 (addressing *Mathews*). For my views on those topics, see William Baude, *Reflections of a Supreme Court Commissioner*, 106 *Minn. L. Rev.* 2631, 2643–47 (2022).

<sup>74</sup> See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Nagle*, supra note 24, at 220.

*inseverable*. It then rightly rejected that rule and emerged with the more modern presumption of severability.<sup>75</sup>

This modern presumption of severability resembles the fundamental principle that courts should simply refuse to enforce a law to the extent it is repugnant to higher law. Both of these formulations permit judicial review of unconstitutionality while leaving most of a law enforceable.

But the fundamental principles of repugnancy and displacement are both clearer and more consistent with the separation of powers. For one thing, they are clearer about scope. Under severability doctrine, people wrestle with what exactly they are supposed to sever from what—individual sections of the statute, words of the statute, applications of the statute?<sup>76</sup> Under repugnancy and displacement, it is clearer that courts should focus on applications: apply law whenever it is valid, and do not when it is not.

Indeed, under these fundamental principles, it is also clearer that the judge does not actually “sever” anything. There is no surgery, no amending, and no making law. The judge is still in the traditional posture of applying law—higher law, lower law, and the rule for conflicts between them.<sup>77</sup>

The fundamental principles are thus also more clearly a rule about judicial authority and not a fiction about legislative intent. Judges do not “presume” a statute to be severable because they have any particular reason to know what the legislature would have wanted them to do with the statute. They treat the statute this way because that is all the legal authority they have in the ordinary case.

Finally, these principles make it clearer what it would take to rebut any presumption of severability or displacement: law.

## 2. *Severability Clauses*

Current doctrine gives great weight to severability and inseverability clauses. But it does not treat them as conclusively binding. That is, while courts will *usually* follow severability and inseverability clauses, sometimes they don't.<sup>78</sup> The first principles of severability would go

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<sup>75</sup> For an account of this history, see Nagle, *supra* note 24, at 213–19.

<sup>76</sup> See, e.g., Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 Ga. L. Rev. 41, 41 & n.1 (1995); Nagle, *supra* note 24, at 208 & n.24.

<sup>77</sup> See *supra* Section I.B.

<sup>78</sup> Shumsky, *supra* note 61, at 234–45. For a subsequent example, see *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016).

further. Because these clauses are a kind of fallback law, they should be enforced absent a specific constitutional infirmity, just like other law. Courts apply law—they don’t just give great weight to it.

The plurality opinion in *Barr v. American Ass’n of Political Consultants* (“*AAPC*”) is especially auspicious on this point.<sup>79</sup> There the Court dealt with a severability clause contained in the Federal Communications Act, invoking it to justify enforcing one part of the Act (a ban on robocalls) after finding another part unconstitutional (an exception to the ban for government-backed debt).<sup>80</sup> In using the severability clause, the Court specifically noted and disavowed the possibility of “overrid[ing] the text of a severability or nonseverability clause on the ground that the text does not reflect Congress’s ‘actual intent’ as to severability.”<sup>81</sup> *We will no longer do that kind of thing*, said Justice Kavanaugh:

That kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress’s will. But courts today zero in on the precise statutory text and, as a result, courts hew closely to the text of severability or nonseverability clauses.<sup>82</sup>

This reasoning treats severability and inseverability clauses as law, as it should.

Justice Kavanaugh’s plurality opinion treated severability clauses as law in another more subtle and more technical way. The severability clause in the case had been enacted as part of the Federal Communications Act of 1934.<sup>83</sup> The two substantive provisions in the case were not added until 1991 and 2015.<sup>84</sup> The new provisions did not mention the old severability clause, but the old severability clause applied to those new

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<sup>79</sup> 140 S. Ct. 2335 (2020).

<sup>80</sup> *Id.* at 2352–56. This is not the only way to frame the analysis, which gets into a more complicated question of “unconstitutional combinations,” discussed *infra* at Section III.B.

<sup>81</sup> *AAPC*, 140 S. Ct. at 2349.

<sup>82</sup> *Id.* The plurality did still say that it should adhere to severability clauses “absent extraordinary circumstances.” *Id.* It’s not clear what that exception was about. Maybe the doctrine of absurdity? Cf. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *Harv. L. Rev.* 2118, 2156–57 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)) (endorsing a narrow absurdity doctrine). Or the possible instances of unconstitutional fallback law? See *supra* Section I.C.

<sup>83</sup> Communications Act of 1934, ch. 652, § 608, 48 Stat. 1064, 1105 (codified at 47 U.S.C. § 608). (It was called a “separability” clause, as was then sometimes common.)

<sup>84</sup> *AAPC*, 140 S. Ct. at 2344–45.

provisions precisely because it was binding law: it governed “this Act,” and therefore continued to govern any new amendments or additions to the Act over time.<sup>85</sup> As the plurality put it, “a severability clause must be interpreted according to its terms, regardless of when Congress enacted it.”<sup>86</sup>

Similarly, an earlier majority opinion in *Seila Law v. CFPB* had invoked a severability clause despite the objection that it was “non-probative ‘boilerplate’” that “‘appears almost 600 pages before the removal provision at issue.’”<sup>87</sup> These objections could matter if severability clauses are just pieces of evidence about some underlying congressional policy. But they have much less force if the clause is law, which generally applies over long distances.

*Seila Law* was not as clear as the *AAPC* plurality about the legal status of severability clauses. It defended a “boilerplate” clause as “tried-and-true language to ensure a precise and predictable result,” defended the “logical and prominent” placement of the severability clause, and speculated about the disruption that would occur under alternative approaches to severability.<sup>88</sup> But it is a healthy step toward treating clauses about severability as fallback law, which should be applied whenever it is constitutionally valid.

Doing so should also mean putting to rest some of the spurious separation-of-powers challenges raised against such clauses and against severability more generally. For instance, the Supreme Court has sometimes complained about applying severability analysis to laws that are written in an overbroad fashion. Consider this passage from *United*

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<sup>85</sup> See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *Harv. L. Rev.* 1079, 1102–04 (2017) (explaining how previously enacted interpretive rules apply to future statutes). There is one additional wrinkle: the plurality quoted the version of the clause contained in the U.S. Code, which said “*this chapter*” instead of “this Act.” *AAPC*, 140 S. Ct. at 2352 & n.10 (emphasis added) (quoting 47 U.S.C. § 608, 48 Stat. at 1105). Perhaps that made the analysis seem slightly easier, but as a technical matter, it is the public law, not the paraphrasing of the U.S. Code, that is the law. See Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 *U. Pa. L. Rev.* 1541, 1656–74 (2020).

<sup>86</sup> *AAPC*, 140 S. Ct. at 2352.

<sup>87</sup> 140 S. Ct. 2183, 2209 (2020) (quoting Brief for the Petitioner at 45, *Seila Law*, 140 S. Ct. 2183 (No. 19-7)). They also argued more generally that “severability ‘rarely turn[s] on the presence or absence of such a clause,’” and that the clause only applied to severing one title of the Act from another. Brief for the Petitioner, *supra*, at 45 (quoting *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)).

<sup>88</sup> *Seila Law*, 140 S. Ct. at 2209–10.

*States v. Reese*, an aggressively anti-severability decision that rejected a civil rights prosecution during Reconstruction:

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.<sup>89</sup>

The same passage has been quoted as authority in modern cases involving free speech and abortion as a reason to disregard a statute's severability clause.<sup>90</sup>

But the separation of powers objection to this scenario is confused. The legislature has decided to prohibit as much conduct as it can, and the judiciary has decided that the Constitution imposes limits on that. Respecting the judiciary's prerogative, the legislature has acknowledged these limits and made clear that the judiciary can enforce them in every case where they are relevant, but only in such cases. It doesn't seem too much to ask that the judiciary decide exactly what those limits are and apply them to the law it believes to be so limited. The Court's real complaint in these cases is not that the judiciary is doing the legislature's job, but that the legislature is refusing to do the judiciary's.<sup>91</sup>

To be sure, there is a potentially more valid complaint about some severability clauses in these scenarios, which is that they could be unconstitutionally vague. If the Constitution imposes some restriction on the vagueness of a law,<sup>92</sup> and if the judiciary's own doctrinal tests flunk that vagueness test, then maybe there is a vagueness problem with using

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<sup>89</sup> 92 U.S. 214, 215, 221 (1875).

<sup>90</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (quoting *Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997) (in turn quoting *Reese*, 92 U.S. at 221)); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (quoting *Reese*, 92 U.S. at 221).

<sup>91</sup> Peter Salib tries to rehabilitate the *Reese* principle by arguing that in some of these cases, such as *Reese*, the statute has "no separate, constitutional commands" and so "severing the unconstitutional portions of a law means severing the *entire* law." Peter N. Salib, *Ban Them All; Let the Courts Sort Them Out: Savings Clauses, the Texas Abortion Ban, and the Structure of Constitutional Rights*, 100 *Tex. L. Rev. Online* 13, 26 (2021). If so, he concludes, "the only way for the law to continue requiring *anything* is for the Court to make up a new rule from scratch," which it shouldn't do. *Id.* I am not sure I agree with the premise, but I agree that if it is true, the conclusion follows.

<sup>92</sup> For instance, another part of *Reno*, 521 U.S. at 870–74, dealt with First Amendment vagueness.

judicial doctrine to mark the bounds of what is prohibited.<sup>93</sup> But that would be a somewhat ironically pessimistic assessment of judicial doctrine, and presumably the Court would still need to enforce whatever parts of the law were not repugnant to the vagueness doctrine.<sup>94</sup>

### 3. Fully Operative Law and Counterfactual Intent

Severability doctrine also sometimes allows the presumption of severability to be rebutted, even in the absence of a severability clause. According to the cases, the presumption can be rebutted if “it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.”<sup>95</sup> The part that remains must also be “fully operative as a law.”<sup>96</sup> The first of these questions is a counterfactual about how Congress would have reacted to the constitutional problem; the second is an objective question about the statute.<sup>97</sup>

The counterfactual test made the difference in *Murphy v. NCAA*. In that case, the Supreme Court concluded that two provisions of a federal anti-gambling statute violated the anti-commandeering doctrine because they purported to stop a state government from authorizing gambling.<sup>98</sup> It then turned to the other provisions of the statute, which fell like a string of dominos. The statute’s direct prohibitions on sports gambling schemes would result in “a scheme sharply different from what Congress contemplated” if left to stand on their own.<sup>99</sup> These prohibitions on private actors “were obviously meant to work together” with the commandeering provisions.<sup>100</sup> And that left only a stand-alone ban on advertising, which Congress rarely enacts, and might be

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<sup>93</sup> Larry Alexander, *There Is No First Amendment Overbreadth (But There Are Vague First Amendment Doctrines); Prior Restraints Aren’t “Prior”; and “As Applied” Challenges Seek Judicial Statutory Amendments*, 27 *Const. Comment.* 439, 440–41 (2011).

<sup>94</sup> This is contrary to *Johnson v. United States*, 576 U.S. 591, 603–04 (2015), and perhaps *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–91 (1921), on which *Johnson* relied.

<sup>95</sup> *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).

<sup>96</sup> *Id.*

<sup>97</sup> Lea argues that these “are not independent, standalone tests. Rather, they are both aspects of the search for legislative intent.” Lea, *supra* note 9, at 745 n.38. Regardless, one aspect is more objective than the other. *Accord id.* at 745.

<sup>98</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1478–82 (2018).

<sup>99</sup> *Id.* at 1482.

<sup>100</sup> *Id.* at 1483.

unconstitutional.<sup>101</sup> The result was that an anti-commandeering problem with part of the law resulted in a completely unenforceable statute.

The more objective part of the test rarely seems to be dispositive. But perhaps something like it made the difference in the 1922 case of *Hill v. Wallace*, where the Court held unconstitutional a tax on futures contracts that taxed contracts unless they were “made by or through a member of the Board of Trade designated by the Secretary of Agriculture” and consistent with various regulations.<sup>102</sup> The Court concluded that this tax was impermissibly regulatory (like the child labor tax it invalidated the same day).<sup>103</sup> And it then concluded that if there were no tax on contracts that did not comply with the regulations, there would be no point to the regulations themselves: “Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they cannot be separated. None of them can stand.”<sup>104</sup>

Both of these aspects of severability doctrine should be viewed with suspicion. They are hard to square with first principles, because they seem to call on courts to do something other than disregarding repugnant law and enforcing valid law. Instead, they ask courts to set aside valid law absent specific legal instructions to do so.

To be sure, it is possible that these tests could be seen by anti-textualists as a sort of fallback law. If one believes that valid law can be found in unwritten congressional intent or inferred congressional policy, one might ask oneself “what Congress would have enacted” as a way to find legal instructions in the absence of any sort of fallback law. But most modern judges are not willing to say that unwritten counterfactual intent is law,<sup>105</sup> yet the test hangs around, seemingly legitimated by repetition in the case reports. Those who do not think that counterfactual intent is law should probably stop treating it as if it were.

The second, more objective part of the test—asking oneself if the provision remains “operative as law”—may be less problematic. Indeed, if applied narrowly, the test is almost tautologically unobjectionable. If a provision is no longer “operative as law,” how could a judge continue

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<sup>101</sup> *Id.* at 1484.

<sup>102</sup> 259 U.S. 44, 63–68 (1922); see Nightingale, *supra* note 54, at 1710–11 (discussing this example and drawing it from *Alaska Airlines*).

<sup>103</sup> *Hill*, 259 U.S. at 67 (citing *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 37–38 (1922)).

<sup>104</sup> *Id.* at 70.

<sup>105</sup> Though some judges today may still be willing to treat it this way in a pinch. See *infra* Section III.B.

applying it anyway? If one provision is logically or linguistically conditional on another provision, and the latter cannot be given effect, then the former cannot either. But precisely because the test is so narrow, it is largely irrelevant and adds little to the more basic principles.

One can see how the doctrine got to its current form, and how it may have been asking the right questions for the dominant judicial fashions at the time it took hold. But those ways of thinking of law have largely fallen out of favor, and for good reason. To figure out the law of severability today, we should not just recite the too-familiar phrases from severability doctrine but rather ask the more fundamental question: is there any binding law that is triggered by the statute's partial unconstitutionality? If so, that instruction should be followed. But if not, courts should enforce all law that is not repugnant to the Constitution.

#### 4. *State Law*

Most of the recent Supreme Court cases about severability have centered on federal statutes, which this piece has focused on so far. The same principles apply—with some important modification—to interpreting state law.

The issue of state law is more complicated because federal judicial power is a question of federal law while the meaning and interpretation of state law is a question of state law. Because severability blends issues of judicial power and issues of interpretation, it blends state and federal law in a way that can be confusing. But the severability first principles let us disentangle the relevant roles of federal and state law.

The principle that federal courts should disregard repugnant law is no different for repugnant state law than for repugnant federal law. That principle is simply an application of the basic *Marbury* rule, which is a rule about the scope of federal judicial power.<sup>106</sup> If anything the point may be even easier for state laws, because the Supremacy Clause explicitly

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<sup>106</sup> States might conceivably choose to understand judicial power differently or to vest their courts with a kind of power that federal law would not call “judicial.” But it is not clear that states have in fact done so, see Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1, 26–28 (2015) (questioning the assumption that state courts have different powers from federal courts), nor whether the Federal Constitution would permit those choices, see Amnon Lehari, *Judicial Review of Judicial Lawmaking*, 96 Minn. L. Rev. 520, 546–52 (2011).



emphasizes that state laws that are contrary to federal law must be disregarded.<sup>107</sup>

However, the principles that federal courts should apply all non-repugnant law, and apply all fallback law, are slightly more delicate. As to applying all non-repugnant state law, the Constitution is less explicit about this obligation than it is about applying federal law. Federal law is the “supreme Law of the Land,” according to the Supremacy Clause, while there is nothing explicit about an obligation to apply state law.<sup>108</sup> Some have inferred from this that “the Constitution permits the justices to subordinate state law to judge-created doctrines.”<sup>109</sup>

But we probably should not read too much into these gaps in the Supremacy Clause. The idea that courts should apply law where it was not displaced was a widely shared understanding of judicial power and duty.<sup>110</sup> It is most likely that the Supremacy Clause addresses particular permutations of this duty (like the duty of state judges to apply federal law) because they were seen to pose a particular question at the time.<sup>111</sup> So, the general principle remains that judges should apply whatever law has not been displaced by higher law.<sup>112</sup>

As to applying state fallback law, this can become more complicated in practice because there is much more potential diversity in the content of a state’s fallback law. For instance, state legislation or state common law might provide for rules of inseverability much more commonly than federal law does.<sup>113</sup> The state might make much greater use of legislative intent or even counterfactual intent in finding implicit fallback law. So federal courts should not be so quick to assume that there is no fallback

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<sup>107</sup> U.S. Const. art. VI, § 2.

<sup>108</sup> *Id.*

<sup>109</sup> Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 *Mich. L. Rev.* 1, 45 (2011) (emphasis omitted).

<sup>110</sup> See Walsh, *supra* note 5, at 755–57.

<sup>111</sup> Caleb Nelson, *Preemption*, 86 *Va. L. Rev.* 225, 249, 251, 256 (2000).

<sup>112</sup> There is also the obligation of 28 U.S.C. § 1652, originally enacted as § 34 of the Judiciary Act of 1789, which now reads: “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” For discussion, see Mitchell, *supra* note 109, at 51–55 (offering different constructions of the Act); see also Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 *Va. L. Rev.* 1703, 1721 (2020) (noting limits to the force of the Act).

<sup>113</sup> See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235, 295–304 (1994) (cataloguing state severability doctrines as of 1994, which were “remarkably uniform,” none of which included the categorical severability rule and many of which referenced legislative intent).

law if they cannot find it on the text of the page. And while the content of state fallback law may be more complicated, the federal courts also have various tools—abstention, certification, remand, deference doctrines—to defer those questions to state courts that may be better equipped to answer them.

So, while the Supreme Court has sometimes said that “[s]everability is of course a matter of state law,”<sup>114</sup> and other times ignored this statement to apply federal severability principles,<sup>115</sup> there are some elements of both that should be carefully separated. Federal courts must disregard a legal provision in cases where it is repugnant, and only in those cases. This is a principle of *federal law* regarding the power of federal courts. They must then apply any relevant fallback law, whatever form it may take. The content of this law is a question of *state law*, and it may well deviate from federal norms of textualism or whatever else. Severability is thus a question of *both* federal and state law, at different steps.

### B. Justices Gorsuch and Thomas

Some of the Justices are getting these basics right. In *Murphy*, Justice Thomas wrote separately, correctly recognizing that something had gone wrong with the Court’s severability doctrine. Along the very lines now sketched here, Justice Thomas wrote that the Court’s severability doctrine is “in tension with traditional limits on judicial authority.”<sup>116</sup> “[C]ourts do not have the power to ‘excise’ or ‘strike down’ statutes,” he wrote, but rather have “the negative power to disregard an unconstitutional enactment” in a particular case.<sup>117</sup> Beyond this, any further decisions about severability ought to be an exercise in statutory interpretation, but Justice Thomas feared that current severability doctrine focuses incorrectly on things such as hypothetical congressional intent.<sup>118</sup> In sum, Justice Thomas endorsed the traditional approach of repugnancy and displacement, plus fallback law.<sup>119</sup>

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<sup>114</sup> *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996).

<sup>115</sup> *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–30 (2006).

<sup>116</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring).

<sup>117</sup> *Id.* at 1486 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

<sup>118</sup> *Id.* at 1486–87. Justice Thomas also argued that severability doctrine is in tension with principles of standing, *id.* at 1487, an issue that comes up again in *Seila Law, California v. Texas*, and other cases. See *infra* Section III.C.

<sup>119</sup> Slade Mendenhall & Brian Underwood, *To Sever or Not to Sever: Mixed Guidance from the Roberts Court*, 69 *Drake L. Rev.* 273, 278, 287–89 (2021), seem to read Justice Thomas differently, believing him to want the entire statute to fall as an inseparable whole. I do not

Justice Thomas has repeated these views, often joined by Justice Gorsuch, in subsequent cases. He reiterated them in the separation of powers case of *Seila Law*.<sup>120</sup> And Justice Gorsuch discussed them, joined by Justice Thomas, in *AAPC*.<sup>121</sup> This is cause for celebration: Their general approach is quite right, it is high time that somebody on the Court put it forward, and in some ways the Court itself seems to be gravitating closer to some of their observations and terminology.<sup>122</sup>

But canonization would be premature: First, both Justices have exaggerated how simple their view is, or how clearly it can resolve some of the cases the Court faces. This became especially apparent in *United States v. Arthrex* and *Collins v. Yellen*, where Justice Gorsuch and Justice Thomas took their theory in very different directions. Further investigation also calls into question their separate opinions in *Seila Law* and *AAPC*. These cases will be discussed in Part III, which discusses the complications of ultra vires acts and unconstitutional combinations. Second, it is too soon to tell if the Justices can stick to their own principles even in simpler severability cases, such as the inseverability of the Affordable Care Act (“ACA”).

Let us briefly consider that ACA severability question. In *NFIB v. Sebelius*, Justice Thomas joined a jointly bylined dissent that found the individual mandate to buy health insurance unconstitutional, as was the expansion of Medicaid.<sup>123</sup> That opinion also concluded that the entire ACA was inseverable from these two provisions. The Justices rejected “uncritical severance” as “assum[ing] the legislative function,” applied a version of the *Alaska Airlines* test,<sup>124</sup> and declared unenforceable even provisions “such as requiring chain restaurants to display nutritional content” that they conceded “appear likely to operate as Congress

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think that is the right reading. See *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (maintaining that courts’ rulings are limited to “the case before them”); *Collins v. Yellen*, 141 S. Ct. 1761, 1795 (2021) (Thomas, J., concurring).

<sup>120</sup> 140 S. Ct. 2183, 2219–24 (2020) (Thomas, J., concurring in part and dissenting in part).

<sup>121</sup> 140 S. Ct. 2335, 2365–67 (2020) (Gorsuch, J., concurring in the judgment in part and dissenting in part). Interestingly, Justice Thomas joined *only* Justice Gorsuch’s severability section, not the merits; he joined the plurality’s merits holding and did not write separately to explain how he stitched the two together. *Id.* at 2343 (plurality opinion).

<sup>122</sup> See, e.g., *supra* notes 79–87; see also *AAPC*, 140 S. Ct. at 2352 n.8 (comparing plurality approach to Justice Thomas’s and concluding that “in many cases, the different paths lead to the same place”).

<sup>123</sup> 567 U.S. 519, 646–61, 671–91 (2012) (joint dissent).

<sup>124</sup> *Id.* at 691–92.

intended” because the Justices found “no reason to believe that Congress would have enacted them independently.”<sup>125</sup>

This analysis cannot be squared with Justice Thomas’s later writings in *Murphy* and the subsequent cases. The *NFIB* joint dissent found two provisions of the ACA unconstitutional. So, as Justice Thomas later recognized, the ordinary course would be to disregard those provisions, and then turn to statutory interpretation as needed.<sup>126</sup> The ACA also contained no explicit fallback law or inseverability provision making the entire statute conditional on the individual mandate. So, the rest of the statute would remain presumptively enforceable.

There would be two further questions. One question is whether the ACA’s express textual conclusion about the importance of the individual mandate could be read as a kind of fallback law—an implicit inseverability clause. The answer is no, as I will discuss shortly.<sup>127</sup> The other question would be whether any of the other provisions of the ACA had separate constitutional infirmities, which would of course render them unenforceable for separate reasons. The joint dissent did not have to confront this question, but by Justice Thomas’s lights, it is plausible that he would find other parts of the Act to exceed Congress’s powers to tax, spend, and regulate commerce.<sup>128</sup> But, again, this would be a case-by-case inquiry that would not dispose of the whole Act.

None of this is to criticize Justice Thomas. The joint dissent was no doubt written quickly and had to cover a great deal of shifting ground. There was likely some incentive for the four to hang together. At the time, Justice Thomas had not developed his more recent wisdom about severability. He was no doubt making a good faith attempt to apply the Court’s confused doctrine.<sup>129</sup> It is just to note that after *Murphy*, Justice

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<sup>125</sup> Id. at 705. Indeed, in passages like this it is possible that the dissenters were applying something like *Alaska Airlines* but *without* the presumption of severability.

<sup>126</sup> As Justice Thomas later recognized in *Murphy v. NCAA*, many of the inseverability arguments should not have been addressed at all in that case, because they were not part of the controversy before the Court. See 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring); Lea, *supra* note 9, at 788–803 (discussing the standing issues these types of “gratuitous severability rulings” present); see also *infra* Section III.C (addressing severability and procedure).

<sup>127</sup> See *infra* notes 139–43 and accompanying text.

<sup>128</sup> Cf. *NFIB*, 567 U.S. at 707–08 (Thomas, J., dissenting) (reminding readers that he continued to oppose modern Commerce Clause doctrine).

<sup>129</sup> Cf. Center for the Study of Constitutional Originalism, First Paper Pt. 3: 13th Annual Hugh and Hazel Darling Works-in-Progress Conference, YouTube, at 39:32 (Mar. 29, 2022), <https://www.youtube.com/watch?v=4115JI5T4z4> [https://perma.cc/SFY9-RUKM]

Thomas's analysis of the ACA would surely have looked different. Indeed, in *Murphy*, Justice Thomas seemed to distance himself from the *NFIB* dissent.<sup>130</sup>

Justice Gorsuch is more of a puzzle. He was not on the Court when *NFIB v. Sebelius* was decided, so he did not have occasion to voice his views on severability until the most recent case of *California v. Texas*.<sup>131</sup> In that case, Justice Thomas denied standing and did not take a stand on the severability of the statute.<sup>132</sup> But Justice Gorsuch joined Justice Alito's dissent concluding that the states had standing to make inseverability arguments, which required addressing inseverability.<sup>133</sup>

For these two Justices to join was somewhat tricky, because Justice Alito—the author of the dissent—had already reached inseverability in the joint dissent in *NFIB v. Sebelius*, and he had not joined any of the subsequent Gorsuch/Thomas revisionist opinions. So, Justice Alito inserted a paragraph to explain why Justice Gorsuch could reach the same result as Justice Alito had:

The same result follows under the new approach to questions of partial unconstitutionality that some Members of the Court have adopted in the years since *NFIB*. They have suggested the severability analysis should track ordinary rules of statutory interpretation. *Seila Law*, 591 U.S., at —, — — —, 140 S.Ct., at 2199–2200 (THOMAS, J., concurring in part and dissenting in part). In their view, Congress decides whether the provisions it enacts are linked to one another or not, and the answer lies in the ordinary tools of statutory construction. And everything the *NFIB* dissenters said points to the same conclusion as a matter of the ACA's text, history, and structure. The relevant provisions were passed as a comprehensive exercise of Congress's Commerce Clause and (arguably) Taxing Clause powers. Those powers cannot justify the individual mandate. The statutory text says the individual mandate is "essential" to the overall scheme, 42 U.S.C. § 18091(2)(I), and it repeatedly states that the various provisions work "together," *NFIB*, 567 U.S., at 694–696, 132 S. Ct. 2566 (joint dissent). It does not matter that this language appears in a section entitled "findings" as opposed to

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(comments of Randy Barnett) (describing how the severability issue was litigated and offering subsequent reflections).

<sup>130</sup> *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

<sup>131</sup> 141 S. Ct. 2104 (2021).

<sup>132</sup> *Id.* at 2120–23 (Thomas, J., concurring).

<sup>133</sup> *Id.* at 2123–24 (Alito, J., dissenting).

a section entitled “severability.” Congress can link distinct provisions in any number of ways, on this view, so long as it does so in the text. The broader statutory history and structure, moreover, reinforce that conclusion. The *NFIB* dissent explained how the ACA’s provisions work in tandem to alter the insurance market. 567 U.S., at 691–706, 132 S. Ct. 2566. Here, the individual mandate requires individuals to obtain “minimum essential coverage.” 26 U.S.C. § 5000A(f). The reporting requirements, in turn, implement the mandate—indeed, they explicitly cross-reference § 5000A—by requiring employers to provide information about such coverage. §§ 6055(e), 6056(b)(2)(B). And the adult-children coverage requirement works as part of a cohesive set of insurance reforms central to the ACA’s overall structure, which turns on healthy persons’ entry into the market via the individual mandate. See 42 U.S.C. § 300gg–14(a). The individual mandate is thus inseverable from the provisions burdening the States under either approach to severability.<sup>134</sup>

This passage almost<sup>135</sup> asks the right question—does the Affordable Care Act provide that if the individual mandate is unconstitutional, the reporting requirements and adult-children coverage requirement should not be enforced? But its answer is wrong.

Focusing on the specific statutory requirements first: The individual mandate requires people to buy a particular kind of insurance, or pay a penalty, and defines what kind.<sup>136</sup> The reporting requirements require employers to say whether they have provided that kind of insurance.<sup>137</sup> If the mandate is now unconstitutional, nobody has to buy it, and nobody has to pay. But that does not mean nobody has to report it. The connection between the reporting requirement and the mandate was that they used the same criteria for what made an insurance plan covered. But the unconstitutionality of the *mandate* did not make the *criteria* unconstitutional or forbid all cross-references to those criteria.

The adult-children coverage requirement has even less explicit connection to the individual mandate. It simply says:

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<sup>134</sup> Id. at 2139–40.

<sup>135</sup> To ask whether the provisions are linked “in any number of ways” by “text,” id., is imprecise. The question is whether their *legal force* is linked by *law*.

<sup>136</sup> 26 U.S.C. § 5000A(a)–(b), (f).

<sup>137</sup> 26 U.S.C. §§ 6055(e), 6056(b)(2)(B).

A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child until the child turns 26 years of age. Nothing in this section shall require a health plan or a health insurance issuer described in the preceding sentence to make coverage available for a child of a child receiving dependent coverage.<sup>138</sup>

No word about the mandate, nothing saying that judges should stop enforcing the provision if other economic premises of the law are false.

That leaves only the argument that the Affordable Care Act contained what is effectively an inseverability clause because it repeatedly finds that the individual mandate is “essential,” to the larger regulatory scheme and to creating effective health insurance markets.<sup>139</sup> One response is that this finding applied only to the 2010 mandate but not to the 2017 amended mandate. This response, however, would be unavailing against a true inseverability clause. If Congress enacts a severability or inseverability clause into law, it can amend the subjects of that law just as any other.<sup>140</sup>

The more fundamental problem is that the “essential” finding is not an inseverability instruction. Every time Congress makes such findings to invoke its necessary-and-proper powers, it is stating its view about the importance and relevance of what it is doing.<sup>141</sup> It is not thereby making fallback law. Indeed, nobody seems to have taken the essential = inseverable argument truly seriously: The ACA findings declare the individual mandate as “essential” not only to other provisions of the ACA, but to all of the Employee Retirement Income Security Act

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<sup>138</sup> 42 U.S.C. § 300gg-14(a).

<sup>139</sup> 42 U.S.C. § 18091(2)(H), (I), (J); see also Josh Blackman, *Unreviewable: The Final Installment of the “Epic” Obamacare Trilogy*, 2020–2021 *Cato Sup. Ct. Rev.* 109, 129–30 (agreeing with this argument).

<sup>140</sup> See *Barr v. AAPC*, 140 S. Ct. 2335, 2349 n.6 (2020) (plurality opinion) (“When Congress enacts a law with a severability clause and later adds new provisions to that statute, the severability clause applies to those new provisions to the extent dictated by the text of the severability clause.”); see also *id.* at 2352 (“To get around the text of the severability clause, plaintiffs point out that the Communications Act’s severability clause was enacted in 1934, long before the TCPA’s 1991 robocall restriction and the 2015 government-debt exception. But a severability clause must be interpreted according to its terms, regardless of when Congress enacted it.”); Baude & Sachs, *supra* note 85, at 1102–04 (explaining how previously enacted interpretive rules apply to future statutes).

<sup>141</sup> See Gluck, *supra* note 61, at 155–58 (giving examples of similar findings).

and the Public Health Service Act.<sup>142</sup> If the “essential” finding were an inseverability clause, it would condemn these laws as well, which nobody was willing to argue or accept.<sup>143</sup>

At bottom, many aspects of Justice Alito’s dissent could hold up if the Affordable Care Act contained an inseverability clause.<sup>144</sup> So, too, Justice Gorsuch might well be able to join such a dissent if there were an inseverability clause. But there was not, and so this was a mistake.

### C. Other Doctrines

#### 1. Facial Challenges

In modern litigation, there is a frequently drawn distinction between challenging a statute “on its face” or challenging it “as applied” to the litigant in question.<sup>145</sup> This is the difference between a challenge that attacks the entire statute, and would imply the invalidity of the entire statute, and a challenge that pertains only to the challenger’s case.

The Court has said that “facial challenges are disfavored” under current doctrine,<sup>146</sup> and the Court has sometimes explicitly connected this principle to severability.<sup>147</sup> There is something to that. The first principles of severability indicate that as-applied challenges are a presumptive and normal way of thinking about constitutional litigation. But it is also more complicated. As Richard Fallon has shown, in practice, the Supreme Court itself does not simply disfavor facial challenges,<sup>148</sup> nor does a presumption of severability do all of the work here.<sup>149</sup>

Nothing stops a litigant from making an argument that logically implies that the statute would be unconstitutional in a range of cases or in all

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<sup>142</sup> 42 U.S.C. § 18091(2)(H) (“Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.”).

<sup>143</sup> Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Hum. Servs., 648 F.3d 1235, 1326–27 (11th Cir. 2011) (making this point), *aff’d in part, rev’d in part sub nom.* NFIB v. Sebelius, 567 U.S. 519 (2012).

<sup>144</sup> For an endorsement of his theory of standing, see Section III.C.

<sup>145</sup> See, e.g., Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008).

<sup>146</sup> Id. at 450–51 (2008).

<sup>147</sup> See, e.g., Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–29 (2006).

<sup>148</sup> Richard H. Fallon, Jr., Fact and Fiction About Facial Challenges, 99 Calif. L. Rev. 915, 935–48 (2011).

<sup>149</sup> Id. at 955–59.



cases. For instance, if Congress passes a law regulating spending on political campaigns, and *A* wishes to spend money and believes that all such legislation is unconstitutional, one might shorthand *A*'s argument as a facial challenge. So too for a law that facially discriminates on the basis of race, for instance.<sup>150</sup>

It is just that the *consequences* of *A*'s argument will not result in the statute being erased, invalidated, or judicially repealed. The consequences of the argument will be to ignore the statute in *A*'s case and then issue whatever judicial relief is appropriate in light of the non-existence of the statute. (For instance, to dismiss the criminal charges against *A*, or to enjoin a government official who was threatening to punish *A* for her spending, or to issue damages against an official who did so punish *A* in the past.)

Similarly, nothing in the severability framework says that all constitutional rules *must* operate at the level of enforcement. It is possible for the Constitution to grant “Rights against Rules,”<sup>151</sup> to say that no rule about speech can be enforced unless it has a certain property or that no law can be enforced if it was enacted with a certain kind of intent. This does not change the severability framework, but it can effectively create a rule of fallback law in particular situations. For instance, if one believes that the validity of a rule about free speech turns on whether it is unconstitutional as applied to a substantial number of others,<sup>152</sup> then that substantive free speech doctrine effectively creates a fallback principle of inseverability for certain free speech claims. One could make similar arguments about other constitutional provisions, such as the enumerated powers, though this has gotten less attention.<sup>153</sup>

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<sup>150</sup> Id. at 921. Caleb Nelson notes that, in recent decades, the Supreme Court has become more willing to engage in judicial review of constitutionally forbidden intent, possibly explaining the rise in such facial challenges. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1876–79 (2008).

<sup>151</sup> See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 Mich. L. Rev. 1 (1998). Adler's theoretical analysis notwithstanding, I agree with Michael Dorf that “[e]ven if some rights are rights against rules, others are rights, simpliciter.” Michael C. Dorf, *The Heterogeneity of Rights*, 6 Legal Theory 269, 270 (2000).

<sup>152</sup> This is the overbreadth doctrine. But see *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1585 (2020) (Thomas, J., concurring) (criticizing basis for this doctrine); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390–91 (2021) (Thomas, J., concurring in part and concurring in the judgment) (same). Larry Alexander argues that First Amendment overbreadth is instead another instance of constitutional doctrine being too vague to be used as a rule for primary conduct. Alexander, *supra* note 93, at 441.

<sup>153</sup> This is one reading of *United States v. Reese*, discussed *supra* in the text accompanying notes 27, 89–90. The Court said that because the law was overbroad, it was not “appropriate

These situations aside, the first principles of severability likely would lead to fewer facial challenges. Fallon observes that some of the Court's tolerance for facial challenges reflects the fact that "the Court's practices in treating severability as a bar to declarations of facial invalidity fail to conform to consistent rules."<sup>154</sup> By calling for more consistent severability, except where provided by law, a return to first principles would probably lead to a more consistent focus on as-applied challenges as well.

## 2. *National Injunctions*

The first principles of severability also cast some light on the extensive debates about national injunctions.<sup>155</sup> These are cases where a court, especially a lower court, forbids the federal government from enforcing a statute or rule against anybody anywhere in the country. (The same kind of remedy against state governments is conceptually similar,<sup>156</sup> although arguably distinguishable.<sup>157</sup>) Until 1939, such injunctions were unheard of, and until recently, they were rare and unnatural.<sup>158</sup>

The principles of severability explain why nationwide injunctions were so rarely thought necessary or pertinent. The consequence of a rule's unconstitutionality as to a particular plaintiff—even on broad constitutional arguments—do not require the statute to be erased or forcibly taken off the ledger. The normal consequence is simply that the statute is not applied to those to whom it cannot be applied. And this normal consequence does not call for anything but the normal remedy, of enjoining whatever it is that threatens to unlawfully harm the plaintiff.

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legislation" under the Fifteenth Amendment. 92 U.S. 214, 218, 221 (1875). Thanks again to John Harrison for this point. Fallon argues that other enumerated powers cases should be seen as overbreadth cases too. Fallon, *supra* note 148, at 945. For another version of this argument, see Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 *Stan. L. Rev.* 1209, 1273–88 (2010).

<sup>154</sup> Fallon, *supra* note 148, at 921–22. Fallon does offer some insightful generalizations about the Court's behavior in such cases. *Id.* at 955–59.

<sup>155</sup> See *supra* note 14.

<sup>156</sup> Sohoni, *supra* note 14, at 975–77.

<sup>157</sup> See Samuel Bray, *A Response to The Lost History of the "Universal" Injunction*, *Yale J. on Regul.: Notice & Comment* (Oct. 6, 2019), <https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/> [https://perma.cc/M43G-UBK Y].

<sup>158</sup> Bray and Sohoni tangle over whether the date is 1913, see Sohoni, *supra* note 14, at 943, or 1939, see Bray, *supra* note 157.

The principles of severability also shed light on the question of whether and how Congress can authorize nationwide injunctions. Congress can enact fallback law, including rules that say “if this rule is found to be unenforceable in any particular case, it should be found unenforceable in all cases.” In other words, Congress can give federal judges the de facto power to completely invalidate a rule nationwide, as a consequence of a particular plaintiff’s claim. Congress can legislate something other than the normal rules.

Indeed, many maintain that the Administrative Procedure Act (“APA”) has done exactly that. The Act says “[t]he reviewing court shall . . . hold unlawful and set aside agency action,”<sup>159</sup> and some have relied on that language to say that nationwide injunctions are permissible under the APA, whatever may be true of them more generally.<sup>160</sup> A few revisionists dispute this interpretation of the APA.<sup>161</sup> But my point is that it is possible. Even if national injunctions are contrary to general principles, that does not preclude Congress from creating fallback law that creates a similar effect.

### 3. *Contract Law*

These first principles may also have parallels in contract law. Under current doctrine, the severability of contract terms tracks the severability of statutes. If a term of a contract is illegal, it will generally be severed unless it is “an essential part of the agreed exchange.”<sup>162</sup> Courts use the parties’ intent to determine if the part was essential.<sup>163</sup> This parallels the rebuttable presumption of statutory severability.

If the same first principles of severability applied to contract law, they might refine the doctrine in a similar way. And indeed, Omri Ben-Shahar

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<sup>159</sup> 5 U.S.C. § 706.

<sup>160</sup> *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409–10 (D.C. Cir. 1998).

<sup>161</sup> See, e.g., John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, *Yale J. on Regul.: Bull.* (Apr. 12, 2020), <https://www.yalejreg.com/bulletin/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies/> [<https://perma.cc/RC8W-PF3K>]; see also Bray, *supra* note 14, at 438 n.121, 454 n.220 (arguing that the APA did not call for national injunctions). But see Mila Sohoni, *The Power to Vacate a Rule*, 88 *Geo. Wash. L. Rev.* 1121, 1126 (2020) (arguing that the APA does allow universal injunctions).

<sup>162</sup> Movsesian, *supra* note 76, at 48; see also 8 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 19:70 (4th ed. 1998) (describing severance).

<sup>163</sup> Movsesian, *supra* note 76, at 48.

has proposed this, arguing that courts should respond to unconscionable contract terms by enforcing the “minimally tolerable term.”<sup>164</sup> As he writes:

[I]f a term is considered unfair, it can be broken down to two distinct components: the allowable portion, and everything beyond it. Once the second component—the excessive increment—is eliminated, the remainder is no longer unfair or unconscionable (even if still relatively one-sided), and does not necessitate further intervention. This remainder—the minimally tolerable term—would be enforceable.<sup>165</sup>

This happens to parallel the stronger rule of statutory severability produced by first principles.

That said, there are arguments for different first principles for contracts than statutes. First, contract law focuses more centrally on the parties’ intent, for reasons that will likely be familiar. Statutes bind third parties who are not party to the bargain and are made by collective entities whose intent is hard to find.<sup>166</sup> Second, different kinds of law govern contracts. In a public law case, the effect of a statute is governed by a combination of constitutional law and the general law of statutory interpretation.<sup>167</sup> In a contract law case, external statutory provisions and common law rules govern its validity and interpretation.<sup>168</sup>

These interpretative doctrines, and severability doctrines, have a similar formal structure at an abstract level: higher law displaces certain parts of a legal instrument (i.e., says what the law is not), and other law determines what takes effect in light of that displacement (i.e., says what the law is). But the substance of the first principles of contract severability is ultimately beyond the scope of this paper.

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<sup>164</sup> Omri Ben-Shahar, Fixing Unfair Contracts, 63 Stan. L. Rev. 869, 876–78 (2011).

<sup>165</sup> *Id.* at 877–78.

<sup>166</sup> Movsesian, *supra* note 76, at 69–71.

<sup>167</sup> Baude & Sachs, *supra* note 85, at 1099. This means that, in principle, a jurisdiction could develop some general law principles of severability that would supplement or replace some of those described here, see generally Ryan Scoville, The New General Common Law of Severability, 91 Tex. L. Rev. 543 (2013) (arguing that the Supreme Court has created such a general common law), but I am skeptical that our federal system has done so, apart perhaps from the special-purpose canons described *infra* at Subsection III.B.1.

<sup>168</sup> Baude & Sachs, *supra* note 85, at 1083, 1094–95 (noting parallels to contract law).

## III. DIFFICULTIES

To be sure, not all cases are as easy as *California v. Texas*.<sup>169</sup>

*A. Ultra Vires*

The revisionist view of severability has been most prominent in recent separation of powers cases. When faced with an executive officer whose tenure or independence is inconsistent with the Court’s interpretations of Article II, what is to be done? Justices Gorsuch and Thomas have rejected conventional severability analysis in ways that seem both intuitive and arresting. But upon further investigation, some of these intuitions do not pan out.

In *Seila Law v. CFPB*,<sup>170</sup> the head of the Consumer Financial Protection Bureau served a five-year term during which he could be removed—said the statute—only “for inefficiency, neglect of duty, or malfeasance in office.”<sup>171</sup> The Court held this restriction unconstitutional and also severable.<sup>172</sup> Justice Thomas, joined by Justice Gorsuch, rejected severability and wrote that they “would simply deny the Consumer Financial Protection Bureau (CFPB) petition to enforce the civil investigative demand.”<sup>173</sup> They elaborated:

As the Court recognizes, the enforcement of a civil investigative demand by an official with unconstitutional removal protection injures Seila. Presented with an enforcement request from an unconstitutionally insulated Director, I would simply deny the CFPB’s petition for an order of enforcement. This approach would resolve the dispute before us without addressing the issue of severability.<sup>174</sup>

This may seem intuitive enough, but the next year the two revisionists suddenly divided among themselves over a seemingly identical question. In *Collins v. Yellen*,<sup>175</sup> the Court dealt with the head of the Federal Housing Finance Agency (“FHFA”), whose governing statute claimed to impose a similarly impermissible tenure in office.<sup>176</sup> Though the majority

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<sup>169</sup> Supra notes 123–43 and accompanying text.

<sup>170</sup> 140 S. Ct. 2183 (2020).

<sup>171</sup> 12 U.S.C. § 5491(c)(1), (3).

<sup>172</sup> *Seila Law*, 140 S. Ct. at 2192.

<sup>173</sup> Id. at 2219 (Thomas, J., concurring in part and dissenting in part).

<sup>174</sup> Id. at 2220 (citation omitted).

<sup>175</sup> 141 S. Ct. 1761 (2021).

<sup>176</sup> 12 U.S.C. § 4512(b)(2).

opinion did not talk explicitly of severability, it seemed to presume the provisions severable once again, noting the lack of a connection between the removal restriction and the challenged actions of the agency.<sup>177</sup>

But this time, Justice Thomas abandoned Justice Gorsuch. Justice Gorsuch reiterated their shared position from *Seila Law*, that “a court would normally set aside the Director’s ultra vires actions.”<sup>178</sup> But Justice Thomas took a step back. He agreed that the removal provision was unconstitutional, but worried “that the Court and the parties have glossed over a fundamental problem with removal-restriction cases such as these: The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract.”<sup>179</sup>

Indeed, in a fundamental sense the constitutional problem in *Collins* was self-correcting: the statute purporting to insulate the director was unconstitutional; it could not be enforced, and it never had been enforced. So, “the President has always had the power to fire the Director for any reason.”<sup>180</sup> Hence, the unlawfulness of the statute did not imply the unlawfulness of the director’s actions. When Justice Gorsuch complained that Justice Thomas had thought otherwise in *Seila Law*,<sup>181</sup> Justice Thomas responded that the point had been conceded there<sup>182</sup> so he hadn’t focused on it.

This split between Justices Thomas and Gorsuch mirrored their split two days earlier in *United States v. Arthrex*.<sup>183</sup> Again, the Court had found a separation of powers problem in agency structure—this time, the excessive authority assigned to administrative patent judges, who had been appointed as “inferior officers” under Article II.

And again, the two revisionists divided. Justice Gorsuch would have taken the “traditional path” of “‘setting aside’ the PTAB decision in this case.”<sup>184</sup> Justice Thomas dissented on the merits, so he did not explicitly address severability. But one passage in his dissent resembled his and the majority’s analysis in *Collins*:

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<sup>177</sup> *Collins*, 141 S. Ct. at 1788.

<sup>178</sup> *Id.* at 1795 (Gorsuch, J., concurring in part).

<sup>179</sup> *Id.* at 1789 (Thomas, J., concurring).

<sup>180</sup> *Id.* at 1793.

<sup>181</sup> *Id.* at 1798 n.2 (Gorsuch, J., concurring in part).

<sup>182</sup> *Id.* at 1793 n.5 (Thomas, J., concurring).

<sup>183</sup> 141 S. Ct. 1970 (2021).

<sup>184</sup> *Id.* at 1990–91 (Gorsuch, J., concurring in part and dissenting in part).

If we accept as true the Court’s position that the Appointments Clause inherently grants the Director power to reverse Board decisions, then another problem arises: No constitutional violation has occurred in this suit. The Board had the power to decide and lawfully did decide the dispute before it. The Board did not misinterpret its statutory authority or try to prevent direct review by the Director. Nor did the Director wrongfully decline to rehear the Board’s decision. Moreover, *Arthrex* has not argued that it sought review by the Director. So to the extent “the source of the constitutional violation is the restraint on the review authority of the Director,” his review was not constrained. Without any constitutional violation in this suit to correct, one wonders how the Court has the power to issue a remedy.<sup>185</sup>

In these cases, it became clear that the revisionist account of severability is incomplete. Without more, it does not tell us what to do in cases like these: nor does it even tell us what exactly is the right category to focus on.

Justice Gorsuch’s argument is that courts would traditionally disregard *ultra vires* actions, and that the executive actions in *Seila*, *Collins*, and *Arthrex*, are *ultra vires* in light of the constitutional issues. It sounds formalist, not only because it is Latin. And let us start by conceding that there is a core insight to this view. Though he did not cite it, Justice Gorsuch might have derived force from the precedent of *United States v. Yale Todd*.<sup>186</sup> That is the case, recall, where the Supreme Court disregarded the adjudications made by judge/commissioners under a constitutionally flawed veterans’ relief statute. The best explanation seems to be the *ultra vires* principle in action. The statute could not confer non-judicial power on judicial officers, so their adjudications were beyond their power. This is the traditional approach that Justice Gorsuch would apply in other separation of powers cases.

But the more recent cases are different in a crucial way. *Yale Todd* featured a lack of constitutional *authority*. The same logic would carry over to challenges under the Appointments Clause.<sup>187</sup> But *Seila Law* and

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<sup>185</sup> *Id.* at 2006 (Thomas, J., dissenting) (citation omitted).

<sup>186</sup> See *supra* notes 46–54 and accompanying text.

<sup>187</sup> Indeed, *Yale Todd* probably should have been mentioned to the parties who were arguing about the “*de facto* officer doctrine” in the recent appointments case of *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment*, 140 S. Ct. 1649, 1656 (2020).

*Collins*, at least,<sup>188</sup> did not present the same kind of problem. The directors of the CFPB and the FHFA were validly appointed under Article II, and validly vested with executive power, which was the kind of power they were exercising. The problem was that the statute purported to limit the President's power to *remove* them.<sup>189</sup> We must stretch the ultra vires doctrine some length to get it to cover removals.

Now, Justice Gorsuch did try to stretch it. Justice Gorsuch argued that there was no historical precedent for a distinction between appointment and removal.<sup>190</sup> But as John Manning has observed, until the 1980s, "The Court's leading removal cases merely involved claims for back pay."<sup>191</sup> And Justice Gorsuch argued that "[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects."<sup>192</sup> But the question is not whether a constitutional defect is "great" but rather whether it goes to the authority of the officer. So, while Justice Gorsuch's approach has a superficial formalist appeal, it glossed over the "vires" in ultra vires.

Justice Gorsuch also may have committed the first half of the writ-of-erasure fallacy. That fallacy is to think that judges have the power to strike down or erase unconstitutional statutes.<sup>193</sup> It is a fallacy because in truth it is the Constitution that makes unconstitutional statutes irrelevant, a fact judges simply recognize. That means that an unconstitutional removal restriction is irrelevant and should be treated as such by all in the executive and judicial branch. Yet Justice Gorsuch would have treated the unconstitutional statutory provision as quite relevant, indeed he would

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<sup>188</sup> *Arthrex* is a more ambiguous case. It is not clear whether the problem was one of appointment, and hence of authority, or one of supervision, which is more analogous to removal. The majority refused to say. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) ("The principal dissent repeatedly charges that we never say whether APJs are principal officers who were not appointed in the manner required by the Appointments Clause, or instead inferior officers exceeding the permissible scope of their duties under that Clause. But both formulations describe the same constitutional violation: Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us." (citation omitted)). Presumably the Court did not think it mattered, but this line of thinking shows why it did.

<sup>189</sup> *Collins*, 141 S. Ct. at 1787 (stressing this point).

<sup>190</sup> *Id.* at 1795–96 (Gorsuch, J., concurring in part).

<sup>191</sup> John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 *Minn. L. Rev.* 1285, 1293 n.35 (1999) (first citing *Wiener v. United States*, 357 U.S. 349, 349–50 (1958); then citing *Humphrey's Ex'r v. United States*, 195 U.S. 602, 612 (1935); and then citing *Myers v. United States*, 272 U.S. 52, 106–07 (1926)).

<sup>192</sup> *Collins*, 141 S. Ct. at 1796 (Gorsuch, J., concurring in part).

<sup>193</sup> *Mitchell*, *supra* note 6, at 937.



have effectively given it great force by holding that its presence—even if ignored in practice—precluded the enforcement of other provisions of law.

Another way to see this mistake: Suppose Congress were to repeal the statutory section that deals with tenure protection. Then surely the director would be allowed to carry on with no problem. Nobody would call his actions *ultra vires*, because the unconstitutional statute would be “gone.” *Now* suppose we were to instead repeal the tenure protection by constitutional amendment, thanks to some modern groundswell of support for executive supervision. Surely the director would also be allowed to carry on with no problem. The fact that the repeal was by amendment rather than statute would not weaken it. *Now* suppose that we *already have* adopted a constitutional provision that repeals the unconstitutional tenure protection—which we have, Article II. That should produce the same outcome, because the Constitution displaces inconsistent statutes regardless of their relative dates.

An unconstitutional statute is void. An unconstitutional removal restriction is therefore void. Nobody should apply it, nobody should enforce it, and if nobody does,<sup>194</sup> all is right with the legal world. That is really what the Court said in *Collins*, and that is all fine and good.

But there is another way to look at the problem that has been splitting Justice Gorsuch and Justice Thomas. Unfortunately, that problem is ubiquitous, and it is not amenable to an easy solution. But until we recognize it, we will be doomed to worse confusion. It is the problem of unconstitutional combinations.

### *B. Combinations*

It is easy enough to say the Constitution displaces unconstitutional laws and requires the others to be enforced. But sometimes a law is

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<sup>194</sup> To be sure, the analysis is more complicated if an executive officer *does* give effect to an unconstitutional statute. But this calls for a nuanced remedial approach. In *Collins v. Yellen*, the Court remanded for examination of whether the unconstitutional statutory provision had somehow been given legal effect that injured the plaintiffs. 141 S. Ct. at 1788–89. And John Harrison had argued that the validity and consequences of this kind of executive action should be addressed through the Administrative Procedure Act. See Brief for Professor John Harrison as Amicus Curiae in Support of Respondents, at 4, 30, *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (No. 19422); see also *Collins*, 141 S. Ct. at 1794 n.7 (Thomas, J., concurring) (contemplating this possibility as “colorable,” but also pointing out that “we would need to consider the interaction between this statutory claim and the [FHFA’s] anti-injunction provision”).

unconstitutional only because it is combined in a particular situation with another law. In these cases, it is obvious that the easy saying is incomplete. *Which law* is to be displaced, and why?

Consider, for instance, *Free Enterprise Fund v. Public Company Accounting Oversight Board* (“PCAOB”),<sup>195</sup> where the Supreme Court held that it was unconstitutional for an agency to be insulated from presidential control by two layers of protection. The PCAOB could be removed for cause by the SEC, whose members could be removed for cause by the President. One such layer, between the President and the SEC, was thought to be fine.<sup>196</sup> One layer between the SEC and the PCAOB would also have been fine.<sup>197</sup> But two layers—from the President to the SEC, then from the SEC to the PCAOB—“contravene[d] the President’s ‘constitutional obligation to ensure the faithful execution of the laws.’”<sup>198</sup> In such a case, the Court must say more to explain which layer will be disregarded as repugnant.

These combinations problems generally take something like this form. There are Statutory Requirement *A*, Statutory Requirement *B*, and a Constitutional Requirement. Any two of these can be enforced. Requirements *A* and *B* would work fine together were it not for the Constitution. The Constitution and *A* can be enforced, but not *B*. Or vice versa. Moreover, we know from basic principles of constitutional supremacy that the Constitution must be enforced. So, the question remains what to make of *A* and *B*.

The problem may seem quirky, but it is a recurring one. In *Arthrex*, the separation of powers problem was a combination of the way that the administrative patent judges were appointed, the significance of the power they were given, and the lack of control of that power by superior officers.<sup>199</sup> *Seila Law* and *Collins*, discussed earlier, are combinations problems too. The statutes there did two things—vest executive power in an appointed official, and tell the President there were limits on his ability to remove that official. Either of these things alone is permissible. Vesting executive power in removable officials is okay. Limiting the power to

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<sup>195</sup> 561 U.S. 477 (2010).

<sup>196</sup> *Id.* at 483 (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1934)).

<sup>197</sup> *Id.* (citing *United States v. Perkins*, 116 U.S. 483 (1886); and then citing *Morrison v. Olson*, 487 U.S. 654 (1988)).

<sup>198</sup> *Id.* at 484 (quoting *Morrison*, 487 U.S. at 693). It was also “contrary to Article II’s vesting of the executive power in the President.” *Id.* at 484.

<sup>199</sup> *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985–86 (2021).

remove non-executive officials is okay. But not both together. The disagreement over severability in those cases can be seen as simply another application of the combinations problem. Some Justices thought that it was the removal restriction that must be ignored, allowing the official to exercise enforcement authority if it was. Other Justices thought that it was the enforcement authority which must be nullified in light of the removal restriction.

A different setting for the combinations problem came in in *Barr v. American Ass'n of Political Consultants*, another recent severability case. There the Court concluded that the First Amendment forbade a combination of two rules: a general ban on robocalls, and a permission for robocalls for government-backed debt.<sup>200</sup> Indeed, as *AAPC* reminded many lawyers, there is a whole class of cases dealing with the question of whether to “level up” or “level down” when there is a constitutionally impermissible discrimination between two classes of persons or activity.<sup>201</sup> All of these level up/down cases are unconstitutional combinations: the higher level rule for one class, and the lower level rule for the other.<sup>202</sup>

The examples do not stop there. *Shelby County v. Holder* dealt with the preclearance requirements of the Voting Rights Act, whose coverage formula was not adequately justified.<sup>203</sup> This might seem like a standalone constitutional problem. But the problem also partly came from adjacent provisions, such as the limited ability to add and remove jurisdictions from coverage based on new developments. The Solicitor General argued that these adjacent provisions were enough to save the statute,<sup>204</sup> and even if they weren't, that suggests that if the Court had instead said that the Constitution required more vigorous “bail in” and “bail out,” the preclearance formula could have been saved. Indeed, we have evidence

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<sup>200</sup> 140 S. Ct. 2335, 2343–44 (2020).

<sup>201</sup> *Id.* at 2354–55 (plurality).

<sup>202</sup> Lea, *supra* note 9, at 776–77, has a very good discussion of these problems but with different terminology: he uses the term “statutory convergences” to capture this set of cases, using “combinations” only for the subset that excludes some of the antidiscrimination cases. Calling them all “combinations” is more straightforward.

<sup>203</sup> 570 U.S. 529, 550–51 (2013). For discussion of the merits, see William Baude, *The Real Enemies of Democracy*, 109 *Calif. L. Rev.* 2407, 2414–15 (2021).

<sup>204</sup> Transcript of Oral Argument at 34–35, 52, *Shelby County*, 570 U.S. 529 (No. 12-96); see also *id.* at 52 (“General Verrilli: . . . if the tailoring mechanism doesn't work, then jurisdictions that could make such a claim may well have an as-applied challenge.”).

of this: in a previous case, the Court had broadened the “bail out” provision to help avoid holding it unconstitutional.<sup>205</sup>

Recognizing the ubiquity of the unconstitutional combinations problem is clarifying. But it is also daunting. For at this point, the simple model of repugnancy and enforcement seizes up: Courts should disregard the two statutory provisions because they are unconstitutional. But once both provisions are disregarded there is actually no need to disregard one of them, because it is permissible on its own. Or alternatively there is no need to disregard the other, because it is permissible on its own. So, on what warrant can courts disregard the first rather than the second, or the second rather than the first?

Thus, the problem of combinations drives home the way in which simple formalist accounts of severability are incomplete.<sup>206</sup> Unconstitutional combinations, which have always been possible, highlight that when the Constitution tells us what the law *isn't*, it does not always tell us enough about what it *is*. This is most obvious in cases like *Arthrex* or *Free Enterprise Fund*, but it is an instance of the general point that what the sub-constitutional law is depends at least in part on the sub-constitutional law. That's always true, and easier cases involving partial unconstitutionality just obscure the point because it's so clear what the sub-constitutional law is in those cases. Even seemingly easy cases of severability actually rest on the conclusion (usually implicit) that no separately constitutional rule or application is dependent on a separately unconstitutional rule or application.<sup>207</sup>

With all of the difficulties in mind, let us focus on possible solutions.

### *1. Fallback Law Solutions*

If the legal system is complete and well-functioning, some principle of law will tell us what the law is in combinations cases. Congress could enact a statute simply telling us whether it would prefer Requirement *A*

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<sup>205</sup> *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); see also Justin Levitt, Section 5 As Simulacrum, 123 *Yale L.J. Online* 151, 156 n.16 (2013) (“It is theoretically possible that the bailout criteria are unconstitutionally stringent . . . . But . . . if the bailout provision is not working as intended—as a symmetric counterpart to coverage—the congressional purpose can be better effectuated by construing the bailout provision than by discarding the entire statutory scheme.”).

<sup>206</sup> Fish goes so far as to use the combinations problem to argue that formalist accounts of severability, and the view that severability is a matter of interpretation rather than remedy, are “untenable.” Fish, *supra* note 9, at 330. As this section shows, that goes too far.

<sup>207</sup> Thanks again to John Harrison for all of this.

to prevail over Requirement *B*, if only one can prevail. But despite the ubiquity of severability clauses, they do not answer this question. Still, there are at least three other potential sources that could provide a legal answer to combinations problems—congressional intent, special-purpose canons, and general-purpose canons. None of these are simple to use and to justify. But they are the best bets we have before we turn to more incomplete solutions.

*a. Hypothetical congressional intent*

As noted above, hypothetical congressional intent is part of black-letter severability doctrine today. And in some ways the combinations cases prove its usefulness. Despite the many valid complaints about the use of hypothetical congressional intent, it is *no worse* at solving the problem of unconstitutional combinations than at solving any other severability problem. We simply try to ask which statutory provision Congress would have preferred to keep if it knew it could only have one.

Of course, as noted, more formalist approaches to interpretation tend to reject hypothetical congressional intent in interpretation. The combinations problem puts pressure on that tendency. Is legislative intent a categorically *forbidden* source in statutory interpretation, or is it simply a *disfavored* source compared to enacted text? If it is categorically forbidden, formalists will have to turn elsewhere. But if it is simply disfavored, then perhaps formalists can turn to it in a pinch.

Some formalists are more categorical than others. There are some accounts of formalism that seem to categorically reject legislative intent. For instance, if one takes the view that it is theoretically or practically impossible for judges to determine collective intent, then it can't be used to solve the combinations problem, no matter how useful it would be.<sup>208</sup> In Frank Easterbrook's memorable turn of phrase, if a judge picks up a statute in search of fallback law and cannot find it, maybe he can do nothing more than to "put it down."<sup>209</sup>

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<sup>208</sup> Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 547–48 (1983) [hereinafter *Easterbrook, Statutes' Domains*]; Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. Chi. L. Rev. 81, 82 (2017); John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 430 (2005) ("[T]extualists deny that a legislature has any shared intention that lies behind but differs from the reasonable import of the words adopted; that is, they think it impossible to tell how the body as a whole actually intended (or, more accurately, would have intended) to resolve a policy question not clearly or satisfactorily settled by the text.").

<sup>209</sup> Easterbrook, *Statutes' Domains*, *supra* note 208, at 535.

But many other formalists allow legislative intent to play some role in interpretation. Some of them go so far as to permit the consideration of legislative history—that is, evidence of *subjective* legislative intent—so long as we understand that it is strongly outranked by the text.<sup>210</sup> Other formalists go less far, but still farther than Judge Easterbrook might seem to. They restrict themselves to *objective* legislative intent. For instance, formalists have defended the use of fictionalized legislative intent,<sup>211</sup> elements of context such as the mischief rule,<sup>212</sup> or other objective versions of collective intent.<sup>213</sup>

Formalists of any of these stripes could use subjective or objective evidence of legislative intent to decide which provision in an unconstitutional combination should be enforced. At the same time, in doing so, formalists must be mindful of their own arguments about the error costs of judicial inquiries into legislative intent. Judges do not become any *better* at non-textual analysis just because they have no other choice.

*b. Special-purpose canons*

Another possibility is the use of substantive canons of construction. In normal statutory interpretation, canons are a frequent tactic to deal with textual ambiguities instead of falling back to legislative history or other kinds of intent-based analysis. And while the legitimacy of this tactic is well debated,<sup>214</sup> one can see it on display in some of the combinations cases the Court has confronted.

The best example is *AAPC*, where the Court confronted the combination of the 1996 ban on robocalls and a 2015 permission for robocalls for government-backed debt.<sup>215</sup> A majority of the Justices

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<sup>210</sup> Caleb Nelson, What is Textualism?, 91 Va. L. Rev. 347, 360–62 (2005); see also *id.* at 405 (observing, though in 2005, that “courts conducting severability analysis routinely have to speculate about how the enacting Congress would have answered a question that it did not actually face. Textualist judges regularly join opinions taking this approach, and they have voiced no fundamental objection to it.”).

<sup>211</sup> Ryan D. Doerfler, Who Cares How Congress Really Works?, 66 Duke L.J. 979, 1020–31 (2017).

<sup>212</sup> Samuel L. Bray, The Mischief Rule, 109 Geo. L.J. 967 (2021).

<sup>213</sup> Richard Ekins, The Nature of Legislative Intent 9–10 (2012). Though Manning, *supra* note 208, at 425, does not deny the construct of objective legislative intent it is not clear to me whether he would countenance these kinds of inquiries.

<sup>214</sup> See, e.g., Baude & Sachs, *supra* note 85, at 1121–28; Ryan D. Doerfler, Late-Stage Textualism, 2021 Sup. Ct. Rev. 267, 269 (2022).

<sup>215</sup> *Barr v. AAPC*, 140 S. Ct. 2335, 2352–56 (2020).

concluded that the 1996 ban should be enforced while the 2015 permission disregarded, and a plurality invoked two related principles from the Court's severability cases. One was a principle that where there is a constitutionally permissible rule that is rendered unconstitutional because of an amendment, the amendment should be junked.<sup>216</sup> The other was a principle that where there is a rule and an exception that are unconstitutional together, the rule should be retained rather than the exception broadened.<sup>217</sup>

The plurality called these "general severability principles."<sup>218</sup> They are effectively canons. They are recurring statements about how to deal with severability in a range of contexts that could be found in previous cases. They do not particularly follow from more abstract principles of severability, and the plurality did not really derive them from any source of law other than the practice of the cases. Indeed, in response to the revisionist dissent by Justice Gorsuch, the plurality agreed that "there is no magic solution to severability that solves every conundrum" but called its "current approach as reflected in recent cases . . . constitutional, stable, predictable, and commonsensical."<sup>219</sup>

Of course, perhaps that statement doth protest too much. For instance, there is an alternative framing available, which would have called for an opposite canon. In other equality cases, one often frames the problem as a choice between leveling up or leveling down, where the general rule seems to be level up rather than to level down.<sup>220</sup> The plurality's use of the rule/exception and amendment canons made the level up rule more problematic.<sup>221</sup> So here as elsewhere, the use of canons gives rise to a debate about which canons are the most fitting. And it does not free us from the more general debate about where these canons come from and what warrant the Court has for treating them as law.<sup>222</sup>

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<sup>216</sup> Id. at 2353–54; see also James Durling & E. Garrett West, *Severing Unconstitutional Amendments*, 86 U. Chi. L. Rev. Online 1, 3 (2018) (defending this principle).

<sup>217</sup> *AAPC*, 140 S. Ct. at 2354–55.

<sup>218</sup> Id. at 2349.

<sup>219</sup> Id. at 2356.

<sup>220</sup> See Caminker, *supra* note 9, at 1186–90; Fish, *supra* note 9, at 349.

<sup>221</sup> Louis Michael Seidman, *The Ratchet Wreck: Equality's Leveling Down Problem*, 110 Ky. L.J. 59, 77–79 (2021) (describing *AAPC*'s impact on the "level up" presumption).

<sup>222</sup> See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010).

*c. General-purpose canons*

*AAPC* demonstrated the ability of special-purpose, severability-specific canons to provide at least a semblance of fallback law. But it would be equally possible, and perhaps more legitimate, to make use of the most relevant *general-purpose* canons of construction. This would jive more with the treatment of severability questions as ordinary questions of law. But it would also lead to some disorienting outcomes.

For instance, couldn't *AAPC* have been solved through application of the last-in-time rule? The Court was faced with a statute enacted in 1996 and an amendment adopted in 2015. The ordinary last-in-time rule says that if one can't have both, one is supposed to prefer the one adopted later.<sup>223</sup> That would mean that the permission for some robocalls implicitly repealed the ban.

Note, though, that this is the opposite of the special-purpose canon the Court adopted. And it would thus have led to the opposite result in the Court's mid-century cases that generated the canon as well.<sup>224</sup> In *Eberle v. Michigan*, the introduction of an exemption for local wine and cider would have implicitly repealed Michigan's dry-county law.<sup>225</sup> In *Truax v. Corrigan*, the state ban on labor injunctions would have implicitly banned all injunctions.<sup>226</sup> In *Frost v. Corporation Commission*, a special regulatory exemption for cooperative corporations would have implicitly repealed a broader permitting scheme.<sup>227</sup>

Now, one reason these results seem so implausible is that our law has a very strong presumption against implied repeal. So, these implied repeals are instinctively hard to swallow. Yet we may have to bite back that instinct. The *reason* we have such a strong presumption against implied repeal is that the two enactments should be harmonized if they can be.<sup>228</sup> And the premise of an unconstitutional combinations problem is that the two enactments cannot be harmonized. It may well be that Congress wanted them to be and thought they could be (in whatever sense Congress wants and thinks), but we know that Congress was wrong about that. So, our instincts about implied repeals may have to be set aside in favor of the more fundamental principle—to which the presumption

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<sup>223</sup> See *The Federalist* No. 78 (Alexander Hamilton).

<sup>224</sup> See *AAPC*, 140 S. Ct. at 2353 (noting and relying on these cases).

<sup>225</sup> 232 U.S. 700 (1914).

<sup>226</sup> 257 U.S. 312 (1921).

<sup>227</sup> 278 U.S. 515 (1929).

<sup>228</sup> See Nelson, *supra* note 111, at 241.



against implied repeals is an exception—that more recent legislation trumps earlier inconsistent legislation.

Another general-purpose canon we might turn to in other cases is the canon of avoiding unconstitutionality.<sup>229</sup> Perhaps one of the two provisions that seems to produce the unconstitutional combination can be “interpreted” into constitutional compliance. If one of the two provisions is more ambiguous, hence more vulnerable to such interpretation, that could provide a resolution.

Here, too, the canon might counsel the opposite of what the Court does in practice. Consider *Free Enterprise Fund* again.<sup>230</sup> The two layers of removal protection that produced the constitutional problem were the rule that members of the SEC could be removed only for cause, and that they could remove members of the PCAOB only for cause. It turns out that using the canon of avoidance could have neatly solved the combinations problem. The second layer of protection, the PCAOB’s, appeared explicitly in the statute.<sup>231</sup> But the first layer of protection, the SEC’s, was nowhere to be found!<sup>232</sup>

When this embarrassing fact emerged during argument of the case, there was a fair response—that under interpretive presumptions in place at the time, an agency like the SEC was simply *presumed* to have protection from presidential removal.<sup>233</sup> That is debatable on its own.<sup>234</sup> But in light of the unconstitutionality of the two layers of removal together, it would have been simple to say that any such presumption was

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<sup>229</sup> See generally Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 Harv. L. Rev. F. 331, 334 (2015) (describing this canon and distinguishing it from the more novel canon “about avoiding constitutional *questions*” (emphasis added)).

<sup>230</sup> *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

<sup>231</sup> 15 U.S.C. §§ 7211(e)(6), 7217(d)(3).

<sup>232</sup> 15 U.S.C. § 78d.

<sup>233</sup> *Wiener v. United States*, 357 U.S. 349, 356 (1958) (inferring protection from removal when statute was silent); see also Transcript of Oral Argument at 18–19, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861) (petitioner’s counsel invoking *Wiener*).

<sup>234</sup> See *Free Enter. Fund*, 561 U.S. at 546–47 (Breyer, J., dissenting) (arguing that because the SEC was created during the nine-year period between the decisions of *Myers* and *Humphrey’s Executor*, Congress would not have intended the SEC to be independent); Note, *The SEC Is Not an Independent Agency*, 126 Harv. L. Rev. 781, 782 (2013) (same); Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163, 1219 (2013) (“All this is defensible, if at all, only on the ground that the Court was implicitly recognizing and incorporating by reference an extrajudicial convention about the independence of the SEC.”).

rebutted by the need to construe the statute to avoid constitutional problems.<sup>235</sup>

Perhaps the counterintuitive consequences of these canons explain why nobody has been inclined to use them. But for those skeptical of special-purpose severability canons and legislative intent, they provide another possible source of established fallback law.

*d. Final thought*

The first principles of severability on their own simply do not commit a judge to any one of the above solutions. All of them are consistent with the premises that Justice Thomas, Justice Gorsuch, and others claim to share. What will determine which solution is most appropriate is a judge's more specific interpretive commitments. Judges that find some form of congressional intent analysis permissible may be able to use hypothetical congressional intent. Judges that do not will likely use one of the canons-based approaches, just as those judges use canons to avoid other ambiguities and difficulties in text-based analysis.<sup>236</sup> And the kind of canons those judges will be willing to use will depend on their approach to precedent and pedigree in using canons of interpretation. So, while the first principles of severability *on their own* do not resolve these cases, they do indicate the question of interpretive theory that does resolve them.

*2. Non-Fallback Approaches*

Still, what if a judge wishes to avoid committing to any of these forms of fallback law? Perhaps a judge is simply unwilling to make use of congressional intent or canons in saying what the law is. Or perhaps the judge is simply not sure of the best interpretive approach and wishes to find a way to avoid such seemingly abstruse questions. Is it possible to handle combinations cases *without a theory of fallback law*?

Sometimes yes, sometimes no.

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<sup>235</sup> *Free Enter. Fund*, 561 U.S. at 548 (Breyer, J., dissenting) (“The Court then, by assumption, reads *into* the statute books a ‘for cause removal’ phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite.”).

<sup>236</sup> See Doerfler, *supra* note 214, at 268.

*a. . . that do not work*

Some judges' have attempted to do so in ways that do not hold up to scrutiny. These approaches, while well-intentioned, should be rejected.

*i. Standing bootstrapping*

One approach, championed by some judges, is to focus on the provision that is necessary to redress plaintiff's injury. This approach traces back to a lower court opinion by then-Judge Scalia and was championed more recently by two esteemed Fifth Circuit judges in the litigation that reached the Supreme Court as *Collins v. Yellen*.<sup>237</sup> As those judges put it: "Which statute should the court refuse to apply when either one would be constitutional in isolation? . . . [T]he statute that allegedly authorizes the injury-in-fact that confers standing upon the plaintiff."<sup>238</sup> In *Collins*, those judges concluded, this principle called for the invalidation of the government's enforcement action—thus reaching the same result that Justice Gorsuch later reached on other grounds.

This approach is attractive on the surface. It focuses correctly on the federal courts' duty to decide the controversies before them and issue judgments that resolve those controversies. But this tactic relies on an unintentional sleight of hand. The posture is something like this: first, conclude that plaintiff has standing; second, observe that if Provision *A* is the unconstitutional one, plaintiff's injury will be redressed, but if Provision *B* is the unconstitutional one, plaintiff's injury will not be redressed; third, conclude that because plaintiff has standing, Provision *A* must be the unconstitutional one.

But the steps here are in the wrong order. If the choice between Provision *A* and Provision *B* will determine whether plaintiff has standing, then one cannot conclude that the plaintiff has standing before deciding which provision to choose. If courts proceed in this order, they have at least two logical approaches: make the standing inquiry looser, in which case it no longer provides a reason to pick Provision *A* over Provision *B*; or conduct the strict standing inquiry more accurately, in

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<sup>237</sup> See *Synar v. United States*, 626 F. Supp. 1374, 1393 (D.D.C. 1986); *Collins v. Mnuchin*, 938 F.3d 553, 609–10 (5th Cir. 2019) (Oldham & Ho, JJ., concurring). It was also espoused by Justice Thomas in *Seila Law v. CFPB*, 140 S. Ct. 2183, 2221 (2020) (Thomas, J., concurring in part and dissenting in part), before his different opinion in *Collins v. Yellen*, 141 S. Ct. 1761, 1789–99 (2021) (Thomas, J., concurring), the next year.

<sup>238</sup> *Collins*, 938 F.3d at 609 (Oldham & Ho, JJ., concurring) (internal quotation marks omitted).

which case a court must decide at the standing stage which provision is at stake.

But what a court cannot logically do is breeze through the standing problem without noticing the unconstitutional combinations problem, then attempt to backfill the combinations problem by relying on an implicit but arbitrary assumption made when breezing through the standing problem. That is how Wile E. Coyote ended up stuck in mid-air and then falling off a cliff.<sup>239</sup>

*ii. Avoiding “editorial freedom”*

On other occasions, courts have tried to avoid the question by simply picking the solution that seemed simplest. To return to *Free Enterprise Fund*, consider what the Court said in dealing with another related combinations problem. Having concluded that the PCAOB was unconstitutionally insulated from presidential control, the Court noted that it had a lot of options for how to respond:

It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board’s responsibilities so that its members would no longer be “Officers of the United States.” Or we could restrict the Board’s enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.<sup>240</sup>

The problem the Court describes here prefigures the kind of problem the Court later confronted in *Arthrex*, *Seila*, and *Collins*. But the opinion, written by Chief Justice Roberts, tries to avoid that problem through a generally minimalist approach. It rejects the idea that it might exercise “editorial freedom” in deciding which provision to treat as invalid, also invoked by refusing to “blue-pencil” the statute.<sup>241</sup>

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<sup>239</sup> The Canyon Fall Gag, Looney Tunes Wiki, [https://looneytunes.fandom.com/wiki/The\\_Canyon\\_Fall\\_Gag](https://looneytunes.fandom.com/wiki/The_Canyon_Fall_Gag) [<https://perma.cc/8TVM-XV4Z>] (last visited Sept. 19, 2022).

<sup>240</sup> *Free Enter. Fund*, 561 U.S. at 509–10 (Roberts, C.J.).

<sup>241</sup> *Id.*

But this minimalist attitude does not actually avoid the problem, because it does not tell the Court which provision should be treated as invalid. The Court is of course right to say it should act judicially, not legislatively. But saying what the law is is judicial business. When two statutory provisions cannot both be the law, saying which one is the law is thus judicial business. Neither selection involves more “editorial freedom” than the other.<sup>242</sup> This is not to say that the majority’s selection is wrong, but it would need to be justified on some actual basis.

By contrast, the Court’s approach in *Arthrex*—by the same author as *Free Enterprise Fund*—is a marked improvement.<sup>243</sup> There the Court again resolved an unconstitutional combinations problem through a form of minimalism—it held that one statutory section “cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs” rather than eliminating the tenure protection of the APJs or eliminating entirely their ability exercise executive power.<sup>244</sup> But this time it justified this resolution of the combinations problem by reference to things like the structure and historical development of the statutory scheme.<sup>245</sup> This is effectively using the hypothetical congressional intent fallback law solution described above. It is perfectly justifiable for any judge who is not a hardcore textualist to do so, and the author was not one.<sup>246</sup>

*b. . . . that work better*

That said, in some combinations cases a judge might be able to avoid thinking about fallback law.

*i. Stipulation*

There is widespread confusion about whether parties can “stipulate the law,”—i.e., whether judges should assume that the law is *X* if both parties agree that it is.<sup>247</sup> But there is some support for the view that they can, and

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<sup>242</sup> See also Lea, *supra* note 9, at 781 n.231, and Mannheim, *supra* note 5, at 1858, agreeing that this approach is mistaken. But see Ryan M. Folio, *Constitutional Avoidance, Severability, and a New Erie Moment*, 42 Harv. J.L. & Pub. Pol’y 649, 679 (2019) (seemingly endorsing it).

<sup>243</sup> *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (Roberts, C.J.).

<sup>244</sup> *Id.* at 1987.

<sup>245</sup> *Id.* at 1986–87.

<sup>246</sup> See, e.g., *King v. Burwell*, 576 U.S. 473, 497–98 (2015).

<sup>247</sup> See Gary Lawson, *Stipulating the Law*, 109 Mich. L. Rev. 1191, 1191 (2011).

to the extent that they can, a judge might use that stipulation to solve a combinations problem.

In the end, that was how the Court tried to deal with the choice between the two layers of removal in *Free Enterprise Fund*. It observed that everybody agreed that the SEC was protected from removal, and implied that everybody agreed that this limitation was constitutional.<sup>248</sup> Similarly, in many other cases like *Shelby County v. Holder*, the Court might have justified its choice to focus on Provision *A* rather than Provision *B* simply on the grounds that nobody was telling it to focus on Provision *B*.<sup>249</sup>

Of course, this approach will not always work. It depends on what the parties argue and whether those arguments implicate both parts of the combination. This approach also relies on the ability to stipulate the law, which is itself contested. But when this approach does work, it may be good enough to at least resolve the case at hand.

#### *ii. Factual particularity*

Another option is to focus on what has actually happened. As discussed above, an unconstitutional statute should be disregarded to the extent of its unconstitutionality. If it is disregarded, then it is no different than a statute that has been subsequently repealed. But sometimes it has not been ignored. Indeed, that is often why a plaintiff is in court complaining about the statute rather than simply ignoring it. These basic facts provide a way to resolve some combinations problems. If Provision *A* and Provision *B* cannot both be enforced, and one of them *has been or is*, then that provides good reason for a court to ignore the other one.

To see how this would work, consider the separation of powers cases where an official cannot have both executive enforcement power and insulation from removal, like *Collins* and *Seila*. By the time the Court confronted those cases, one of those things had plainly happened—the

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<sup>248</sup> *Free Enter. Fund*, 561 U.S. at 487 (“The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office,’ and we decide the case with that understanding.” (citations omitted)). It is not clear how firm these stipulations were. See Transcript of Oral Argument at 21–22, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861) (“Mr. Carvin: . . . If this Court wants to say that—that those people are subject to the President’s plenary—

Justice Scalia: I’d love to say that. That would be wonderful.

Mr. Carvin: I’m not going to stand in your way . . . .

Justice Scalia: This is not an argument you have made anyway.”).

<sup>249</sup> But see the oral argument statements cited supra note 204.

officials had been vested with and exercised executive power. And the other had arguably not—the officials had perhaps not been insulated from removal, because the President had not tried to remove them, nor was it clear whether they had done anything because of any (mistakenly) anticipated insulation. That supported the Court’s choice to disregard the unconstitutional tenure protection, not the exercise of executive power.<sup>250</sup>

Similarly, in a claim involving a challenge to *past* discrimination in the awarding of some benefit, a Court might avoid the more general level-up/level-down question. If the benefit has already been awarded to some, and if the state is in no position to claw that benefit back from them retroactively, then it has no choice but to “level up” at least with respect to past benefits.<sup>251</sup>

This approach has the appeal of avoiding resort to controversial sources of fallback law. But it does have some counterintuitive consequences. For one thing, it may effectively empower the executive branch to elect which of two statutes to enforce. For instance, imagine the executive branch had tried to get out in front of the constitutional challenges to the Voting Rights Act by arranging for bailout for many jurisdictions even if they did not strictly comply with the statutory criteria. Doing so early enough and often enough might have created facts on the ground that diffused the challenge to the preclearance formula in *Shelby County*.<sup>252</sup>

This approach will not work in every case, and it is probably better for judges to just try to figure out how to say what the law is in unconstitutional combinations cases. But it has the great virtue of allowing courts to focus on their judicial task, which is to decide cases by applying all and only valid law and leaving matters outside the case for others to worry about. And again, in many cases, it may be good enough for government work.

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<sup>250</sup> See *supra* notes 170–82 and accompanying text.

<sup>251</sup> See Lea, *supra* note 9, at 785–86 n.240; Ruth Bader Ginsburg, Address, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301, 307 (1979). Of course, relief going forward would still pose the general question.

<sup>252</sup> For instance, while *Shelby County* was pending, the Attorney General consented to the bailout of the State of New Hampshire, despite imperfect compliance and over the objection of an attempted intervenor. *New Hampshire v. Holder*, 293 F.R.D. 1, 3, 8 (D.D.C. 2013); Consent Judgement and Decree, *New Hampshire v. Holder*, No. 1:12-CV-01854 (D.D.C. filed Mar. 1, 2013). One amicus alleged that this was a nefarious attempt to “save[]” the Voting Rights Act by “attempting to make bailout more widely available by bending the rules.” Brief of Amicus Curiae the State of Alaska in Support of Petitioner Shelby County, Alabama, at 18–20, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96). If so, it was too little too late.

*C. Severability Procedures*

The confusing nature of severability has also left courts confused about how severability impacts procedure. When should courts address severability? When do plaintiffs have standing based on inseverability? When do they lack standing based on severability?

But once the proper view of severability is before us, the procedural inquiries become fairly simple. Severability arguments are simply arguments about what the law is. So, courts should refrain from gratuitously opining about severability just as they do from gratuitously opining about other law. Plaintiffs can premise their standing on legal arguments that derive from fallback law, just as from other kinds of law. And, if their legal arguments about severability are wrong, their claims can fail for that reason.

In terms of gratuitous severability rulings, we should not simply expect that Part I of a judicial opinion about a law's constitutionality should be followed by a Part II that addresses severability. That would be the natural order of things if judges had a general power of constitutional-law-opining, backed up with a remedy of severability. But they do not. Judges opine about the constitutionality of various rules—"say what the law is"—as needed to "apply the rule to particular cases."<sup>253</sup> Severability is just another part of that saying what the law is, and therefore also something courts should do only as needed to apply a statute to particular cases.

Thus, Brian Lea and Justice Thomas are right to question the occasional practice of "gratuitous severability rulings," where the Court assumed that after holding that a plaintiff was correct about a constitutional claim that it should also go on to talk about the severability of provisions that didn't affect the plaintiff.<sup>254</sup> This is just gratuitous dictum and is no more justifiable than other forms of gratuitous dictum.<sup>255</sup>

At the same time, in other cases courts have been too reluctant to confront severability questions integral to a plaintiff's standing. In *California v. Texas*, the plaintiffs tried to get the Supreme Court to say that most of the Affordable Care Act was invalid because it was inseverable from the unconstitutional individual mandate.<sup>256</sup> The case

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<sup>253</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>254</sup> Lea, *supra* note 9, at 789–803; *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring).

<sup>255</sup> I take no position here on whether such dictum is unconstitutional, or simply bad practice.

<sup>256</sup> See *supra* notes 131–39.



thus presented controversial questions of constitutionality (was the \$0 mandate unconstitutional?), of severability (was the mandate indeed inseverable from the rest of the Act?), and of standing (could the plaintiffs raise this argument?). The Court resolved the case on standing grounds, but standing might in fact have been the least vulnerable part of the plaintiffs' case.

The best argument for Texas's standing was "bank-shot" standing—that Texas was entitled to have an injunction against the plausible enforcement of Provision *A*, if Provision *B* is invalid and inseverable.<sup>257</sup> This may seem like a strange form of third-party standing, but if inseverability is limited to fallback law it is actually unremarkable first-party standing. The plaintiff is effectively saying that Congress has instructed for Provision *A* not to be enforced if Condition *X* obtains, and that Condition *X* obtains.<sup>258</sup> Such a plaintiff has an orthodox legal injury, an orthodox claim for why that injury is illegal, and an orthodox claim for redress. A Court might be *annoyed* if the determination of Condition *X* involves an important or awkward question and the current case feels too unimportant to justifying answering it. But a judge's duty is to answer the questions necessary to apply the law to decide the cases before him, not the questions he would like to answer.

This is not to say that the bank-shot argument should have succeeded. The bank-shot theory of standing rested on the premise of inseverability, and that premise was false.<sup>259</sup> And because inseverability is a pure question of law, it can be resolved at a very early stage of the litigation—it would even be permissible to resolve it before considering the constitutional merits argument. So even if an inseverability argument can be used to produce standing, using a bad inseverability argument to produce standing has little consequence. A plaintiff who uses a bad inseverability claim to get into court and then lose has gained nothing more than a plaintiff who invents a fictitious cause of action to enforce a fictitious right. Perhaps the plaintiff has standing,<sup>260</sup> but it is simply standing to lose on the merits a few minutes later.

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<sup>257</sup> See Stephen Sachs, *ACA: The Lay of the Land, Reason: Volokh Conspiracy* (Nov. 13, 2020, 7:32 AM), <https://reason.com/volokh/2020/11/13/aca-the-lay-of-the-land/> [<https://perma.cc/JA2M-ZJL9>].

<sup>258</sup> Accord Lea, *supra* note 9, at 765–66.

<sup>259</sup> See *supra* notes 136–39.

<sup>260</sup> See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

In the course of denying Texas’s claim to standing, the Court did not fully address “bank-shot” standing. It treated the argument partly as waived, and partly as a different kind of causation argument.<sup>261</sup> Perhaps that was for the best. It could well be that the majority was fractured, both on whether to recognize bank-shot standing (which it should) and whether the inseverability arguments were correct (which they were not). But if the Court confronts the question again in cooler air, it should accept this kind of argument if there is inseverability. Because real inseverability clauses are so rare,<sup>262</sup> however, perhaps it never will.

Thus, because inseverability is simply a claim about fallback law, it can be an ingredient in a plaintiff’s theory of why a statutory provision against him is unenforceable. For the same reason, a severability argument can be an ingredient in defeating a plaintiff’s legal theory. If a plaintiff’s only constitutional complaint is about statutory provisions that did not injure him, and if those provisions are severable from the provisions that did, his claim fails.<sup>263</sup> That is why federal courts classes properly recognize the conventional wisdom that a plaintiff may not challenge the constitutionality of a statute that has not been applied to him, absent some unusual circumstance like an inseverability argument.<sup>264</sup>

Perhaps this principle needs to be dusted off to deal with some of the recent separation of powers cases. As noted above, since the 1980s, the Supreme Court has been willing to assume that a regulated party is injured by the presence of an unconstitutional removal restriction. When the restriction is actually relevant to a plaintiff’s case—if the president tried and failed to protect the plaintiff from administrative overreach, or if the

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<sup>261</sup> *California v. Texas*, 141 S. Ct. 2104, 2116, 2119–20 (2021); see also *id.* at 2122 (Thomas, J., concurring) (stating that the argument was not raised early or often enough and also required a theory of statutory interpretation that plaintiffs did not propose). The bank-shot theory was more clearly articulated in the Federal Government’s brief, see Brief for the Federal Respondents at 16–22, *California*, 141 S. Ct. 2104 (Nos. 19-840 & 19-1019); see also Blackman, *supra* note 139, at 133–35, but elements of the theory could also be found in Texas’s, see Brief for Respondent/Cross-Petitioner States at 26–27, *California*, 141 S. Ct. 2104 (Nos. 19-840 & 19-1019).

<sup>262</sup> See Gluck, *supra* note 61, at 159 & n.97 (canvassing the U.S. Code and Public Laws and finding only nine inseverability clauses).

<sup>263</sup> It is tempting to say that such a plaintiff has no standing, but it is more accurate to say that the claim fails on the merits, see Lea, *supra* note 9, at 760.

<sup>264</sup> See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 168–74 (7th ed. 2015) (reproducing and discussing *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912)).

restriction changed the decisions of the official<sup>265</sup>—this is quite plausible. But in cases where the removal restriction has never come into play, this is more akin to *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.*<sup>266</sup>

The recent separation of powers severability decisions drive this home. If the end results of *Free Enterprise Fund*, *Seila Law*, and *Collins* were simply to expand the rights of the President, and to deny plaintiffs the actual relief against enforcement that they sought, perhaps then each of those suits should have been dismissed at an early stage.<sup>267</sup>

As a final point of emphasis and clarification, it is important to remember that, ultimately, severability should drive standing rather than the other way around. Severability is a question of the meaning of law. It preexists the courts, courts do not have the power to change it, they are just supposed to discern it and recognize it. Also, the executive branch has to resolve questions of severability even outside the courts, as it too must grapple with the consequences of statutes that have unconstitutional applications.

This means that, in general, the answers to severability questions do not depend on the standing of particular litigants, and its contours should not be reshaped in order to produce a judge's desired resolution of a standing question. That is why standing is addressed here at the end of the article. The fact that judges have to address it earlier in their cases should not confuse them into letting it drive their views of the law.

#### CONCLUSION

The Constitution does not tell us everything we need to know about severability. But it tells us two important things: that the task of a judge is to apply law, and that the Constitution displaces ordinary law that is repugnant to it. Ordinary law tells us the rest: when the Constitution does not stand in the way, it tells us what the rest of the law is. And it tells us

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<sup>265</sup> See *supra* note 194 and accompanying text.

<sup>266</sup> See Fallon et al., *supra* note 264, at 169–74 (discussing *Jackson Vinegar Co.*).

<sup>267</sup> See Tyler B. Lindley, *The Writ-of-Erasure Fallacy and the Balance of Powers*, 17–19, 28–37 (Aug. 31, 2022) (unpublished manuscript) (on file with author); Tyler B. Lindley, *Justiciability and Remedies in Administrative Law Challenges*, U. Chi. L. Rev. Online (Apr. 1, 2021), <https://lawreviewblog.uchicago.edu/2021/04/01/lindley-justiciability/> [<https://perma.cc/5NKL-JC6N>]; cf. Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435, 1477–78 (2013) (questioning standing in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), and *Morrison v. Olson*, 487 U.S. 654 (1988)).

whether to apply any fallback rules in cases of unconstitutionality. Taken together, those are the principles of severability.