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## *ARTICLES*

# SITUATIONAL SEVERABILITY

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*Severability doctrine can level an entire statute based on a single unconstitutional provision or application. Yet scant attention has been paid to the contexts in which the federal courts address severability. The courts assume that they can address severability whenever they confront a partially invalid law and that they can apply the same standard (calling for a wide-ranging search for the legislature's likely intent) in all cases.*

*This unitary approach is problematic because it ignores that courts address severability in different contexts, which raise their own unique concerns. As a result, courts have answered severability questions in ways that violate the rules of Article III standing and the separation of powers. For instance, they have addressed severability at the jurisdictional stage of adjudication to determine a litigant's standing—even though doing so runs counter to the principle that*

[*] Attorney, Jones Day. Former Law Clerk to Justice Clarence Thomas and (now-Chief) Judge Ed Carnes. In this Article, I discuss *National Federation of Independent Business v. Sebelius*, which the Supreme Court decided while I was clerking. Discussion of that case—and any other—in this Article is based entirely on the Court's published decision and other publicly available materials, and is not derived from my experience clerking at the Court. Needless to say, the views expressed in this Article are mine alone, and should not be interpreted as reflecting the views of anyone else, including any of my employers, past or present. For providing the material support that made this project possible, thanks go to Dean Bo Rutledge and the University of Georgia School of Law. For graciously sharing thoughtful comments on earlier drafts, thanks go to Puja Lea and Professors Kent Barnett, Jason Cade, Nathan Chapman, Dan Coenen, Matt Hall, and Usha Rodrigues. For assistance in completing the manuscript, thanks go to T.J. Striepe, Gracie Waldrup, and Cindy Wentworth. And for their editorial assistance, I thank the staff of the Virginia Law Review—and especially Tim Horley and Rebecca Sciarrino. Any errors are mine.

*jurisdictional questions should be kept distinct from those concerning the rights and duties of the parties. And courts have deployed severability doctrine at the merits stage to identify what rights the legislature has authorized a litigant to assert—even though the severability standard gives short shrift to the principle of legislative supremacy that animates the courts' general, text-bound approach to determining the statutory rights available to litigants. Moreover, courts have applied severability doctrine after resolution of a case to determine whether and how other parts of a partially invalid law will apply in the future—even though doing so violates basic Article III standing principles.*

*In offering the first comprehensive account of the ways in which courts apply severability doctrine, this Article illuminates these deficiencies. It also proposes a new, situation-sensitive approach to severability that would correct them. In short, this Article proposes that severability doctrine should be situational—just like severability itself.*



## INTRODUCTION

When part of a statute conflicts in some respect with a superior law, severability doctrine determines how, if at all, the remainder of

the statute will operate.[1] Do not let that dry description fool you; severability questions often involve very high stakes. Consider *National Federation of Independent Business v. Sebelius* ("*NFIB*"), in which the Supreme Court held unconstitutional the Medicaid expansion provisions of President Obama's signature healthcare legislation, the book-length Patient Protection and Affordable Care Act ("ACA").[2] After holding the Medicaid expansion unconstitutional, the Court turned to the question of severability, asking whether it should strike down every other (presumptively constitutional) provision of the massive statute for no reason other than that those provisions could not be severed from the Medicaid expansion.[3] And, though their position did not carry the day, four justices would have invalidated the entire ACA on grounds of inseverability.[4]

*United States v. Booker* likewise illustrates the practical centrality of severability determinations.[5] There, the Court held that some applications of the mandatory Federal Sentencing Guidelines scheme violated the Sixth Amendment.[6] The Court then applied severability doctrine to fundamentally reshape federal sentencing law by rendering the Guidelines advisory in every criminal case—even those in which the mandatory scheme enacted by Congress posed no constitutional problem.[7] Cases like *NFIB* and *Booker* are not unusual: severability doctrine has determined the fates of many landmark laws, including the Federal Employers' Liability Act,[8] the Federal Election Campaign Act,[9] the Sarbanes-Oxley Act,[10] and the Social Security Act.[11]

[1] See, e.g., Robert L. Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 76 (1937).

[2] 132 S. Ct. 2566, 2606–07 (2012) (opinion of Roberts, C.J.); id. at 2666 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting ("joint dissent")).

[3] See id. at 2607–08 (opinion of Roberts, C.J.); id. at 2630–31 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 2666 (joint dissent).

[4] See id. at 2668 (joint dissent). Unlike the majority, the dissenters would have held the much-discussed individual mandate unconstitutional, and that view informed their severability analysis. See id. at 2643.

[5] 543 U.S. 220 (2005).

[6] Id. at 226–27.

[7] Id. at 245–46, 265–67.

[8] El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 93–97 (1909).

[9] Buckley v. Valeo, 424 U.S. 1, 6, 108 (1976).

[10] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–09 (2010).

[11] See Steward Mach. Co. v. Davis, 301 U.S. 548, 573, 598 (1937).

Indeed, as things now stand, the federal courts assume that they can engage in severability analysis any time they confront a partially invalid law. And, whenever courts address a severability question, they apply the same severability standard. That standard requires a court faced with a partially invalid law to engage in a peculiar form of statutory interpretation, under which it must undertake a potentially wide-ranging search for indicia of the enacting lawmakers' likely preference regarding severability.[12]

Given the high stakes involved, it should not be surprising that many scholars have trained their sights on the courts' severability standard. Their criticisms have been harsh, but conflicting.[13] Some claim that the severability standard places too much focus on legislative intent.[14] Others criticize courts for giving insufficient weight to certain forms of evidence of the legislature's likely preference.[15] Some argue that the governing severability standard gives judges too much power to effectively nullify otherwise valid statutory provisions or applications.[16] But others urge that judges should have greater freedom to nullify statutory provisions or applications on grounds of inseverability.[17]

[12] See infra notes 36–58 and accompanying text.

[13] See Mark L. Movsesian, Severability in Statutes and Contracts, 30 Ga. L. Rev. 41, 41–42 (1995) (cataloguing disagreement among commentators).

[14] See, e.g., David H. Gans, Severability as Judicial Lawmaking, 76 Geo. Wash. L. Rev. 639, 696 (2008); Emily Sherwin, Rules and Judicial Review, 6 Legal Theory 299, 312–13 (2000); Kevin C. Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 743 (2010).

[15] See, e.g., Honorable James T. Broyhill & Jane Sutter Starke, Aftershocks of the Loss of the Legislative Veto: Severability and the Need for a Replacement Device, 7 Pace L. Rev. 609, 621 (1987); Glenn Chatmas Smith, From Unnecessary Surgery to Plastic Surgery: A New Approach to the Legislative Veto Severability Cases, 24 Harv. J. on Legis. 397, 405–06 (1987); see also Lisa Marshall Manheim, Beyond Severability, 101 Iowa L. Rev. 1833, 1838–39, 1851 (2016) (arguing that the governing severability standard restricts the available options and, therefore, often prevents courts from giving effect to legislative intent).

[16] See, e.g., Laurence H. Tribe, Constitutional Choices 79–80 (1985); Eric S. Fish, Severability as Conditionality, 64 Emory L.J. 1293, 1299 (2015); Movsesian, supra note 13, at 45–46; Walsh, supra note 14, at 740–41.

[17] See, e.g., Tom Campbell, Severability of Statutes, 62 Hastings L.J. 1495, 1496–97 (2011); C. Vered Jona, Note, Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation, 76 Geo. Wash. L. Rev. 698, 699–700 (2008); see also Note, The Aftermath of *Chadha*: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations, 71 Va. L. Rev. 1211, 1215–18 (1985) (arguing that, as applied, the current approach to severability leads too often to conclusions of severability, contrary to likely legislative intent).

Despite all of this debate, little attention has been paid to the differing *contexts* in which federal courts apply severability doctrine.[18] Indeed, this Article offers the first comprehensive account of the varying ways in which federal courts deploy severability doctrine both within and without the three stages of adjudication—the jurisdictional stage, the merits stage, and the remedial stage.[19]

As it turns out, courts currently apply severability doctrine in several contexts and at different stages of the adjudicatory framework. They do so, moreover, with the presupposition that severability doctrine is *unitary* in the sense that it poses the same basic question in all of these different contexts. But this approach is wrong. On the better view, severability is *situational*. This is because severability doctrine serves different functions depending on the context in which it is applied. This Article develops this core idea by offering a new taxonomy that facilitates a better understanding and evaluation of severability doctrine in light of its context-specific functions.

But the Article offers more than a taxonomy. In pulling back the curtain on severability's situationality, it illuminates shortcomings of the federal courts' current one-size-fits-all approach to severability. That blunderbuss approach is problematic for two reasons. First, it leads the courts to deviate from their usual rules of Article III standing, which demarcate the federal judicial power. Second, because it wholly ignores the purposes served by severability doctrine in specific contexts, the courts' unitary approach to severability fails to account for context-specific considerations that should inform severability analysis. Specifically, present-day severability doctrine allows courts to engage in a wide-ranging search for perceived legislative intent even when doing so would be prohibited by the approach to statutory interpretation that the courts have developed to govern similar situations.

[18] Professors John C. Harrison and Erik Zimmerman have given some attention to the contexts in which issues of severability arise. See John Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 57–59 (2014) (arguing that severability doctrine is substantive, not remedial); Erik R. Zimmerman, Supplemental Standing for Severability, 109 Nw. U. L. Rev. 285, 320–21 (2015) (similar). Their works, although thoughtful, neither offer a comprehensive account of severability doctrine's roles nor discuss whether the current severability standard is appropriate for some or all of those roles. This Article does both.

[19] See infra Section I.B (discussing three-stage adjudicatory framework).

Having exposed those deficiencies, this Article proposes to correct them with targeted modifications to the now-prevailing doctrine. These proposed modifications would bring severability practice in line with the courts' approach to contextually similar issues of statutory interpretation and with the constitutional limits on the adjudicatory power of the federal courts. In short, the proposed approach would make severability doctrine context specific precisely because different contexts bring into play different considerations of precedent and policy to which courts should attend in shaping severability law.

This Article proceeds in four parts. Part I provides background. It describes severability doctrine as set forth by the Supreme Court and provides a synopsis of scholarly criticisms of that doctrine. It then describes the three stages of adjudication in the federal courts: the jurisdictional stage, the merits stage, and the remedial stage.

Part II considers the impact of severability doctrine at the jurisdictional stage. At present, severability doctrine will prevent a litigant from demonstrating the Article III "redressability"—and thus standing—needed to press her claim if the law in operation following a severability analysis would leave her no better off than the law as enacted.[20]

For instance, imagine that an immigrant is protected from deportation by statutory provision *A*, but that the government removes that protection—and sets in motion the immigrant's deportation—pursuant to unconstitutional provision *B*. Under the reasoning of *INS v. Chadha*,[21] that litigant will lack standing to challenge provision *B* if provision *A* cannot be severed from it, because the litigant will face deportation whether or not her challenge succeeds. But applying severability doctrine in this fashion at the jurisdictional stage can leave a court unable to address unlawful action taken against a litigant before it. That risk, I argue, can be avoided through adherence to the Court's usual approach to Article III standing, under which the weakness of a litigant's arguments on the merits will not deprive her of standing. Because severability questions are rightly seen as merits questions, courts should accept a litigant's severability arguments in assessing her standing. As a

[20] See, e.g., INS v. Chadha, 462 U.S. 919, 931–34 (1983).
[21] Id.

result, courts should postpone resolution of severability issues to the merits stage of adjudication.

Part III turns to the roles that severability doctrine can play at the merits stage. Section III.A discusses what I call "inseverability claims." When a litigant asserts an inseverability claim, he argues that one statutory provision cannot be applied to him because the legislature has inseverably linked that provision (or its application to him) to another, invalid provision (or application). For example, imagine that a law imposes both a perfectly permissible tax and an unconstitutional prior restraint.[22] Now, imagine that a litigant who is subject to the tax seeks to resist its application on the ground that it is inseverable from the invalid prior restraint. In adjudicating that inseverability claim, the court will use severability doctrine to determine whether the legislature has authorized the litigant to rely on the prior restraint's incompatibility with the First Amendment in challenging the related tax. If the two provisions are inseverable, then the litigant may do so; if not, then he may not. In the context of inseverability claims, then, severability doctrine serves to identify the legislatively authorized rights available to a litigant seeking to challenge an otherwise valid provision or application of law that injures him. Yet the current, freewheeling severability standard is badly out of step with the courts' usual, text-driven approach to identifying the legislatively authorized rights that litigants may assert. Section III.A, therefore, proposes a restriction of the severability rubric that would allow courts to reach conclusions of inseverability—and thereby expand the rights assertable by litigants—only when the statutory text or structure compels the conclusion that the legislature intended that result. In other words, Section III.A argues that in the context of inseverability claims, severability doctrine should be brought into alignment with the courts' ordinary approach for answering similar questions of statutory interpretation.

Section III.B then discusses the role of severability doctrine in the context of what I refer to as impermissible convergences of law. An impermissible convergence of law occurs when two or more independently unproblematic aspects of law together violate a litigant's rights. *Booker* provides an illustration: specific Federal Rules of Criminal Procedure, the applicable provisions of the Federal Sentencing

[22] For a fuller discussion of this example, see infra notes 158–182 and accompanying text.

Guidelines, and the provisions of the Sentencing Reform Act of 1984 that made those guidelines mandatory combined to cause a violation of Booker's Sixth Amendment right that none of them would have caused independently.[23] A court facing such an impermissible convergence of law must determine which aspects of the enacted law it should apply, and which it should ignore, in adjudicating the dispute before it. In that context, Section III.B argues, the current severability rubric properly allows a court to engage in a wide-ranging search for indicia of the legislature's likely intentions regarding the substantive fallback law that should govern the dispute before the court—just as the Supreme Court did in *Booker*.[24]

Finally, Part IV considers the Supreme Court's practice of issuing what I term gratuitous severability rulings. When a court renders a gratuitous severability ruling, it determines the severability of statutory provisions or applications that do not injure the litigants before it, and it does so after adjudicating those litigants' claims. Though the Court has issued gratuitous severability rulings with increasing frequency in recent decades, the joint dissent in *NFIB* offers perhaps the most striking example of the practice. In that case, the plaintiffs—several states, some individuals, and an association of small businesses—challenged the ACA's individual mandate and Medicaid expansion.[25] The dissenters agreed with the majority that the Medicaid expansion was unconstitutional, but, unlike the majority, they would have held the individual mandate unconstitutional as well.[26] Based on those conclusions—and in keeping with the Court's practice of issuing gratuitous severability rulings—the dissenters also would have held inseverable the many remaining provisions of the ACA which neither applied to nor injured the *NFIB* plaintiffs.[27] Section IV.A argues that gratuitous severability rulings like that proposed by the *NFIB* dissenters contravene the Court's Article III standing doctrine, which bars federal courts from adjudicating the validity of provisions or applications of law that do not injure the litigants before them. Section IV.B then analyzes

[23] *Booker*, 543 U.S. at 227–35; see also id. at 314–18 (Thomas, J., dissenting in part) (discussing various provisions that together led to a violation of Booker's rights).
[24] Id. at 246–48.
[25] *NFIB*, 132 S. Ct. at 2580 (plurality opinion).
[26] Id. at 2668 (joint dissent).
[27] See infra notes 283–285 and accompanying text.

and rejects attempts by others to justify the courts' practice of issuing gratuitous severability rulings.

## I. SEVERABILITY DOCTRINE AND THE THREE-STAGE ADJUDICATORY FRAMEWORK

One must understand severability doctrine and the federal courts' adjudicatory framework to examine and evaluate the roles that severability doctrine plays within that framework. This Part, therefore, provides a brief exposition of both. Section A describes the Court's treatment of severability and scholarly criticisms of the current severability framework. Section B outlines the federal courts' three-stage adjudicatory framework.

### *A. Severability Law*

When a statute as written conflicts in some respect with superior law, courts apply severability doctrine to determine whether other provisions or applications of that statute can continue in effect.[28] To use the language of severability doctrine, the other provisions or applications can continue to operate only if the invalid aspects of the statute are "severable" from them. Severability doctrine often applies when one or more—but fewer than all—provisions of a multi-provision statute are invalid. But severability doctrine can also apply in other contexts. For example, severability doctrine can apply when only some applications of a single statutory provision are invalid.[29] In addition, severability doctrine can apply in situations involving separate statutes. For instance, a court could determine that a provision of Law *A* cannot be severed from an invalid provision of Law *B*.[30]

During our nation's early history, the Supreme Court did not engage with severability issues. Instead, it operated under the assumption that, where only some parts of a statute were invalid, the remainder would be

[28] See, e.g., Stern, supra note 1, at 76. Severability doctrine can apply to forms of law other than statutes. See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 190–91 (1999) (assuming arguendo that executive orders can be severed); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988) (holding an administrative regulation severable). For simplicity's sake, this Article focuses on the severability of statutes. The arguments it sets forth, however, also apply to other forms of law.

[29] See Zimmerman, supra note 18, at 296.

[30] See Harrison, supra note 18, at 57 n.3.

given "full effect."[31] As Professor Kevin Walsh has explained, the Court did not frame this assumption in terms of severability. Instead, it took the view that, when higher law—for instance, the Constitution—and subordinate law—for instance, a statute—conflicted, the higher law "displace[d]" the lower law to the extent of any inconsistency.[32] This early approach in effect operated as "a conclusive presumption of severability," meaning a law was inapplicable only to the extent that it conflicted with higher law.[33]

With the rise of complex legislation during the 1800s, the Court began giving closer attention to severability issues.[34] That process led to the adoption of an approach that looks to legislative intent to resolve issues of severability.[35] Under this framework, the original, limited approach to partial unconstitutionality remains the default. That default results from a presumption of severability,[36] under which courts assume that a legislature intends for any unlawful part of its handiwork to be severable from all lawful parts in the absence of indicia of a contrary intention.[37]

A litigant can, however, rebut the presumption of severability and the default approach to partial invalidity that it reflects. In other words, current doctrine authorizes courts to give effect to a judicially perceived

[31] Stern, supra note 1, at 79 (quoting Bank of Hamilton v. Dudley, 27 U.S. (2 Pet.) 492, 526 (1829)).

[32] See Walsh, supra note 14, at 756.

[33] 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, 453 (2011).

[34] See Ryan Scoville, The New General Common Law of Severability, 91 Tex L. Rev. 543, 550 n.33 (2013).

[35] See Walsh, supra note 14, at 769–75 (describing development of legislative intent–focused severability doctrine).

[36] See Jenna L. Kamiat, Comment, PPACA and the Individual Mandate: A Healthy Approach to Severability, 80 Fordham L. Rev. 2237, 2242 (2012). During the *Lochner* era, the Supreme Court briefly deviated from that presumption. See Michael D. Shumsky, Severability, Inseverability, and the Rule of Law, 41 Harv. J. on Legis. 227, 234–37 (2004).

[37] See Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion). As Professor Adrian Vermeule has observed, this "presumption is implicit in the Court's frequently repeated formula for determining severability." Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1950 n.28 (1997). That is, the Court sets severability as a default when it says that invalid aspects of a statute should be severed unless "it is . . . evident . . . that [the legislature] would have preferred no statute at all" to the statute without its invalid aspects. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) (citations and internal quotation marks omitted).

legislative desire for *in*severability. To rebut the presumption, a litigant must demonstrate that the legislature that enacted the challenged law would prefer that otherwise valid aspects of the law not have effect in light of the law's partial invalidity. As the Court recently explained the test: a court will "give effect to the valid portion of a . . . statute" (1) "so long as" the valid portion "remains fully operative as a law" and (2) "so long as it is not evident from the statutory text and context that [the legislature] would have preferred no statute at all" to the partially valid statute.[38] Perceived legislative intent thus determines whether valid provisions or applications of a law are inseverable from invalid provisions or applications.[39]

There is room to conclude, however, that the Supreme Court has not been entirely consistent in describing how courts should go about ascertaining legislative intent. The difficulty concerns the second aspect of the severability test, which involves a less objective inquiry than the question whether the valid aspects of the statute remain operative as a law.[40] The Court at times has asked whether the remainder of the statute would operate in the manner the legislature intended.[41] At other times, however, the Court has asked whether the legislature would have passed the legislation without its invalid aspects.[42]

[38] *Arkison*, 134 S. Ct. at 2173 (citations and internal quotation marks omitted). The two prongs of the severability rubric are not independent, standalone tests. Rather, they are both aspects of the search for legislative intent. A legislature could not have intended severability if the valid portions of the statute would not be independently operative as a law. See Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987). But see Fish, supra note 16, at 1300, 1305 (arguing that federal courts currently apply independent and "very different" tests to determine severability and that those tests "lack a unifying principle").

[39] See *Alaska Airlines*, 480 U.S. at 683 n.5. Circumstances might arise in which legislative intent would not drive the severability inquiry. For instance, states can develop their own standards—which might not look to legislative intent—for determining whether invalid aspects of a state law can be severed. See Leavitt v. Jane L., 518 U.S. 137, 139 (1996). That said, the vast majority of states apply a standard that mirrors federal severability doctrine. See Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 285 (1994). The key point, though, is that a federal court undertaking a severability analysis seeks to discern and give effect to the intent of the lawmaking body that is responsible for the challenged law.

[40] See Kenneth A. Klukowski, Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?, 16 Tex. Rev. L. & Pol. 1, 30 (2011).

[41] See, e.g., *Alaska Airlines*, 480 U.S. at 684.

[42] See, e.g., Buckley v. Valeo, 424 U.S. 1, 108 (1976).

Others have described these as competing tests,[43] but they are better viewed as complementary facets of the controlling inquiry into perceived legislative intent. That is, severability doctrine assumes that the legislature would prefer inseverability—and would not have enacted the otherwise valid aspects of the statute—if the remaining aspects of the statute would not operate in the manner intended by the legislature.[44] And, even if the remaining aspects of the statute would operate as intended, a court may reach a conclusion of inseverability if something about the statutory text or context indicates that the legislature would not have enacted them without the invalid aspects.[45] At the end of the day, the key question is: what would the legislature "have preferred[?]"[46]

Under current law, a court may consider a wide range of potential indicia of legislative intent in seeking to answer that key question. Most obviously, a court may consider the statutory text, including any applicable severability clause—i.e., an enacted provision specifically calling for severance of invalid provisions or applications—or inseverability clause—i.e., an enacted provision specifically calling for nonseverance of invalid provisions or applications. Although courts consider severability clauses, they do not treat them as dispositive.[47] In contrast, the Supreme Court has strongly suggested that courts should give constitutionally valid inseverability clauses dispositive effect.[48]

[43] See Fish, supra note 16, at 1305.

[44] See Klukowski, supra note 40, at 8.

[45] See *Alaska Airlines*, 480 U.S. at 685.

[46] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) (citations and internal quotation marks omitted).

[47] See INS v. Chadha, 462 U.S. 919, 932–35 (1983); Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

[48] See Heckler v. Mathews, 465 U.S. 728, 738–40, 739 n.5 (1984); Zobel v. Williams, 457 U.S. 55, 65 (1982). As noted, courts do not give severability clauses dispositive effect. Whatever the propriety of that practice, inseverability clauses differ from severability clauses in ways suggesting that inseverability clauses are more clearly deserving of deference. But see Shumsky, supra note 36, at 245 (arguing that courts should give severability clauses dispositive effect). For instance, legislatures routinely insert boilerplate severability clauses into statutes, often without discussion or deliberation. See, e.g., Israel E. Friedman, Inseverability Clauses in Statutes, 64 U. Chi. L. Rev. 903, 910 (1997). But they only rarely insert inseverability clauses, and, when they do, they usually debate the topic extensively. See id. at 911–12. Moreover, application of a severability clause could give rise to a variety of outcomes depending on the nature of partial statutory invalidity, and the legislature likely will not have foreseen many of those outcomes. See Sherwin, supra note 14, at 317–18. Application of an inseverability clause, in contrast, gives rise to a single outcome in the event of partial invalidity. For these reasons, courts can have greater confidence that they are

In addition to the statutory text, a court may consider the statute's structure[49] and what it perceives to be the predominant purpose or purposes, as ascertained from the statute's text and structure, so as to determine whether the remaining aspects of the statute would serve those purposes.[50] Aside from these textually derived considerations, courts can consider later legislative enactments[51] or the ways in which government officials have implemented a law[52] in ascertaining the law's likely purpose and its severability-related effects. Courts also look to legislative history in seeking to ascertain the legislature's intention with respect to severability.[53] And courts seek to predict the practical effects of the remainder of a partially invalid statute and to determine whether the legislature would have deemed those effects undesirable.[54] In considering all of these matters, courts often also rely heavily on their intuitions regarding what the legislature would have desired had it considered the severability issue.[55]

At bottom, as the foregoing discussion suggests, a court making a severability determination engages in a form of statutory interpretation based on legislative intent.[56] But severability doctrine involves a peculiar kind of statutory interpretation. Because a legislative body usually will not have foreseen the potential problems with its handiwork, it will not have formed an intent regarding severability in the event of partial invalidity.[57] As a result, a court faced with a severability question often must engage in a counterfactual inquiry, asking what the legislature would have intended if it had thought about both the specific problem

giving effect to the legislature's design when they apply inseverability clauses, as opposed to severability clauses. See Friedman, supra, at 917–19.

[49] See *Alaska Airlines*, 480 U.S. at 687.

[50] See Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 767 (1996) (plurality opinion); New York v. United States, 505 U.S. 144, 186 (1992).

[51] See Tex. Co. v. Brown, 258 U.S. 466, 473–74 (1922).

[52] See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191–92 (1999).

[53] See, e.g., INS v. Chadha, 462 U.S. 919, 932–34 (1983).

[54] See, e.g., United States v. Booker, 543 U.S. 220, 258–59 (2005).

[55] See, e.g., Lynch v. United States, 292 U.S. 571, 586–87 (1934) (basing a severability determination largely on the conclusion that Congress "overlooked" differences in two classes to whom a statute applied).

[56] See, e.g., John Copeland Nagle, Severability, 72 N.C. L. Rev. 203, 226 (1993); Stern, supra note 1, at 115.

[57] See Sherwin, supra note 14, at 304; Walsh, supra note 14, at 740–41.

with its statute and the severability issue that that problem has produced.[58]

The counterfactual nature of the severability inquiry gives rise to two related problems. First, the current severability rubric poses a high risk of error because it is difficult to accurately determine what a legislature would have intended with respect to severability in the absence of an inseverability clause or other fallback law[59] expressly setting forth the legislature's intent.[60] Second, the speculative nature of legislative intent–based severability determinations leaves courts room to implement their own policy preferences under the cover of severability analysis.[61]

Troubled by existing severability doctrine's potential for error and manipulation, scholars have proposed wide-ranging reforms. Generally speaking, these proposals call for bright-line rules that would restrict the ability of courts to reach severability or inseverability conclusions based on inferred legislative intent. At one extreme, some have argued that courts should always sever statutory provisions or applications that conflict with higher law.[62] At the other extreme, some have argued that courts should always deem statutes inseverable.[63] In between those two

[58] See Smith, supra note 15, at 402.

[59] Professor Michael Dorf coined the term "fallback law." See generally Michael C. Dorf, Fallback Law, 107 Colum. L. Rev. 303 (2007) (discussing the phenomenon in depth). Generally speaking, fallback law refers to provisions that a legislature includes in a law, but that by their terms are to take effect only if the original law is deemed invalid—either wholly or partially, depending on the terms of the fallback law. See id. at 304. Dorf considers severability clauses to be a species of fallback law. Id. at 305. From the legislature's perspective, that description seems fitting. As already discussed, however, courts treat severability clauses as, at most, weak and rebuttable fallback law. See supra notes 47–48. Unless otherwise noted, discussions of express fallback law in this Article concern enacted inseverability clauses or enacted substitutive provisions. For a case giving effect to enacted fallback law of the substitutive sort, see *Bowsher v. Synar*, 478 U.S. 714, 735 (1986).

[60] See Tobias A. Dorsey, Remarks, Sense and Severability, 46 U. Rich. L. Rev. 877, 893 (2012); Walsh, supra note 14, at 740–41.

[61] See Stern, supra note 1, at 101–02, 111–14; Walsh, supra note 14, at 749–50, 752.

[62] See Dorsey, supra note 60, at 891.

[63] See generally Campbell, supra note 17 (arguing for the complete abolition of statutory severance). Those taking this distinctly minority position also contend that courts impermissibly engage in legislation, in violation of the Constitution's bicameralism-and-presentment requirements and separation-of-powers or federalism principles, whenever they allow aspects of a partially invalid law to continue in force. See id. at 1498–504; see also Lars Noah, The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference?, 56 Wash. & Lee L. Rev. 235, 241–45 (1999) (describing, but not endorsing, this argument). This argument misunderstands the nature of judicial review. When a court holds a provision or application of a law invalid, it does not thereby remove that aspect of

extremes, several have argued that courts should hold statutory provisions or applications inseverable only if (1) the legislature has included an applicable fallback provision requiring that result or (2) the otherwise-valid provisions or applications are incapable of functioning independently.[64]

In short, scholars have identified potential problems with the current severability regime and have proposed alternative approaches aimed at minimizing those problems. Little attention, however, has been paid to the differing contexts in which courts have applied severability doctrine—that is, the circumstances in which federal courts have applied severability doctrine at various stages of their adjudicatory framework. Below, I consider the various contexts in which the courts have applied severability doctrine and the purposes that severability doctrine serves within those contexts.

### *B. The Three-Stage Framework*

To understand the ways in which severability doctrine fits into the federal courts' adjudicatory framework, one must first understand that framework. This Section outlines each of that framework's three stages: the jurisdictional stage, the merits stage, and the remedial stage.[65]

*The Jurisdictional Stage*. At the jurisdictional stage, a federal court must determine whether it has power to adjudicate a particular claim.

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the law from the books, leaving the severable aspects of the law in place as a new law. Rather, the entire, original law remains on the books, though the longstanding doctrines of stare decisis and issue and claim preclusion may effectively deprive the aspects deemed invalid of further effect. See Harrison, supra note 18, at 87–89. A court thus does not create a new law when it deems aspects of a statute severable, even if it does alter the practical effect of the statute. A contrary conclusion would require the total invalidation of every law that by its terms included an invalid provision or application. As Eric Fish has observed, that position "runs against centuries of practice" and necessarily leads to "untenable results." Fish, supra note 16, at 1314–16.

[64] See, e.g., Fish, supra note 16, at 1298; Nagle, supra note 56, at 254–56, 257 n.258; Shumsky, supra note 36, at 272; Walsh, supra note 14, at 779–80. Walsh claims that courts would not sever statutes at all under his approach, but instead would generally deem them "displace[d]" by higher law only to the extent that they are inconsistent with that higher law. Walsh, supra note 14, at 778–81. As Professor Larry Alexander has observed, however, Walsh's proposed approach "is actually just a conclusive presumption of severability in the absence of [enacted] fallback law." Alexander, supra note 33, at 453.

[65] See Richard H. Fallon, The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights, 92 Va. L. Rev. 633, 639 (2006).

Jurisdiction, then, is a threshold issue: if the court lacks jurisdiction over a particular claim, it must dismiss that claim without proceeding further.[66]

Article III establishes the most fundamental of the limits on the federal courts' power. Article III limits "[t]he judicial power of the United States" to certain enumerated categories of "[c]ases" and "[c]ontroversies."[67] Building on that idea, the Supreme Court has "deduced a set of" jurisdictional requirements.[68]

These requirements, according to the Court, define what constitutes a "[c]ase" or "[c]ontroversy" within the meaning of Article III, and collectively constitute the "irreducible constitutional minimum of standing."[69] These constitutional requirements are so irreducible, in fact, that Congress cannot override them.[70] To establish Article III standing, a litigant must show three things: "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'"[71] The Court views these requirements as keeping the federal courts within their assigned constitutional role[72] by limiting them to "adjudication of actual disputes between adverse parties."[73] By so limiting the federal courts, the Article III standing requirements serve two interrelated goals. First, they prevent the federal courts from issuing advisory opinions in excess of their Article III authority.[74] Second, they "prevent the judicial process from . . . usurp[ing] the powers of the political branches" and thereby effectuate "separation-of-powers principles."[75]

[66] See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

[67] U.S. Const. art. III, § 1; id. art. III § 2, cl. 1.

[68] Lexmark Int'l v. Static Control Components, 134 S. Ct. 1377, 1386 (2014).

[69] Id. (citation omitted).

[70] See, e.g., Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).

[71] Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). Though scholars have criticized the Court's Article III standing jurisprudence, the Court remains committed to it. See Heather Elliott, Congress's Inability to Solve Standing Problems, 91 B.U. L. Rev. 159, 165 (2011). I, therefore, take the tripartite constitutional standing rubric as a given in this Article.

[72] See, e.g., Elliott, supra note 71, at 169–70.

[73] Richardson v. Ramirez, 418 U.S. 24, 36 (1974).

[74] See, e.g., FEC v. Akins, 524 U.S. 11, 24 (1998).

[75] *Susan B. Anthony List*, 134 S. Ct. at 2341 (citation omitted).

In keeping with those goals, the Court has adopted what some have termed a "claim-specific" approach to Article III standing.[76] That is, the Court has insisted that a litigant satisfy all of the Article III standing requirements with respect to each claim that she asserts. This claim-specific approach to standing has manifested itself in several ways, three of which are particularly important for our purposes. First, the Court has held that a litigant complaining of multiple actions must satisfy the Article III standing requirements with respect to each of the actions challenged.[77] Thus, that "a plaintiff . . . has been subject to injurious conduct of one kind" does not, "by virtue of that injury[,] [give that plaintiff] the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."[78] Second, the Court has held that a litigant must satisfy the Article III standing requirements with respect to every statutory provision that she seeks to challenge.[79] For example, the Court held in *DaimlerChrysler Corp. v. Cuno* that the plaintiffs lacked standing to challenge a state tax credit, and that they could not surmount that Article III obstacle by establishing their standing to challenge a related municipal tax abatement.[80] Third, the Court has held that, when a litigant succeeds on the claims for which he has standing, a court must limit the scope of the remedy "to the inadequacy that produced the injury in fact that the plaintiff has established."[81] Stated differently, a court may not evade the requirements of Article III standing by awarding a remedy that addresses improper actions which the litigant has no standing to challenge.[82]

This claim-specific approach makes sense. As already noted, Article III standing doctrine is premised on the idea that federal courts exceed their Article III power, and invade the power of other constitutional actors, when they adjudicate legal issues outside of "actual disputes

[76] Zimmerman, supra note 18, at 312.
[77] See Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996).
[78] Blum v. Yaretsky, 457 U.S. 991, 999 (1982) (citation omitted).
[79] See Davis v. FEC, 554 U.S. 724, 733–34 (2008).
[80] See 547 U.S. 332, 346, 350–53 (2006).
[81] *Lewis*, 518 U.S. at 357.
[82] The Court also has held that a litigant must satisfy the Article III standing requirements with respect to every remedy that he seeks. For instance, a litigant's standing to seek damages—because he has been subjected to injurious action in the past—will not by itself suffice to support a claim for forward-looking relief designed to prevent (even identical) injury in the future. See City of Los Angeles v. Lyons, 461 U.S. 95, 101–10 (1983).

between adverse parties[,]" as defined by the tripartite Article III standing rubric.[83] On that view, failure to adhere to a claim-specific model of standing would allow courts to flout Article III and separation-of-powers principles by deciding legal issues that lie outside of the "cases" or "controversies" presented to them.[84] Indeed, on the Court's view of Article III, resolution of a claim for which the plaintiff lacks standing would seem to amount to the issuance of an advisory opinion—a discussion of law not tied to the party's request for "specific relief" from his claimed injury, and, thus, "advising what the law would be upon a hypothetical state of facts."[85] The Court's conclusion that a court must tailor its remedies to the claims for which the plaintiff has standing also coheres with the Court's view of the Article III standing doctrine. As explained in *Lewis v. Casey*, the Article III standing requirements "would hardly . . . prevent[] courts from undertaking tasks assigned to the political branches . . . if[,] once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration."[86]

*The Merits Stage*. The merits stage of adjudication concerns the substantive rights of the litigants.[87] At this stage, the court must perform two closely related tasks: (1) it must "identify and resolve any lack of clarity in the applicable legal rules," and (2) it "must apply those abstract rules to the facts of the case before it."[88]

Because they possess no general lawmaking power,[89] the federal courts must defer to other government actors' decisions regarding the scope and content of legal rules. Specifically, the courts must defer to Congress, with respect to federal law;[90] the states, with respect to state law;[91] and the People as a whole, with respect to the federal Constitution.[92] Thus, the Court established in *Erie Railroad Co. v. Tompkins* that "[e]xcept in matters governed by the Federal Constitution

[83] Richardson v. Ramirez, 418 U.S. 24, 36 (1974).
[84] See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 133 (2011).
[85] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937).
[86] 518 U.S. at 357.
[87] See Fallon, supra note 65, at 645.
[88] Harrison, supra note 18, at 63.
[89] See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).
[90] See U.S. Const. art. I, § 1.
[91] See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).
[92] See U.S. Const. pmbl.; see also id. art. V (setting out amendment process).

or by [a]cts of Congress, the law to be applied in any case is the law of the State," as established by its legislature or its courts.[93] The courts take a similarly deferential stance to merits issues involving federal law. For instance, the fundamental principle of legislative supremacy[94] dictates that they must defer to Congress's decision to create (or not) a federal statutory cause of action,[95] and to Congress's decision regarding who may (or may not) assert a federal statutory cause of action.[96] Similarly, the courts defer to substantive lawmakers' decisions regarding who does (and does not) enjoy particular rights.[97] In articulating and applying the substantive content of an applicable law, the court will also defer to the lawmaker that created that law.[98]

With regard to these principles, the devil is in the details. Difficult questions arise, for example, when a seemingly applicable law does not speak clearly to the issue facing the court,[99] or when a seemingly applicable law conflicts in some way with higher law. In particular, a federal statute must give way to the extent it conflicts with the federal Constitution,[100] and a state statute must give way to the extent it conflicts with the federal Constitution, a federal statute,[101] or the applicable state constitution. At the merits stage, then, a court must consider all of these sources of law—and their interactions—in attempting to articulate the content of the legal rules that apply to the parties before it.[102]

[93] 304 U.S. at 78.

[94] See, e.g., James J. Brudney, Distrust and Clarify: Appreciating Congressional Overrides, 90 Tex. L. Rev. See Also 205, 207 (2012).

[95] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001).

[96] See Lexmark Int'l v. Static Control Components, 134 S. Ct. 1377, 1387–88 (2014).

[97] See, e.g., Brian Charles Lea, The Merits of Third-Party Standing, 24 Wm. & Mary Bill Rts. J. 277, 311–13 (2015) (noting that the rule barring assertion of third-party rights serves to effectuate lawmakers' decisions regarding who does, and does not, enjoy rights that they have created). The Court has developed exceptions that permit courts to ignore the rule barring third-party standing in some circumstances. For discussion of those exceptions, including proposals for modification, see id. at 296–302, 315–40.

[98] See, e.g., Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1974–75 (2014) (deferring to congressional intent to make equitable defense of laches unavailable).

[99] See, e.g., Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395, 399–401 (1950) (describing indeterminacy of legal texts).

[100] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[101] U.S. Const. art. VI, para. 2.

[102] See Harrison, supra note 18, at 82.

Properly understood, severability doctrine speaks to this aspect of the merits stage of adjudication.[103] Specifically, severability analysis involves a form of statutory interpretation[104] through which a court identifies the law applicable to a justiciable dispute when the law as written conflicts in some respect with a higher law.[105] Severability doctrine rightly gives effect to the principle of legislative supremacy by focusing on the intent of the lawmaker responsible for the subordinate and partially displaced law. To agree with the general outline of severability law, however, is not to agree with the courts' one-size-fits-all approach to severability. Rather, severability doctrine should be evaluated in light of the contexts in which it has been employed by the courts. I argue below that, viewed in light of those contexts, current severability doctrine is in need of modification.[106]

*The Remedial Stage*. At the remedial stage of adjudication, a court must decide what remedy or remedies it should award to a successful litigant and against an unsuccessful litigant.[107] Remedies, then, "operate with respect to [the] specific parties" in the litigation[108] and seek to compensate a victorious litigant for past injury or protect her from future injury.[109] In deciding what remedies to award, courts "look to a distinct" and primarily judge-developed "body of legal norms."[110] As an example, a court will grant a successful plaintiff an injunction only if the plaintiff can demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[111]

[103] See infra Part III for a discussion of the specific ways in which severability doctrine does so.
[104] See supra note 56 and accompanying text.
[105] See Harrison, supra note 18, at 81–82.
[106] See infra Parts II–IV.
[107] See Fallon, supra note 65, at 645.
[108] Harrison, supra note 18, at 85.
[109] See Douglas Laycock, Modern American Remedies 3–5 (4th ed. 2010).
[110] Harrison, supra note 18, at 63.
[111] eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (citation omitted).

If the plaintiff cannot make that showing, then she will not receive an injunction, though she might receive milder prospective relief in the form of a declaratory judgment,[112] in addition to any damages to which she is entitled. Federal courts generally may exercise discretion in deciding whether to award and how to shape prospective relief.[113] That discretion, though, is constrained by both the fundamental limits imposed by Article III[114] and judge-made rules governing the availability of prospective relief.[115]

In recent decades, the Court has taken to describing statutory severance as a "remedy."[116] On this view, a court applies the remedy of severance to "excise[]" provisions or applications of a statute so that a valid remainder can continue in operation.[117] If the court determines that severance is inappropriate, on the other hand, it uses its remedial power to "invalidat[e]"[118] or "nullif[y]"[119] the inseverable—but otherwise permissible—provisions or applications, effectively removing them from the statute books.

As Professor John C. Harrison explains, this characterization of severability as a remedial doctrine is inaccurate. Put simply, the

[112] See Steffel v. Thompson, 415 U.S. 452, 466 (1974).

[113] See Green v. Mansour, 474 U.S. 64, 72 (1985) (declaratory judgment); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312–13 (1982) (injunction).

[114] See supra notes 76–86 and accompanying text. Of course, an award of prospective relief also must not transgress other constitutional limitations.

[115] See supra note 111 and accompanying text (discussing traditional test governing propriety of injunctive relief).

[116] See, e.g., Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006); Heckler v. Mathews, 465 U.S. 728, 738 (1984). Many scholars, understandably following the Court's lead, couch their discussions of severability in terms of remedial discretion or values. See, e.g., Kent Barnett, To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation, 92 N.C. L. Rev. 481, 518–21 (2014); Gans, supra note 14, at 643–45; Klukowski, supra note 40, at 31; Candace S. Kovacic, Remedying Underinclusive Statutes, 33 Wayne L. Rev. 39, 45, 88–95 (1986); Bruce K. Miller, Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of *Heckler v. Mathews*, 20 Harv. C.R.-C.L. L. Rev. 79, 81 (1985); Scoville, supra note 34, at 569–70; Evan H. Caminker, Note, A Norm-Based Remedial Model for Underinclusive Statutes, 95 Yale L.J. 1185, 1208 (1986); Robert L. Nightingale, Note, How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes, 125 Yale L.J. 1672, 1736 & n.275 (2016).

[117] E.g., United States v. Booker, 543 U.S. 220, 245 (2005); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 764 (1986) (holding a statute inseverable and describing the choice between severance and nonseverance as a matter of "remedy").

[118] E.g., *Ayotte*, 546 U.S. at 329.

[119] E.g., *Booker*, 543 U.S. at 247; *Heckler*, 465 U.S. at 739 n.5.

invalidation or severance of statutory provisions or applications is not a remedy awardable by federal courts.[120] Under the longstanding conception of judicial review traceable to *Marbury v. Madison*,[121] the federal courts possess only the limited power to decide justiciable controversies between litigants according to the law. Upon doing so, a court may award a remedy to a successful litigant who is threatened with or has suffered injury. But as noted, those remedies operate only against the parties to the litigation; they do not operate on a challenged law itself.[122] Thus, a court may enjoin a defendant from applying a statute to a plaintiff or issue a judgment declaring that a statute cannot be applied to a plaintiff.[123] A court cannot, however, wholly or partially invalidate a statute, removing it from the books in the way a legislature might through a repeal or amendatory legislation.[124] In short, severance (or nonseverance) and invalidation are not themselves remedies to be awarded upon a conclusion that a statute conflicts in some respect with superior law.[125]

The on-the-ground operation of severability confirms that it is not a remedial doctrine. When a court applies severability law, it does not exercise remedial discretion to determine "which type of remedy" it will provide.[126] Instead, a court engages in statutory construction, looking to legislative intent—hypothetical or otherwise—in an effort to determine the law's operative meaning for purposes of establishing the rights and duties of the parties to the case before it.[127] The application of

[120] See Harrison, supra note 18, at 88–89.

[121] 5 U.S. (1 Cranch) 137 (1803).

[122] See Harrison, supra note 18, at 84–85.

[123] See Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

[124] See Harrison, supra note 18, at 81, 84. Admittedly, though, the word "invalid" and its derivatives serve as a useful shorthand for a conclusion that a statute cannot be applied by a court. See id. at 88 n.156.

[125] A remedial conception of severability would seem to require abandonment of the long-accepted *jus tertii* inseverability doctrine, which allows a litigant to claim that a statute cannot be applied to him because certain of its other provisions or applications that have not been applied to him are invalid. See infra notes 170–174 and accompanying text. If severability is a remedy to be awarded only upon a successful claim of partial invalidity, a court faced with a *jus tertii* inseverability claim will never reach the severability issue because the litigant making the *jus tertii* inseverability claim has no independent invalidity claim of his own.

[126] Zimmerman, supra note 18, at 319.

[127] See supra notes 34–58 and accompanying text.

severability doctrine thus occurs *before* the remedial stage of adjudication.[128]

Recognition of severability's nonremedial character raises questions concerning where, how, and how well severability fits into the adjudicatory framework. The Parts that follow explore those questions by identifying and examining severability doctrine's roles in the adjudicatory process.

## II. SEVERABILITY AT THE JURISDICTIONAL STAGE

On occasion, the Supreme Court has applied severability doctrine at the jurisdictional stage of adjudication. Specifically, the Court has applied severability doctrine to determine whether a plaintiff could satisfy the redressability requirement of the Article III standing test.

*INS v. Chadha* illustrates the point. Chadha was a deportable alien, but the Attorney General had suspended his deportation under a provision of the Immigration and Nationality Act ("INA") granting him that authority. The case arose after the House of Representatives exercised *its* authority under the legislative veto provision of the INA to override the Attorney General's suspension decision.[129] Chadha challenged his then-impending deportation on the ground that the legislative veto provision violated the constitutional separation of powers.[130] The government defended the constitutionality of the

[128] See Harrison, supra note 18, at 82. That said, a court's resolution of severability issues at the merits stage can *impact* the later remedial calculus by determining whether a litigant will receive a remedy and, if so, the scope of that remedy. See, e.g., Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330–32 (2006) (where some applications of state abortion statute violated Constitution, remanding for application of state severability law, which would determine whether constitutional applications of statute could be enjoined). That is not surprising, however, because merits determinations regularly affect the remedial stage. For instance, the success or failure of a litigant's argument that a particular statutory provision or application is unconstitutional might determine whether the litigant will receive any remedy, or whether he will receive a remedy that includes that particular statutory provision or application within its scope. See Harrison, supra note 18, at 69–70; Zimmerman, supra note 18, at 319–20. And the success or failure of a litigant's statutory interpretation arguments at the merits stage might similarly impact the remedial stage. Things are no different when it comes to questions of severability—which are, after all, only a sort of statutory interpretation question. See supra note 56 and accompanying text.

[129] INS v. Chadha, 462 U.S. 919, 924–27 (1983).

[130] Id. at 928.

legislative veto provision.[131] However, it also argued that, if the legislative veto provision violated the Constitution, the Attorney General could not suspend Chadha's deportation because the provision authorizing him to do so was inseverable from the legislative veto provision.[132] In making the latter argument, the government argued that Chadha could not satisfy the redressability requirement of the Article III standing doctrine because he would be deported whether or not his challenge to the legislative veto provision succeeded.[133] The Court disagreed. Relying on the INA's severability clause and legislative history, it held the legislative veto provision severable from the provision under which the Attorney General had suspended Chadha's deportation.[134]

The Court, however, did not reject the premise of the government's argument. That is, the Court accepted that severability doctrine can operate at the jurisdictional stage to deprive a litigant of Article III standing. Severability doctrine can do so whenever the result for the litigant challenging the law will be the same under the statutory scheme as enacted and the effective statutory scheme that would result from a severability analysis in the event of partial statutory invalidity.[135] *Chadha* illustrates the circumstance in which severability doctrine is most likely to impact the Article III standing analysis: situations in which (1) a litigant seeking a benefit necessarily relies on a provision

[131] Congress intervened to defend the legislative veto provision after the executive branch agreed with Chadha that it was unconstitutional. See id. at 939. For simplicity's sake, I refer in the text to the government.

[132] Id. at 931. The government's argument on this point was a conditional *jus tertii* inseverability claim: the government argued that the provision authorizing suspension of deportations could not be applied if a related and allegedly inseverable provision (the legislative veto provision) violated the rights of someone else—that is, Chadha. See id. For a discussion of *jus tertii* inseverability claims, see infra notes 170–182 and accompanying text.

[133] *Chadha*, 462 U.S. at 931.

[134] Id. at 932–34.

[135] Severability doctrine does not factor into the Article III standing analysis where a litigant alleges that he has been denied a benefit under, or suffered a burden imposed by, an underinclusive statute that violates an antidiscrimination norm imposed by superior law. In such cases, the Court has reasoned that equality of treatment would remedy the litigant's injury, even if that equality of treatment is achieved in a manner—like denying everyone benefits—that ensures that the litigant will not benefit as a practical matter. See Heckler v. Mathews, 465 U.S. 728, 738–40 (1984). Application of severability doctrine to impermissibly underinclusive statutes is discussed infra notes 234–256 and accompanying text.

creating the possibility of that benefit; (2) another provision withholds, or authorizes the withholding of, the requested benefit; (3) the benefit-seeking litigant challenges the second provision; and (4) the second provision arguably is inseverable from the first provision.[136]

Making severability determinations at the jurisdictional stage creates the possibility of undesirable results. Specifically, it can leave courts unable to address litigants' complaints that they are being or will be injured by laws that impermissibly conflict with superior law. Again, consider *Chadha*: because the Court treated the severability issue as a matter of Article III standing, neither Chadha nor any other alien could have challenged the unconstitutional legislative veto had the Court held the legislative veto inseverable from the provision authorizing the Attorney General to suspend deportation. As a result, courts would have had no power to consider the unconstitutional legislative veto, and Congress would have remained free to continue exercising it to the detriment of aliens without fear of judicial review. In short, application of severability doctrine at the jurisdictional stage creates a risk of disabling courts from addressing impermissible and injurious applications of law.[137]

[136] See Nagle, supra note 56, at 209 & n.28; Jonathan B. Fellows, Note, Congressional Oversight Through Legislative Veto After *INS v. Chadha*, 69 Cornell L. Rev. 1244, 1259 (1984). Severability doctrine could affect the justiciability analysis in other scenarios. For instance, it might do so where the operative law remaining after severability analysis could leave the litigant challenging the law worse or no better off than they would be under the law as written. See Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 582 (1985) (addressing severability at the jurisdictional stage where allegedly invalid provisions requiring arbitration to establish compensation for use of litigants' data were arguably severable from provisions allowing use of that data). It might also do so where an arguably applicable fallback provision would have the same effect on the challenger as the challenged provision. See infra notes 142–143 and accompanying text. Or it might do so where an allegedly invalid provision amends—but is arguably severable from—an earlier statute that would have the same effect on the litigant before the court. The Court faced that scenario in 1941 in *Reitz v. Mealey*, though it explained its refusal to pass on the validity of the severable amendment in terms of judicial restraint rather than constitutional justiciability. See 314 U.S. 33, 39–40 (1941).

[137] One might argue that an application of law is not injurious if the result for the litigant would be the same under the law following a severability analysis as it would be under the law as written and applied. That argument, however, improperly conflates the "injury-in-fact" component of the Article III standing analysis with the question of whether the litigant will succeed in his lawsuit. In *Chadha*, for example, Congress's legislative veto caused Chadha injury-in-fact by subjecting him to deportation, from which the Attorney General had shielded him. That a holding of inseverability would have left Chadha subject to

But the courts could eliminate that risk simply by adhering to their usual approach to Article III standing, and, thus, postponing severability analysis to the merits stage of adjudication. The Court in recent years has emphasized the importance of keeping merits inquiries distinct from jurisdictional ones.[138] In keeping with that approach, the Court has held that a litigant does not lack standing to challenge an applicable statutory provision simply because another statutory provision *might* cause her to suffer the harm of which she complains.[139] Moreover, and more fundamentally, the Court has made clear that the weakness of a litigant's arguments on the merits does not deprive that litigant of Article III standing.[140] Stated differently, a litigant's injury is "redress[able]" for Article III standing purposes if the relief she requests will remedy her injury, even if her legal arguments ultimately will fail on the merits.[141] In assessing a litigant's Article III standing, then, a court should accept that litigant's arguments regarding the merits of her claim.

Under that approach, a court should accept a litigant's severability arguments in assessing her Article III standing. Where a lawmaker has enacted an inseverability clause or fallback provision, the severability issues in the case might turn on the constitutionality of that provision.[142]

deportation does nothing to change that fact. Thus, the Court in *Chadha* treated the severability issue as a question of Article III redressability, rather than injury-in-fact. See *Chadha*, 462 U.S. at 931, 936. Although I take issue with the Court's consideration of the severability question at the jurisdictional stage, the Court was right not to frame its severability discussion in terms of the "injury-in-fact" component of Article III standing.

[138] See, e.g., Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160–63 (2010).

[139] See Larson v. Valente, 456 U.S. 228, 242–43 (1982).

[140] See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2663 (2015).

[141] See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 96 (1998).

[142] Some fallback provisions might independently violate the Constitution for reasons having nothing to do with their status as fallback law. See Dorf, supra note 59, at 319–24 (cataloguing examples). A court obviously should not apply such a fallback provision. It might also be argued that inseverability clauses or fallback provisions in some circumstances violate the Constitution for reasons related to their fallback-ness. For instance, one could argue that the Constitution forbids giving effect to fallback provisions or inseverability clauses where doing so would prevent courts from adjudicating and remedying unlawful and injurious government action. See Miller, supra note 116, at 132–41. Indeed, the district court in *Heckler v. Mathews* declined to enforce an inseverability clause contained in the Social Security Act on the ground that it was an unconstitutional "attempt to discourage the bringing of an action by destroying standing." See 465 U.S. 728, 737 (1984) (citation and internal quotation marks omitted). The Supreme Court in *Heckler* did not decide that issue because it held that the inseverability clause did not deprive the litigant of standing to assert

Or, the severability question might turn on the meaning of that provision—whether it is in fact triggered, and, if so, what it says regarding the rights and duties of the litigants before the court. Either way, the severability question speaks to the merits of the parties' dispute and, thus, should not be decided at the jurisdictional stage of adjudication.[143] And, if there is no inseverability clause or other fallback provision, application of severability doctrine will involve interpretation of the statutes establishing the parties' rights and duties in light of the contingency of partial statutory invalidity.[144] The severability argument, then, is an argument about the merits. Under the already-discussed approach to Article III standing, such disagreements over

his equal protection claim. Id. at 737–40; see also supra note 135 (explaining the standing rule applicable in challenges to underinclusive statutes). Whether a federal court can properly decline to apply fallback law on this basis turns on the extent to which Congress can (or cannot) restrict the jurisdiction or remedial power of the federal courts. To the extent Congress can freely do so, courts should enforce inseverability clauses or fallback provisions even when they would prevent a plaintiff from obtaining a remedy. To the extent Congress cannot do so, courts should refuse to enforce inseverability clauses or fallback provisions when they would leave a litigant unable to obtain a remedy. Much has been written on the extent to which Congress may curtail the jurisdiction and remedial power of the federal courts. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). I do not address that issue here—without adopting a position, the discussion in the text assumes that Article III would not bar enforcement of a fallback provision solely because it would leave a litigant unable to obtain a remedy.

[143] One caveat might be necessary here. The Supreme Court has in the past suggested that a plaintiff challenging an application of one law will flunk the redressability prong of the standing test if a second, unchallenged, and applicable law independently causes the harm of which the litigant complains. See Renne v. Geary, 501 U.S. 312, 318–19 (1991) (dicta); id. at 326–27 (Stevens, J., concurring) (as one of the five justices who joined the relevant portion of the majority opinion in *Geary*, observing that the second, unchallenged law "plainly" prohibited the activity in which the plaintiffs sought to engage). That suggestion is in tension with the Court's insistence that standing issues should be kept distinct from issues concerning the merits of the parties' dispute. If the Court adheres to it, though, an unchallenged and applicable fallback provision could defeat a plaintiff's standing if it would leave her worse or no better off than the challenged provision. If a fallback provision can ever defeat a plaintiff's standing in that fashion, it should do so only where there is no substantive dispute about its application—that is, where the plaintiff concedes that the fallback provision is valid and applicable and does not raise relevant arguments concerning its interpretation. A contrary approach would improperly "confuse weakness on the merits with an absence of Article III standing." *Ariz. State Legislature*, 135 S. Ct. at 2663 (alteration and citations omitted).

[144] See supra notes 56–58 and accompanying text.

constitutionality and statutory interpretation should not influence the Article III standing inquiry.

Thus, a court should accept a litigant's severability arguments in assessing her Article III standing. As noted, this approach would have the effect of postponing severability analysis to the merits stage, even where resolution of the severability issue might leave a complaining litigant unable to obtain a remedy. That is, in fact, how the Court consistently treated severability issues before *Chadha*.[145] But the suggested adjustment to severability doctrine has more going for it than theoretical nicety and consistency with historical practice.

It also would prevent severability principles from precluding a federal court from addressing an impermissible application of law that injures a litigant before the court. Take *Chadha* as an example. Had it followed the approach suggested here, the Court, in assessing Chadha's Article III standing, would have accepted Chadha's argument that the legislative veto provision was severable from the provision authorizing the Attorney General to suspend deportation. The Court then would have moved on to the merits stage of adjudication. At that stage, the Court would have been free to address the validity of the legislative veto as one logical step in the resolution of Chadha's suit—even if it ultimately concluded that the legislative veto provision was inseverable. True, for reasons of constitutional avoidance,[146] the Court might have chosen to address only the nonconstitutional severability issue, to the exclusion of the issue of the legislative veto's validity. But nothing would have required the Court to take that course, for the simple reason that constitutional avoidance is not an inexorable command. Indeed, federal courts not infrequently depart from the policy of avoidance, as when they decide that a constitutional violation occurred before holding it

[145] See, e.g., Lynch v. United States, 292 U.S. 571, 586 (1934) (addressing severability without suggesting that it could affect justiciability, where resolution of the severability issue could have left the complaining litigant unable to obtain a remedy); Frost v. Corp. Comm'n, 278 U.S. 515, 525 (1929) (same); see also infra notes 170–174 and accompanying text (discussing *jus tertii* inseverability claims, in which failure of a litigant to establish inseverability could leave him unable to obtain a remedy).

[146] See, e.g., Singleton v. Wulff, 428 U.S. 106, 113–14 (1976) (plurality opinion).

harmless or not "clearly established" within the meaning of the qualified immunity doctrine.[147]

The bottom line is that a federal court should have discretion in determining whether to address constitutional issues, even if, at the end of the day, a severability determination will require it to enter judgment against the litigant pressing those issues. Adoption of that approach would help to ensure that impermissible government action does not remain shielded by severability doctrine from judicial review. And, in so doing, it would enable the courts to provide clarity to other actors—in *Chadha*, the federal government and immigrants—concerning the scope of their legal obligations and rights. In that respect, the flexible approach to adjudication advocated here resembles qualified immunity doctrine, which allows courts to determine whether a constitutional violation occurred before determining whether the violated right was clearly established.[148] In both contexts, deviation from a strict principle of constitutional avoidance allows "for the law's elaboration" and promotes compliance with the law.[149]

## III. SEVERABILITY AT THE MERITS STAGE

As discussed above, severability doctrine speaks to the merits stage of adjudication. It does so in two separate contexts.[150] First, severability

[147] See Pearson v. Callahan, 555 U.S. 223, 236–42 (2009) (holding that federal courts may exercise discretion in determining which prong of the qualified immunity analysis to address first); Fallon, supra note 65, at 660 n.90.

[148] See Dorf, supra note 59, at 368.

[149] Saucier v. Katz, 533 U.S. 194, 201 (2001). In both the severability and qualified immunity contexts, the underlying substantive determination might prove unnecessary to the judgment because severability principles or the "clearly established" prong of the qualified immunity test might defeat the litigant's claim. The Court on occasion has suggested that determinations unnecessary to a judgment can qualify as holdings when they occur as a logical step toward resolution of the claims before the court. See Camreta v. Greene, 563 U.S. 692, 704, 708–09 (2011) (determination that a constitutional violation occurred, where the defendant was ultimately held entitled to qualified immunity); Fla. Cent. R.R. v. Schutte, 103 U.S. 118, 143 (1880) ("It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter."). Whether they can or should be deemed holdings, determinations of the sort discussed in the text help to clarify the law and provide instruction to the affected actors.

[150] Several scholars argue that severability doctrine is a necessary corollary of a so-called "valid rule requirement," under which everyone has a "personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of

doctrine applies at the merits stage in cases involving inseverability claims, in which a litigant argues that one provision or application of law cannot be applied to him because the legislature has inseverably linked it to another invalid provision or application. In such cases, severability doctrine identifies the rights that the legislature has authorized the litigant to assert in challenging an otherwise valid provision or application of law. Section III.A argues that, in the context of inseverability claims, the severability rubric should be tightened to better accord with courts' usual approach to determining the legislatively authorized rights that litigants may assert. Second, severability doctrine speaks to the merits stage when multiple features of the law, as enacted, operate in conjunction to violate a litigant's rights. In cases involving such impermissible convergences of law, severability doctrine determines the fallback law that will govern the dispute. Section III.B argues that, in the context of impermissible convergences of law, severability doctrine should continue to allow courts to engage in a wide-ranging search for indicia of legislative intent.

### *A. Inseverability Claims and Legislative Expansion of Assertable Rights*

Severability doctrine impacts the merits stage of adjudication in the context of what I call "inseverability claims." It does so by helping to identify precisely what rights are assertable by a litigant challenging a provision or application of law.

*How Inseverability Claims Work.* Consider, first, a fundamental premise of our legal order. When a litigant challenges application of a law that has caused or will cause her injury-in-fact, she can press in support of her challenge the rights that she enjoys under constitutional or

law"—that is, a rule of law that could be applied to others without violating their constitutional rights. Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1331 (2000) (citation omitted). On this view, "a statute that has unconstitutional applications cannot be constitutionally applied to anyone, even to those whose conduct is not constitutionally privileged, unless the court can sever the unconstitutional applications of the statute from the constitutionally permitted ones." Dorf, supra note 39, at 238; see Fallon, supra, at 1349; Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873, 887–88 (2005). As I have argued elsewhere, neither the Constitution nor the decisions of the Supreme Court create the sort of right to a valid rule envisioned by the valid rule requirement. See Lea, supra note 97, at 315–23. Thus, severability doctrine cannot be justified as a necessary means of protecting a personal constitutional right to a valid rule.

subconstitutional law.[151] To resolve the litigant's challenge on the merits, a court proceeds through two steps. First, the court determines whether the litigant belongs to the class to whom the relevant lawmaker has extended the asserted right. Second, if the court concludes that the lawmaker has authorized the litigant to assert the right, it determines whether the challenged application of law would, in fact, violate the litigant's right.

Usually, all of the action occurs at the second step. Indeed, a court often will have no need to discuss the first step explicitly. For instance, assume that a litigant wishes to display a political sign, and that she challenges a municipal code that bars her from doing so on the ground that it violates her First Amendment right to free speech. The court need not pause to consider whether the litigant falls within the class protected by the First Amendment. She plainly does, and she may assert her First Amendment right to challenge the law.[152] Sometimes, however, the first step of analysis requires deeper consideration. For instance, questions might arise concerning the extent to which a particular sort of litigant—say, an artificial entity—may assert a specific right.[153] Or a lawmaker's use of imprecise language might raise questions concerning whether the lawmaker has conferred a right at all or whether a litigant falls within the class that the lawmaker has authorized to assert a conferred right.[154]

Severability analysis often amounts to a similar inquiry into whether a lawmaker has authorized a litigant to assert the rights on which she relies in challenging a law. Recall that the severability rubric requires courts to look to the intent of the lawmaking body that created the challenged law in determining whether its valid provisions or applications can be severed from its allegedly invalid provisions or applications.[155] A conclusion that Statutory Aspect *A* cannot be severed from Statutory Aspect *B* thus amounts to a conclusion that the lawmaking body intended Statutory Aspect *A* not to apply to anyone if Statutory Aspect *B* is invalid.[156] As a result, a litigant injured by

[151] See *Singleton*, 428 U.S. at 113 (plurality opinion).

[152] See generally Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (holding that municipal sign code violated the First Amendment rights of a pastor and his church).

[153] See First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778–86 (1978) (holding that corporations enjoy the right to freedom of speech).

[154] See Lexmark Int'l v. Static Control Components, 134 S. Ct. 1377, 1388 (2014).

[155] See supra notes 34–39 and accompanying text.

[156] See Lea, supra note 97, at 290–94, 323–28.

Statutory Aspect *A* may challenge it on the ground that Statutory Aspect *B* is invalid—either because Statutory Aspect *B* violates her rights or because it violates the rights of others to whom it applies. In mounting that claim challenging Statutory Aspect *A*, the litigant is asserting rights that the lawmaking body responsible for Statutory Aspect *A* has authorized her to assert.

*First-Person and* Jus Tertii *Inseverability Claims.* Inseverability claims can take two forms. In a "first-person" inseverability claim, a litigant: (1) is injured by both Statutory Aspects *A* and *B*; (2) claims that Statutory Aspect *B* violates his rights; and (3) claims that Statutory Aspect *A* cannot be applied to him because the legislature has made it inseverable from invalid Statutory Aspect *B*.[157] In a *jus tertii* inseverability claim, a litigant: (1) is injured by Statutory Aspect *A* but not Statutory Aspect *B*; (2) claims that Statutory Aspect *B* violates the rights of those to whom it applies; and (3) claims that Statutory Aspect *A* cannot be applied to him because the legislature has made it inseverable from invalid Statutory Aspect *B*.[158]

An example might help to illustrate how these challenges work and how they fit within the adjudicatory framework. Imagine that Congress, troubled by a proliferation of violent and sexually explicit internet videos, passes the Internet Speech Review Act, which contains two

[157] Erik Zimmerman appears to include claims of this sort under the broader label of "as-applied" severance, which he would extend to all situations in which a litigant claims that a statutory provision or application that injures him is both invalid and inseverable from other statutory provisions or applications. See Zimmerman, supra note 18, at 299; see also Vermeule, supra note 37, at 1951 (labeling such challenges "severance proper"). I do not use Zimmerman's terminology because it obscures an important distinction between, on one hand, cases in which the other, allegedly inseverable provisions or applications injure the litigant and, on the other hand, cases in which they do not. The former class consists of the first-person inseverability claims discussed in this Section. I refer to the latter class as "gratuitous" severability cases and discuss them in Part IV.

[158] Others have used different labels to describe these *jus tertii* inseverability claims. Vermeule uses the term "*jus tertii* severance." Vermeule, supra note 37, at 1951. I eschew that description because I focus here on the litigant's claim, and the litigant is claiming *in*severability. Zimmerman refers to *jus tertii* inseverability claims as severability "in the overbreadth posture." See Zimmerman, supra note 18, at 304. I do not adopt that label because it evokes the First Amendment overbreadth doctrine, which I have criticized as an unwarranted judicial expansion of the scope of First Amendment rights. See Lea, supra note 97, at 315. The viability of *jus tertii* inseverability claims does not turn on an analogy to overbreadth doctrine. Indeed, *jus tertii* inseverability claims have sounder theoretical footing than overbreadth doctrine, in that *jus tertii* inseverability claims are grounded in the designs of substantive lawmakers, as opposed to judicial fiat. Id. at 290–94, 323–28.

subsections. Subsection (a) makes it a crime to post to the internet a video that has not been approved by a National Board of Internet Speech Review and instructs the Board to deny approval if a video either (1) has as its purpose or predominant effect the arousal of sexual desire or (2) presents the commission of violent acts as profitable, desirable, or acceptable behavior. Subsection (a) also makes the Board's determinations final and not subject to judicial review. Subsection (b) imposes a new two percent tax on the income of any individual who earns more than $25,000 in a single tax year from ownership interests in any business enterprises. Imagine further that the applicable severability rubric leads to the conclusion that Congress would want subsection (b) of the Act to fall if it turns out that subsection (a) is invalid.

Now, imagine two litigants, First Person ("F.P.") and Jus Tertii ("J.T."). F.P. is the owner of the website VideoChute.com, to which he regularly posts videos, some of which he describes as salacious or shocking. F.P. is wealthy, earning more than $1,000,000 per year from his various businesses. After paying the tax described in subsection (b), F.P. files suit in federal district court, asserting two claims. First, he seeks an injunction barring the government from enforcing against him subsection (a), which requires him to obtain the Board's approval before he may post a video to the internet. Second, he seeks a refund of the taxes that he paid pursuant to subsection (b).[159] Like F.P., J.T. also earns more than $1,000,000 per year from his various businesses. Unlike F.P., however, J.T. posts no videos to the internet; in fact, he does not even watch videos on the internet. After paying the tax under subsection (b), J.T. files suit seeking a refund of the amount paid.

Consider first F.P.'s lawsuit. F.P.'s challenge to subsection (a) is unremarkable. F.P. plainly has standing to challenge that provision: it causes him an injury-in-fact by threatening him with criminal sanctions, and the court can remedy that injury-in-fact with an injunction.[160] In mounting his challenge to subsection (a), F.P. need only rely on his own First Amendment right to freedom of speech. And F.P.'s challenge to subsection (a) likely will succeed because subsection (a) establishes a

[159] See 28 U.S.C. § 1346(a)(1) (2012) (giving district courts original jurisdiction over suits for tax refunds).

[160] See Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341–46 (2014).

prior restraint on speech without providing any of the procedural safeguards required by the First Amendment.[161]

F.P.'s challenge to subsection (b), however, is less straightforward. As with subsection (a), F.P. has standing to challenge subsection (b), as it has caused him financial loss that can be remedied by a judicial decree requiring the government to refund his tax payment.[162] Subsection (b), however, appears to be a valid exercise of Congress's taxing power[163] that does not itself trench on F.P.'s constitutional rights. To challenge subsection (b), then, F.P. mounts a first-person inseverability claim, arguing that subsection (b) cannot apply to him because it is inseverably linked to the invalid subsection (a).[164] F.P.'s challenge to subsection (b) does not even arguably run afoul of the general bar on asserting the rights of third parties because it depends on an assertion of his own constitutional rights, albeit via his challenge to subsection (a). But, because subsection (b) does not itself violate F.P.'s constitutional rights, F.P. must also rely on Congress's intent that subsections (a) and (b) stand or fall together. By making subsection (b) inseverable from subsection (a), Congress has authorized F.P. to assert his First Amendment rights—through his challenge to subsection (a)—in challenging subsection (b), even though those rights ordinarily would not shield him from subsection (b). In other words, Congress, by making the two subsections inseverable, has authorized F.P. to challenge subsection (b) on a new ground that would not otherwise be available to him.

The Supreme Court has often entertained first-person inseverability claims. *Carter v. Carter Coal Co.* provides an example. In that case, coal companies challenged the Bituminous Coal Conservation Act of 1935, which, among other things, imposed price-fixing and labor regulations on coal companies and taxed their production of coal.[165] The coal companies succeeded in arguing that the labor regulations and taxes

[161] See, e.g., Freedman v. Maryland, 380 U.S. 51, 58–59 (1965).

[162] See Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990).

[163] See U.S. Const. art. I, § 8; id. amend. XVI.

[164] In this example, F.P. asserts a first-person inseverability claim as a plaintiff. But defendants can also assert first-person inseverability claims. See, e.g., United States v. Jackson, 390 U.S. 570, 572, 585–91 (1968); Charles Wolff Packing Co. v. Ct. of Indus. Relations, 267 U.S. 552, 562 (1925).

[165] See Carter v. Carter Coal Co., 298 U.S. 238, 289, 310–11 (1936).

exceeded Congress's authority.[166] Having so concluded, the Court went on to hold that the government could not apply the price-fixing provisions to the coal companies because Congress would not have intended those provisions to apply if the labor regulations were invalid.[167] Relying on legislative intent, then, the coal companies successfully argued that the grounds on which they could challenge the price-fixing provisions had been expanded to include defects in the Act's labor regulations.[168] In other words, the Court's resolution of the severability inquiry answered a merits question concerning the legislatively authorized grounds available to the coal companies in challenging the Act's price-fixing provisions.[169]

Now consider J.T.'s lawsuit. Unlike F.P., J.T. does not seek an injunction barring enforcement of subsection (a) of the Act. Indeed, he would not have standing to do so: because J.T. neither posts nor watches internet videos, subsection (a) does not injure him. Thus, J.T. challenges only the tax imposed by subsection (b).[170] J.T. has standing to challenge

[166] See id.

[167] See id. at 316.

[168] The Supreme Court has entertained many first-person inseverability claims, some successful. See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 190–91 (1999); Wyoming v. Oklahoma, 502 U.S. 437, 459–61 (1992); Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 533–34 (1938); R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330, 361–62 (1935). Of course, first-person inseverability claims do not always succeed. They will fail if the court holds unproblematic the allegedly invalid and inseverable provision or application. See, e.g., Utah Power & Light Co. v. Pfost, 286 U.S. 165, 183–86 (1932). They will also fail if the court holds that the invalid provision or application is severable from the provision or application that is the target of the first-person inseverability claim. See, e.g., Leavitt v. Jane L., 518 U.S. 137, 140 (1996); New York v. United States, 505 U.S. 144, 186–87 (1992).

[169] Because state law governs the severability of state statutes, the Supreme Court, where possible, often remands cases involving first-person inseverability claims to the state courts, so that they can resolve the question of severability. See, e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 376 (1986).

[170] In our example, J.T. is a plaintiff asserting a *jus tertii* inseverability claim. A defendant may also assert a *jus tertii* inseverability claim by arguing that particular provisions or applications may not be applied to her detriment because those provisions or applications are inseverable from other, invalid provisions or applications. See, e.g., Dorchy v. Kansas, 264 U.S. 286, 290 (1924); N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 496 (1909). Moreover, one party might launch a conditional *jus tertii* inseverability claim premised on the success of his opponent's challenge to one aspect of a law. That is, the first party might contend that his opponent's challenge to the statute lacks merit, but also argue on grounds of inseverability that other aspects of the statute cannot be applied to his

subsection (b), as it has caused him monetary harm that can be remedied by a judicial decree. But subsection (b) appears to be constitutionally valid; it falls within the scope of Congress's taxing power and does not violate J.T.'s constitutional rights. J.T., therefore, argues that subsection (b) cannot be applied to him because (1) it is inseverable from subsection (a), and (2) subsection (a) is a prior restraint that violates the constitutional rights of those to whom it applies. But, because J.T. neither posts nor watches internet videos, subsection (a) does not violate *his* constitutional rights. J.T. thus relies on the rights of third parties—that is, those, like F.P., whose constitutional rights are violated by subsection (a)—in mounting his challenge. That is a *jus tertii* inseverability claim: J.T. claims that Congress authorized him to assert the rights of others in challenging subsection (b) because it intended the two provisions of the Act to be inseverable.

*Jus tertii* inseverability claims are a longstanding feature of American jurisprudence. In *Butts v. Merchants' & Miners' Transportation Co.*, for example, a company engaged in transportation on the high seas successfully challenged application of the Civil Rights Act of 1875 on the ground that the Act's applications to companies engaged in wholly intrastate transportation were both unconstitutional and inseverable.[171] To be sure, *jus tertii* inseverability claims have failed more often than they have succeeded. But the Court has accepted the propriety of *jus tertii* inseverability claims even in rejecting them on the merits. For instance, the Court in *New York Central Railroad Co. v. White* allowed a railroad company to resist application of New York's Workmen's Compensation Law on the ground that one of its provisions violated the Fourteenth Amendment rights of employees because that provision was "an essential," and thus inseverable, "part of" the law.[172] The Court thus recognized that the railroad company was authorized to assert the rights

detriment if the opponent's challenge succeeds. The government asserted a *jus tertii* inseverability claim of this sort in *INS v. Chadha*. See supra note 132.

[171] 230 U.S. 126, 138 (1913). For other cases involving successful *jus tertii* inseverability claims, see, for example, *Pepper v. United States*, 562 U.S. 476, 495–98 (2011); *The Employers Liability Cases*, 207 U.S. 463, 494, 499–502 (1908); *Illinois Central Railroad Co. v. McKendree*, 203 U.S. 514, 529 (1906); *James v. Bowman*, 190 U.S. 127, 140–41 (1903); *Baldwin v. Franks*, 120 U.S. 678, 686–90 (1887); *Trade-Mark Cases*, 100 U.S. 82, 98–99 (1879); *People v. Commissioners of Taxes & Assessments*, 94 U.S. 415, 418 (1876); and *United States v. Reese*, 92 U.S. 214, 221–22 (1875).

[172] 243 U.S. 188, 197 (1917).

of employees because of the law's inseverability, though it ultimately held that the inseverable provision did not violate the employees' rights.[173] Furthermore, the Court on many occasions has rejected *jus tertii* inseverability claims on the ground that the allegedly invalid aspect of the statute (that did not itself injure the litigant) was severable from the aspect of the statute that injured the litigant making the challenge.[174] These cases, too, illustrate the viability of *jus tertii* inseverability claims; were such claims categorically meritless, the Court would have had no reason to resolve the severability issues they presented.

Nevertheless, scholars and some lower courts have suggested that federal courts either cannot or need not adjudicate *jus tertii* inseverability claims. These critics have advanced two arguments in support of the position that justiciability barriers should or can preclude *jus tertii* inseverability claims even if the challenged law is nonseverable.

The first argument sounds in Article III standing doctrine. It posits that the litigant making the *jus tertii* inseverability claim lacks standing to challenge the statutory provision or application that does not itself injure him—that is, the allegedly invalid and inseverable provision or application on which the litigant's *jus tertii* inseverability claim hinges.[175]

This argument misunderstands the mechanics of *jus tertii* inseverability claims. A litigant asserting a *jus tertii* inseverability claim

[173] See id. at 204. For other cases involving *jus tertii* inseverability claims that failed on the ground that the inseverable and supposedly invalid provision or application was in fact valid, see, for example, *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917), and *Carroll v. Greenwich Insurance Co.*, 199 U.S. 401, 408–09 (1905).

[174] See, e.g., Dillon v. United States, 560 U.S. 817, 829–30 (2010); Alaska Airlines v. Brock, 480 U.S. 678, 683 (1987); Regan v. Time, Inc., 468 U.S. 641, 652–55 (1984) (plurality opinion); Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 72–77 (1961); Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs, 332 U.S. 495, 500–01 (1947); Bd. of Trade v. Olsen, 262 U.S. 1, 42 (1923); El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 93–98 (1909); Field v. Clark, 143 U.S. 649, 694–97 (1892). Because the severability of state statutes is a matter of state law, the Supreme Court, where possible, often remands cases involving *jus tertii* inseverability claims to state courts so that they may decide the severability issues presented therein. See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229–30 (1990); *Dorchy*, 264 U.S. at 288–91.

[175] See, e.g., Nat'l Fed'n of the Blind of Tex. v. Abbott, 647 F.3d 202, 210–11 (5th Cir. 2011); Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 890–93 & n.4 (9th Cir. 2007); Tribe, supra note 16, at 80–81; Kevin C. Walsh, The Ghost That Slayed the Mandate, 64 Stan. L. Rev. 55, 75–77 (2012).

seeks to challenge—within the meaning of Article III standing doctrine—only the provision or application of law that causes her injury. That litigant's arguments regarding the other, allegedly invalid and inseverable provisions or applications of law are just that—arguments, made in support of her claim that she cannot be subjected to the provision or application that injures her.[176] That is, the challenger argues that the provision or application that injures her cannot be applied to her because the legislature that enacted it intended that it should not apply *to anyone* if the allegedly inseverable provisions or applications violate the rights of those to whom they apply. That claim will fail on the merits if the allegedly invalid provisions or applications turn out to be severable, but the possibility that the litigant's claim might fail has no bearing on the litigant's standing to challenge the provision or application that injures her.[177] In short, *jus tertii* inseverability claims do not offend the Court's claim-specific approach to Article III standing.[178]

The second argument against the justiciability of *jus tertii* inseverability claims posits that courts can decline to adjudicate them by applying the prudential limitation on third-party standing.[179] This prudential objection, too, misconceives the theoretical underpinnings of *jus tertii* inseverability claims. In mounting a *jus tertii* inseverability claim, a litigant argues that the lawmaker that created the challenged law intended that it not apply to anyone if certain of its provisions or applications are invalid, and that the lawmaker, therefore, "intended for challengers to be able to assert rights belonging to others in the first instance."[180] A successful *jus tertii* inseverability claim thus involves first-party standing because the litigant asserts legal rights that a relevant lawmaking body has authorized her to assert.[181] As the Court recently has emphasized, a federal court has no authority to decline to adjudicate

[176] See Zimmerman, supra note 18, at 318.

[177] See William Alan Shirley, Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions, 85 Colum. L. Rev. 1808, 1814 n.42 (1985).

[178] Local 514 Transp. Workers Union of Am. v. Keating, 358 F.3d 743, 750 (10th Cir. 2004); Catholic Soc. Serv. v. Shalala, 12 F.3d 1123, 1125–26 (D.C. Cir. 1994); Zimmerman, supra note 18, at 306–09, 318.

[179] See Tribe, supra note 16, at 80–81; Zimmerman, supra note 18, at 305, 308–09, 318.

[180] Lea, supra note 97, at 290–94.

[181] See Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 290 (1984).

a litigant's legislatively authorized claims on prudential justiciability grounds.[182]

*Inseverability Claims and the Severability Standard.* Both first-person and *jus tertii* inseverability claims comply with the Court's justiciability rules, and both sorts of inseverability claims fit comfortably within the accepted three-stage adjudicatory framework. When a court engages in severability analysis in the course of resolving an inseverability claim, it answers a merits question concerning the rights assertable by a litigant in challenging an otherwise valid provision or application of law. Specifically, the court determines whether a litigant injured by an otherwise valid aspect of a law has been authorized by the lawmaker that enacted that law to challenge the provision or application that injured him on the ground that other provisions or applications violate the rights of those to whom they apply. A conclusion of inseverability, then, amounts to judicial recognition of a legislative authorization to the litigant to assert rights that usually would be unavailable in challenging an otherwise valid provision or application of law.

But the Supreme Court's standard for determining severability is badly out of step with its usual approach to discerning the statutory rights assertable by litigants. Driven by the principle of legislative supremacy, the Court generally has insisted on a textualist approach to questions of statutory interpretation,[183] including questions regarding whether a litigant has been authorized by statute to assert the claims and rights on which she relies. For instance, courts will allow a litigant to enforce a statute in a suit under Section 1983,[184] whether for equitable relief[185] or an award of damages,[186] only if the "text and structure" of the statute "unambiguously confer[] [a] right" on that litigant.[187] Similarly, a court will allow a litigant to assert a private right of action, whether for

[182] See Lexmark Int'l v. Static Control Components, 134 S. Ct. 1377, 1388 (2014). If a litigant fails to demonstrate the inseverability on which his *jus tertii* inseverability claim depends, the court should reject his claim on the merits. See Lea, supra note 97, at 324.

[183] See, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 624 (1990); John F. Manning, The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 30 (2014).

[184] 42 U.S.C. § 1983 (2012).

[185] See, e.g., Blessing v. Freestone, 520 U.S. 329, 337 (1997).

[186] See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 279–80 (2002).

[187] Id. at 283, 286; see id. at 284 ("For a statute to create such private rights, its text must be phrased in terms of the persons benefitted." (citations and internal quotation marks omitted)).

equitable relief[188] or damages,[189] under a statute only if the statutory text contains evidence of an affirmative legislative intent to create a right assertable by that litigant.[190] Absent such evidence, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[191] The federal courts have adopted this strict textualist approach to effectuate the principle that "the creation of new rights ought to be left to legislatures, not courts."[192]

That principle applies in the context of inseverability claims, where the severability determination will determine the legislatively authorized rights assertable by a litigant in challenging an otherwise valid provision or application of law. But courts engage in analysis of a very different stripe when they apply severability doctrine to determine whether a litigant can mount a successful inseverability claim. For instance, current severability doctrine does not limit courts to consideration of statutory text and structure. Instead, it invites courts to rely heavily on other, atextual considerations, including often inconclusive legislative history and the court's own sense of the challenged law's purposes, the relative importance of those purposes to the legislature, the relative importance of specific aspects of the statutory scheme, and the likely effects of the truncated statute.[193]

Moreover, severability doctrine requires no showing of affirmative legislative intent to allow the litigant to assert rights that would otherwise be unavailable to him. Instead, it permits a court to base a determination of inseverability on its conclusion about what the legislature *would* have done—whether it would have passed the statute without its allegedly invalid aspects[194]—or *would* have wanted—whether it would have been pleased with the truncated statute's manner

[188] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001).
[189] See, e.g., Astra USA v. Santa Clara Cty., 563 U.S. 110, 116–17 (2011).
[190] See, e.g., *Alexander*, 532 U.S. at 286–87.
[191] Id.
[192] Paroline v. United States, 134 S. Ct. 1710, 1725 (2014) (citations omitted); see Lexmark Int'l v. Static Control Components, 134 S. Ct. 1377, 1388 (2014) ("[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied.").
[193] See supra notes 47–55 and accompanying text.
[194] See, e.g., Buckley v. Valeo, 424 U.S. 1, 108 (1976).

of operation.[195] But the court's inquiry into the legislature's intent will, in the vast majority of cases, be a fictitious and indeterminate enterprise because the legislature will have had no intent with respect to severability or inseverability.[196] To translate the point into the language of assertable rights, the enacting lawmaker will not have affirmatively intended to authorize litigants to challenge one aspect of the statute on the ground that another aspect of the statute violates the rights of those to whom it applies. Much less will the lawmaker have "unambiguously conferred" such authorization on litigants through the statutory text.[197] Yet current severability doctrine allows courts to infer inseverability based on hypothetical legislative intent and to thereby allow litigants to assert rights that would otherwise be unavailable to them in challenging statutory provisions or applications.

In the context of inseverability claims, the Court should tighten the severability standard to bring it in line with its usual approach to discerning the legislatively authorized rights available to litigants. A tightened severability doctrine is not difficult to formulate—it would focus on the text of the challenged law, would generally insist on a clear and affirmative legislative desire for inseverability, and would generally require courts to refrain from giving effect to unenacted, judicially inferred preferences for inseverability. It would, in short, permit conclusions of inseverability in only a few, narrowly defined circumstances.

First, a litigant could assert a viable inseverability claim if the lawmaker that enacted the challenged law also enacted an inseverability clause or other fallback provision that, by its terms, applies to the case before the court. Such a provision manifests, in the text of the law, an affirmative legislative intent for inseverability and—under the logic of inseverability claims—expansion of the universe of rights on which injured parties may rely in challenging the law. Courts must defer to such a clear textual expression of legislative intent, just as they must defer to a textual expression of legislative intent to create a cause of action assertable by a litigant[198] or confer a right on a litigant.[199]

[195] See, e.g., Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987).
[196] See supra notes 57–61 and accompanying text.
[197] Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002).
[198] See Lexmark Int'l v. Static Control Components, 134 S. Ct. 1377, 1388 (2014).
[199] See *Gonzaga Univ.*, 536 U.S. at 283.

Second, a litigant could assert a viable inseverability claim if the challenged provision or application would not be "operative as a law" without the allegedly invalid provision or application.[200] Such situations likely would arise rarely, but they are not unimaginable. For example, assume that Congress enacts a statute creating an American Religion Agency ("ARA") vested with authority to develop regulations governing religious organizations. Assume further that Congress later passes a second statute stating that "all citizens shall submit to the ARA periodic reports regarding their well-being" and articulating the contents of the required reports. An inseverability claim challenging that reporting requirement might succeed if the court determines that the provision creating the ARA violates the Constitution. That is, the court might hold the provision requiring reporting to the ARA inseverable from the provision creating the ARA on the ground that the reporting provision cannot be given legal effect without the provision creating the recipient of the reports.[201]

To be sure, a conclusion of inseverability premised on statutory inoperability does not rest on an affirmative, textual indication of legislative intent. To allow inoperability-based conclusions of inseverability therefore might seem inconsistent with the text-centered approach taken by the Court in its Section 1983 and direct right of action cases. But perhaps not: the Court has stated that a court may look to the "structure" of a statute in determining whether Congress conferred a right on the litigant through that statute,[202] and the inability of a statute to function without its invalid parts is, at the end of the day, a structural feature of the statute. Even if this legislative desire for inseverability is a fiction, that fiction seems certain to effectuate what the legislature *would* desire. As the Court observed in *Alaska Airlines v. Brock*, "Congress could not have intended a[n] [invalid] provision to be severed from the remainder of [a] statute if the balance of the legislation is incapable of functioning independently."[203] Given these considerations, the inoperability of a truncated statute should suffice as the basis for an inseverability claim.

[200] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) (citations and internal quotation marks omitted).

[201] See Fish, supra note 16, at 1339.

[202] See *Gonzaga Univ.*, 536 U.S. at 286.

[203] 480 U.S. 678, 684 (1987).

Third, legislative history might give rise to a viable inseverability claim in rare instances. Despite its recent hard turn toward textualism, the Court has not definitively overruled earlier decisions in which it considered legislative history in assessing whether a litigant could assert a particular statute via a direct cause of action or a suit under Section 1983.[204] The Court, then, has left itself room to consider legislative history in these contexts, though it likely would do so only if faced with ambiguous statutory language and legislative history clearly evincing a legislative intent to allow the litigant to assert the statute.[205] If the Court goes that route, it could also authorize federal courts to consider legislative history in the analogous context of inseverability claims. If a court can ever base a conclusion of inseverability on legislative history, however, it should do so only where the legislative history clearly addresses the precise issue of severability before the court and unmistakably expresses a desire for inseverability. Stated differently, conflicting legislative history or general statements concerning the statute's purpose or effect should not suffice. An approach that allowed for more freewheeling consideration of legislative history would create a risk that judges might reach conclusions of inseverability that do not reflect the legislative will and thereby allow litigants to assert rights without legislative warrant. The strict limits on inseverability determinations proposed in this Article would eliminate that risk and, in so doing, ensure that "the creation of new rights" is "left to legislatures, not courts."[206]

[204] See, e.g., Suter v. Artist M., 503 U.S. 347, 362 (1992) (§ 1983); Karahalios v. Nat'l Fed'n of Fed. Emps., 489 U.S. 527, 536 (1989) (direct cause of action).

[205] See, e.g., Manning, supra note 183, at 74, 75 n.422 ("These days, the Court readily dismisses legislative history that it finds to be at all conflicting, murky, ambiguous, or otherwise unhelpful.").

[206] Paroline v. United States, 134 S. Ct. 1710, 1725 (2014) (citations and internal quotation marks omitted). The discussion in this Part assumes that it is a *federal* law being challenged via an inseverability claim. In an inseverability claim challenging a *state* law, a federal court must apply the relevant state's severability rules, as they will determine whether the state has authorized the litigant to assert the rights on which he relies. See Leavitt v. Jane L., 518 U.S. 137, 139 (1996).

### *B. Impermissible Statutory Convergences and Identification of Fallback Law*

In cases involving inseverability claims, severability doctrine operates at the merits stage of adjudication to identify the legislatively authorized rights that a litigant may assert in challenging a law that injures her. But severability doctrine can also impact the merits stage—albeit in a different way—in two other situations. Both of those situations involve convergences of law that lead to violation of a litigant's rights. In the first situation, multiple provisions of law together operate to cause or threaten injury to a litigant in violation of her rights. As we will see, both *United States v. Booker*[207] and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[208] presented situations of this sort. In the second situation, an impermissibly underinclusive statute injures or threatens to injure a litigant in violation of her rights. This situation arises when a statute, in its application to some and not others, violates an antidiscrimination norm like the constitutional principle of equal protection.[209] In both of these scenarios, courts use severability doctrine to determine the substantive fallback law that will apply to a dispute given that multiple features of the enacted law, in their convergent operation, violate the rights of one of the litigants.

*Impermissible Statutory Combinations.* Severability doctrine comes into play whenever multiple statutory provisions work together to cause a violation of a litigant's rights that none of them would have caused on its own. Two of the Supreme Court's most well-known recent severability decisions arose in cases involving such impermissible statutory combinations.

Consider first the Court's decision in *Booker*.[210] The jury convicted Booker of possessing at least 50 grams of cocaine base with an intent to distribute.[211] The trial court sentenced Booker pursuant to the Federal Sentencing Guidelines, which the Sentencing Reform Act made mandatory, based on additional facts found by the judge under a preponderance of the evidence standard, including that Booker

[207] 543 U.S. 220, 226–27 (2005).
[208] 561 U.S. 477, 483–84 (2010).
[209] See infra notes 234–256 and accompanying text.
[210] 543 U.S. at 220. *Booker* involved two criminal defendants—Booker and Fanfan—but I focus here on Booker. For a discussion of Fanfan's case, see infra note 219.
[211] *Booker*, 543 U.S. at 227.

possessed more than 600 grams of cocaine base.[212] As a result, the trial court sentenced Booker to a longer term of imprisonment than could have been imposed based on the facts found by the jury beyond a reasonable doubt.[213] Booker claimed this sentencing method violated his Sixth Amendment right to a jury trial—a claim that he clearly had standing to make given that its application resulted in an extension of Booker's period of imprisonment. The Supreme Court agreed with Booker, holding that the joint operation of the Sentencing Reform Act provisions and Guidelines provisions resulted in a violation of Booker's Sixth Amendment right,[214] even though none of those provisions would have done so on their own.[215]

Confronted with this situation, the Court had to determine how the district court should proceed on remand. Specifically, the Court needed to determine which of the applicable—and problematic in combination—sentencing provisions it should instruct the district court to ignore when resentencing Booker. The Court applied severability analysis in making that determination. That is, the Court sought to determine how Congress would want the scheme to apply in light of its partial invalidity, and it considered the language, history, and purposes of the sentencing scheme and the practical effects of various dispositions in doing so.[216] Ultimately, the Court concluded that Congress would

[212] Id.

[213] Id. at 226–27; see Manheim, supra note 15, at 1853–54.

[214] *Booker*, 543 U.S. at 226–27; see also id. at 314–18 (Thomas, J., dissenting in part) (discussing various provisions that together led to violation of Booker's rights).

[215] See Harrison, supra note 18, at 61.

[216] See *Booker*, 543 U.S. at 247–65. Professor Lisa Manheim suggests that the severability analysis in *Booker* is unique because the Court in that case disregarded "a separate provision in the Act . . . [that] it did not consider . . . to be the immediate source of the unconstitutionality." Manheim, supra note 15, at 1854. But, as Manheim seemingly recognizes, in cases involving impermissible statutory convergences, none of the together-problematic provisions can be said to be *the* immediate source of the constitutional violation because it is the *combination* of those provisions that causes the violation to occur. See id. at 1853 (describing the posited distinction "between the most immediate source of a statute's unconstitutionality and some other implicated portion" as "vague and problematic"). That fact appears not to have escaped the *Booker* Court, which described the disregarded statutory provisions as "a necessary condition of the constitutional violation." *Booker*, 543 U.S. at 259; see also id. at 245 ("We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory . . . incompatible with today's constitutional holding."). Moreover, *Booker* is hardly the only case in which the Court has used severability to determine which of the problematic-in-combination aspects of the law should give way. See infra notes 220–227, 235–256, and accompanying text. In any

have preferred the inapplicability of those provisions of the Sentencing Reform Act that made the Guidelines mandatory. The Court thus instructed the lower courts to ignore those provisions—and to treat the Guidelines as merely advisory, as opposed to compulsory—in resentencing Booker.[217]

The *Booker* Court described its severability analysis as a "remedial" matter,[218] but that label was imprecise and misleading. In assessing severability, the Court in fact engaged in statutory construction to determine the law that governed the dispute between the government and Booker given that the sentencing scheme as written violated Booker's constitutional rights. That is, the Court used severability analysis to determine the fallback law applicable in Booker's case. The severability issue thus went to the merits of the parties' dispute.[219]

The Court's severability analysis in *Free Enterprise Fund* involved the same sort of fallback-centered determination. The plaintiff in *Free Enterprise Fund*—an accounting firm (the "Firm")—was subject to regulation by the Public Company Accounting Oversight Board (the "Board"), which was formally investigating the Firm.[220] The Firm filed suit seeking a judgment declaring unconstitutional the provisions of the Sarbanes-Oxley Act that established the Board and an injunction barring the Board from taking further action against the Firm.[221]

The Firm argued that Congress's structuring of the Board violated the constitutional separation of powers because it exercised "wide-ranging

event, in cases involving impermissible convergences of law, I agree with Manheim that the wide-ranging approach to severability used in *Booker* is appropriate. See Manheim, supra note 15, at 1854–55; infra notes 228–233 and accompanying text.

[217] See *Booker*, 543 U.S. at 265–67.

[218] See id. at 267.

[219] See Harrison, supra note 18, at 64. The Court's severability discussion also applied to Fanfan's case. Fanfan's sentence did not violate the Sixth Amendment because the district court refused to consider those Guidelines provisions that would have increased Fanfan's sentence based on facts not found by the jury. See *Booker*, 543 U.S. at 228–29. In its severability analysis, however, the Supreme Court held that the district court improperly interpreted the sentencing scheme in light of its partial unconstitutionality when it refused to consider, even as an advisory matter, those Guidelines provisions that would have increased Fanfan's sentence. See id. at 264. That amounted to a merits determination that the district court erred to the government's detriment in applying the sentencing scheme to the dispute between Fanfan and the government. In light of its determination, the Court vacated Fanfan's sentence and remanded for possible resentencing. See id. at 267–68.

[220] *Free Enter. Fund*, 561 U.S. at 487.

[221] *Free Enter. Fund*, No. 06-0217(JR), 2007 WL 891675, at *2 (D.D.C. Mar. 21, 2007).

executive power . . . without [being] subject[] . . . to Presidential control."[222] This alleged constitutional flaw resulted from the combined effect of multiple statutory provisions, including: (1) the provisions giving the Board enforcement power; (2) the provisions defining the scope of the Board's responsibilities; (3) the provisions making Board members removable by the Securities and Exchange Commission only for cause; and (4) the provisions making Securities and Exchange Commissioners removable by the President only for cause.[223] None of those provisions were independently unconstitutional.[224] But in combination, the Supreme Court held, they violated the separation of powers by granting Board members executive power while separating them from presidential oversight with two levels of for-cause removal limitations.[225]

Having reached that conclusion, the Court considered what law should apply as between the Board and the Firm. Specifically, the Court had to determine which of the several provisions that together led to the constitutional violation should give way. Applying severability doctrine, the Court chose the option that did the least violence to Congress's handiwork, concluding that Congress would prefer that the provisions limiting removal of Board members give way.[226] The Court instructed the district court to issue a declaratory judgment reflecting its determination of the law applicable as between the parties.[227]

As *Booker* and *Free Enterprise Fund* illustrate, cases that involve an unconstitutional convergence of multiple statutory provisions raise difficult severability questions. Specifically, a court must determine which provisions, of the multiple provisions that together operate to violate a litigant's rights, it should refuse to apply. And, in making that determination, the court must achieve two objectives. First, it must apply the law in a way that will not violate the litigant's rights. Second, in keeping with the principle of legislative supremacy, the court in doing so

[222] *Free Enter. Fund*, 561 U.S. at 487.
[223] Id. at 483–87.
[224] See Harrison, supra note 18, at 71.
[225] *Free Enter. Fund*, 561 U.S. at 492.
[226] See id. at 508–09; see also Harrison, supra note 18, at 71 ("The Court, using principles of statutory interpretation that apply in ordinary severability cases, concluded that the congressional fallback solution retained the [Board]'s power but eliminated its directors' insulation.").
[227] See *Free Enter. Fund*, 561 U.S. at 513–14.

must seek to give effect to the legislative will. Attainment of that second objective will present no difficulties when the legislature has enacted an inseverability clause or other treatment of fallback law that makes its desires plain.[228] Usually, however, the legislature will not have done so.[229] In that scenario, the court will have no choice except to grope for the most likely legislative intent.

*Booker* and *Free Enterprise Fund* provide guidance to courts faced with such challenges. In particular, *Booker* indicates that a court faced with an impermissible convergence of statutory provisions should consider a wide range of factors in deciding which of the together-offending provisions the legislature would prefer the court to ignore. Those factors include, for example, the text, structure, legislative history, and purpose of the statutory scheme, as well as the practical effects of the possible fallback options.[230] And *Free Enterprise Fund* demonstrates that, in undertaking this analysis, the default fallback option should be that which least upsets the operation of the statutory scheme as enacted.[231]

This methodology requires a more open-ended and freewheeling inquiry than this Article's proposed approach to severability in cases

[228] See Bowsher v. Synar, 478 U.S. 714, 734–36 (1986).

[229] See supra note 57 and accompanying text.

[230] See *Booker*, 543 U.S. at 258–66.

[231] See *Free Enter. Fund*, 561 U.S. at 483–87, 509–10; Dorsey, supra note 60, at 894. The Court's opinion in *Free Enterprise Fund* can be read as suggesting that some potential fallback options were categorically impermissible because they were overly complex, in that they would require the Court to exercise too much "discretion" or "editorial freedom" in determining which of the together-problematic statutory provisions should be disregarded. Manheim, supra note 15, at 1858 (quoting *Free Enter. Fund*, 561 U.S. at 510). But see Harrison, supra note 18, at 71 (stating that the Court arrived at its fallback disposition through ordinary severability principles). If the Court meant to make that suggestion, it seems ill-advised; as Manheim explains, "analytical complexity, on its own, [does not] constitute[] judicial error." Manheim, supra note 15, at 1859. After all, courts regularly engage in complicated statutory analysis. See id. at 1859–60, 1881–82. Courts faced with impermissible combinations of law therefore should not rule out possible fallback options simply because those options would involve complicated statutory severance. If the complexity of particular fallback options is to be considered in the severability analysis at all, it should be considered only to the extent the complexity sheds light on the legislature's preferred fallback disposition. See Randall v. Sorrell, 548 U.S. 230, 262 (2006) (plurality opinion) (based in part on the fact that there were many complicated ways of avoiding constitutional defect, holding that the Vermont legislature would prefer that all of the statutory provisions relating to a campaign contribution limit give way).

involving inseverability claims.[232] But cases involving impermissible statutory combinations differ from cases involving inseverability claims in ways that justify that greater flexibility. Unlike cases involving inseverability claims, cases involving impermissible statutory combinations do not involve a potential expansion of the grounds on which a litigant may attack a statute. In inseverability claim cases, the principle of legislative supremacy cuts in favor of a narrow, text-focused approach that would prevent the judiciary from expanding the grounds on which litigants can challenge the legislature's handiwork. In cases involving impermissible statutory combinations, however, this concern about judicial rights expansion is not in the picture. Moreover, a court faced with a severability issue resulting from an impermissible statutory combination, unlike a court faced with an inseverability claim, *must* ignore one of the independently valid statutory provisions, for the simple reason that applying all of them would violate the litigant's rights. In that scenario, the principle of legislative supremacy counsels in favor of a broad approach that allows the court to consider whatever guidance it can find concerning the legislature's likely intent as to which provision or provisions the court should ignore in adjudicating the case before it.[233]

*Impermissibly Underinclusive Statutes.* Severability doctrine also applies at the merits stage in cases involving impermissibly underinclusive statutes. An impermissibly underinclusive statute violates an antidiscrimination norm that is established by superior law, usually the Constitution.[234] An underinclusive statute might, for example,

[232] See supra notes 199–206 and accompanying text.

[233] Cf. Eric S. Fish, Choosing Constitutional Remedies, 63 UCLA L. Rev. 322, 369 (2016) (treating this issue as a remedial matter, but arguing that courts should strive to effectuate the legislative will when the law as written transgresses the Constitution).

[234] Most obviously, an underinclusive statute can violate the Fourteenth Amendment Equal Protection Clause or the equal protection component of the Fifth Amendment. See Orr v. Orr, 440 U.S. 268, 283 (1979); Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969). But underinclusive statutes can violate antidiscrimination norms created by other constitutional guarantees, including, for example, the dormant Commerce Clause, see Levin v. Commerce Energy, 560 U.S. 413, 426 (2010); Article IV's Privileges and Immunities Clause, see Supreme Court of N.H. v. Piper, 470 U.S. 274, 280 (1985); the First Amendment's Speech and Press Clauses, see Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 581–83, 586 n.9 (1983); the First Amendment's Establishment Clause, see Welsh v. United States, 398 U.S. 333, 356–57 (1970) (Harlan, J., concurring in the result); the Fifteenth Amendment, see Guinn v. United States, 238 U.S. 347, 364–66 (1915); and the doctrine of intergovernmental tax immunity, see Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 812–14 (1989). Moreover, an underinclusive state statute can violate an

exclude the litigant from a class of beneficiaries while including others similarly situated. Or it might impose a burden on the litigant but exclude others similarly situated.

Either way, statutory underinclusiveness can result from a single provision or from multiple provisions working in tandem. For instance, a provision providing that "[a] male shall be entitled to retirement benefits amounting to 75% of his average pre-retirement income" would violate the equal protection rights of women. And so would the following two-provision statute:

> (a) Any person shall be entitled to retirement benefits amounting to 75% of his average pre-retirement income.
>
> (b) No female shall qualify for the retirement benefits established by subsection (a).

In both situations, two aspects of the statutory scheme—the statute's inclusion of males and its exclusion of females—operate together to cause a violation of the constitutional rights of female would-be beneficiaries. When a female would-be beneficiary files a lawsuit challenging either of those two statutes, the court will recognize the equal protection violation. But how is the court to resolve the lawsuit after reaching that conclusion?

Under longstanding doctrine, a court has two alternatives when faced with an impermissibly underinclusive statute.[235] The court may either extend the unequally distributed benefit or burden to those impermissibly excluded or nullify the benefit or burden so that it does not apply to anyone.[236]

The Court often has described that choice as presenting a "remedial" question.[237] But a court does not actually engage in a remedial inquiry

antidiscrimination norm imposed by a federal statute or the state's constitution. See Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 244–45 (1931) (federal statute); Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., 488 U.S. 336, 336 (1989) (state constitution).

[235] See Dorf, supra note 39, at 251–52.

[236] See, e.g., *Levin*, 560 U.S. at 426–27; Heckler v. Mathews, 465 U.S. 728, 738 (1984).

[237] See, e.g., Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017); *Levin*, 560 U.S. at 427–28; *Heckler*, 465 U.S. at 738; Califano v. Westcott, 443 U.S. 76, 90 (1979). But see City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976) (in challenge to a state statute alleged to be unconstitutionally underinclusive, describing the question of extension or invalidation as a "state-law question," rather than a "federal" or "constitutional" question

when it responds to an impermissibly underinclusive statute. Faced with such a statute, the court must decide which of the two statutory features—inclusion of some and exclusion of others—that together lead to a violation of a litigant's rights must give way. In making that decision, the court must interpret the statute to determine how it will apply between the litigants given that the statute, as written, violates the challenger's rights.[238] That is a merits determination; indeed, it is effectively the same as the merits determination made by a court faced with an impermissible convergence of multiple statutory provisions.[239] The Supreme Court's approach to impermissibly underinclusive statutes bears this out, because it has made plain that a court should give effect to the likely will of the responsible lawmaker when faced with an impermissibly underinclusive law.[240] Thus, in cases arising out of state

that would be independently reviewable in the Supreme Court). Manheim criticizes severability doctrine on the ground that it does not allow courts to extend impermissibly underinclusive statutes when the legislature would prefer that result. See Manheim, supra note 15, at 1851–53. She acknowledges, however, that courts often expand impermissibly underinclusive statutes "in the context of 'remedy.'" Id. at 1852. But, as I explain in the text, cases involving impermissibly underinclusive statutes are severability cases, as the court in such a case must determine which of two problematic-in-combination features of the statute will give way. That the Court often uses "remedial" language to describe those cases does not change that fact. Indeed, as Manheim recognizes, the Court's use of "remedial" language does not even distinguish cases involving underinclusive statutes from other categories of severability cases. See Manheim, supra note 15, at 1844 & n.66; supra notes 116–128 (criticizing the Court's practice of describing severability as a remedial doctrine).

[238] See Dorf, supra note 39, at 252 (noting that severance decisions involving impermissibly underinclusive statutes "are based on principles of statutory interpretation").

[239] See supra notes 216–233 and accompanying text.

[240] See, e.g., *Morales-Santana*, 137 S. Ct. at 1698–99; *Levin*, 560 U.S. at 427; Nguyen v. INS, 533 U.S. 53, 72 (2001); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 292 n.31 (1987). On occasion, the Court has resolved cases in the manner most favorable to the litigant challenging the underinclusive statute—requiring extension of a benefit-conferring statute or inoperability of a burden-imposing statute—without explicitly considering the likely intention of the relevant lawmaker. In some of these cases, the Court took the view that the Constitution dictated that result. This can happen, for instance, when the Constitution independently entitles the litigant to the result he seeks. See, e.g., Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding all natural parents—wed and unwed—are entitled to a hearing before loss of parental rights). Or it can happen when the litigant challenges past discrimination. To the extent the litigant does so, the relevant lawmaker's preferred fallback law will be irrelevant if practical difficulties or "due process related concepts of reliance and fair notice would impede [government] officials from reaching back to impose" a burden on or undo a benefit to those favored by the discriminatory statute. Ruth Bader Ginsburg, Address, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301, 307 (1979). But see *Morales-Santana*, 137 S. Ct. at 1700–01 (faced

courts and involving impermissibly underinclusive state statutes, the Court has remanded to allow the state courts to definitively articulate the applicable fallback law.[241]

Sometimes, of course, a federal court cannot remand a case involving an impermissibly underinclusive statute to state court. This can happen, for instance, when a federal statute is unconstitutionally underinclusive or when a litigant challenges an underinclusive state statute in federal court.[242] In those situations, the Court has used severability principles to

with impermissibly discriminatory statute governing conferral of citizenship on those born abroad with one citizen parent, denying fifty-five-year-old litigant benefit under favorable provision of statute based on perceived legislative intent, while stating that unfavorable fallback law would apply only "prospectively"). To effectuate the offended antidiscrimination norm in that scenario, a court has no choice but to extend to the litigant the favorable treatment previously accorded to others during the relevant time period. Challenges to threatened future discrimination do not generally pose such problems, and the Court therefore has looked to the intent of the relevant lawmaker in determining how the law should apply given the impermissible underinclusiveness of the law as written. See, e.g., Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 817–18 (1989).

In other cases, the Court may have thought the lawmakers' preferred fallback law too obvious for discussion in light of the circumstances. See *Morales-Santana*, 137 S. Ct. at 1698 n.22 (observing that, in several early cases dealing with impermissibly underinclusive statutes, the Court "silently" gave effect to the perceived intent of the legislature); Ginsburg, supra, at 313. The Court might have done so because, for instance, the underinclusive laws governed some practically necessary aspect of the government's operations, provided popular and important benefits, impermissibly excluded only a small class of beneficiaries, or because of some combination of those circumstances. See, e.g., Plyler v. Doe, 457 U.S. 202, 207 (1982) (state law excluded from free public education a "very small subclass of" undocumented alien children); Graham v. Richardson, 403 U.S. 365, 369 n.4 (1971) (state welfare schemes excluded a relatively small number of aliens). Or, perhaps, the Court simply overlooked the fallback law issue in these cases, or at least some of them. See Kovacic, supra note 116, at 91.

[241] See, e.g., *Levin*, 560 U.S. at 427–28 & n.6 (collecting cases); Tex. Monthly v. Bullock, 489 U.S. 1, 8, 25 (1989) (plurality opinion); Mayflower Farms v. Ten Eyck, 297 U.S. 266, 274 (1936); see also *Morales-Santana*, 137 S. Ct. at 1698 n.23 ("Because the manner in which a State eliminates discrimination 'is an issue of state law,' . . . upon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation." (quoting Stanton v. Stanton, 421 U.S. 7, 18 (1975)). The Court has even gone so far as to conclude that federal district courts generally should dismiss challenges to allegedly underinclusive state taxation schemes on the ground of comity because a federal court would be unable to remand such a suit to state court upon a conclusion of unconstitutionality and because the Tax Injunction Act might disable the federal court from giving effect to the fallback law likely preferred by state lawmakers. See *Levin*, 560 U.S. at 428.

[242] In the latter scenario, a court could use the certification procedure to invite the appropriate state court to articulate the fallback law. See Fish, supra note 233, at 379. A federal court could also use the certification procedure in a case involving an impermissible

identify the applicable fallback law. That is, the Court has applied severability doctrine to determine whether, in light of the statute's invalidity as written, the enacting lawmaker would prefer operation of the inclusionary aspect of the statute—effectively broadening the statute's reach—or the exclusionary aspect of the statute—effectively nullifying the statute.

The Court has looked to both textual and nontextual clues in searching for the legislature's likely preference as between expansion or inoperability of an impermissibly underinclusive statute. For instance, the Court has strongly suggested that an applicable inseverability clause should be treated as conclusive evidence that the relevant lawmaker would prefer the inoperability of the underinclusive statute.[243] The Court also has treated an applicable severability clause as evidence that the enacting lawmaker would prefer that an impermissibly underinclusive statute apply without its exclusionary aspect.[244] Such a severability clause, the thinking goes, suggests a legislative commitment to the continued, positive operation of the statute and, thus, its inclusionary aspect.[245]

Of course, determining the fallback law applicable to the litigants becomes more difficult when the legislature has not spoken to the issue through a severability or inseverability clause or enacted fallback law.[246] In the past, the Court occasionally purported to glean the legislature's likely intent entirely from the text of the underinclusive law. *Guinn v. United States* provides an example.[247] In that case, the Court held impermissibly underinclusive, and thus violative of the Fifteenth Amendment, a state constitutional provision establishing a voters' literacy test but excepting persons who had voted, or whose ancestors

combination of state laws. See supra notes 210–233 and accompanying text (discussing impermissible statutory combinations).

[243] See, e.g., *Nguyen*, 533 U.S. at 72; Heckler v. Mathews, 465 U.S. 728, 739–40 & n.5 (1984). In cases involving impermissibly underinclusive state statutes, the applicable fallback law must be identified in accordance with principles of state law, including any principles dealing with the effect of inseverability clauses. See Zobel v. Williams, 457 U.S. 55, 64–65 (1982) (noting that an inseverability clause expressed the intent of the state legislature but remanding for state courts to articulate the applicable fallback law).

[244] See, e.g., Califano v. Westcott, 443 U.S. 76, 90 (1979); Welsh v. United States, 398 U.S. 333, 364–65 (1970) (Harlan, J., concurring in the result).

[245] See *Califano*, 443 U.S. at 90.

[246] See Kovacic, supra note 116, at 58–59; Miller, supra note 116, at 89–90.

[247] 238 U.S. 347, 367 (1915).

had voted, before ratification of the Fifteenth Amendment.[248] The Court then held the literacy test wholly inapplicable, reasoning that the text of the state constitution—which in fact contained no relevant language beyond the problematic provision itself—manifested a predominant desire that the literacy test not apply to those excepted under the provision as written.[249]

It seems difficult to justify this practice of relying solely on the statutory text. The text of an underinclusive statute no doubt reveals that the legislature intended to include some within the law's sweep and to exclude others. But, in the absence of a severability or inseverability clause or other specification of fallback law, the text will (at least typically) not speak to whether the legislature would pick the statute's inclusionary or exclusionary feature if forced to choose between the two. That is, the text of an impermissibly underinclusive statute, considered alone, generally will not reveal the legislature's preferred fallback law.

If courts are to have any hope of accurately ascertaining a lawmaker's preferred fallback law in light of an impermissibly underinclusive statute, then, they must engage in a more wide-ranging search for indicia of that lawmaker's intent. Indeed, the Court usually has taken that course.[250] When faced with an impermissibly underinclusive statute, the Court has considered not just the text, but also the legislative history and the context in which the statute was enacted in an effort to identify the legislature's preferred fallback law.[251] The Court also has evaluated the practical effects of both extension and nullification in an effort to

[248] See id. at 364–65.

[249] See id. at 366–67. For other cases in which the Court purported to glean the legislature's intent from the text of the impermissibly underinclusive statute, see *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902), and *Spraigue v. Thompson*, 118 U.S. 90, 94–95 (1886).

[250] For discussion of the factors considered by courts in determining whether a lawmaker likely would prefer extension or nullification of its impermissibly underinclusive handiwork, see Ginsburg, supra note 240, at 318–24; Deborah Beers, Note, Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative, 12 Colum. J.L. & Soc. Probs. 115, 125–39 (1975); and Caminker, supra note 116, at 1187–89.

[251] See, e.g., *Morales-Santana*, 137 S. Ct. at 1700 & n.26; Califano v. Westcott, 443 U.S. 76, 90 (1979); Welsh v. United States, 398 U.S. 333, 365–66 (1970) (Harlan, J., concurring in the result); Nat'l Life Ins. Co. v. United States, 277 U.S. 508, 522 (1928); see also Note, The Effect of an Unconstitutional Exception Clause upon the Remainder of a Statute, 55 Harv. L. Rev. 1030, 1033 (1942) (noting courts' use of legislative history in attempting to discern legislative intent).

determine whether the enacting lawmaker likely would have deemed one of those options too costly, too impracticable, or otherwise inconsistent with its goals.[252] Notable among such practical considerations are the size of the class previously excluded from the statutory scheme as compared to the size of the included class[253] and, relatedly, the cost to the government or private entities of extending the coverage of a benefit-conferring statute.[254]

In sum, a court faced with a meritorious challenge to an impermissibly underinclusive statute will engage in a broad search for indicia of the legislature's intent. That inquiry might seem open ended and indeterminate; indeed, now-Justice Ginsburg once described it as "essentially legislative."[255] But, in this context, necessity often demands such an open-ended inquiry. The problem, again, is that a court cannot apply an impermissibly underinclusive statute as written, but it must determine how the statute should apply—that is, whether effect should be given to the statute's exclusionary or inclusionary aspect—in resolving the case before it. Given our constitutional system's allocation of lawmaking authority primarily to nonjudicial actors, courts rightly look to the design of the lawmaker that created the underinclusive law in attempting to determine the applicable fallback law.[256] In the usual situation where the substantive lawmaker has not made its intentions

[252] See, e.g., *Morales-Santana*, 137 S. Ct. at 1700 (refusing to give effect to beneficial aspect of citizenship statute where doing so would carry with it great "potential for disruption of the statutory scheme," including by causing the statute to "irrational[ly]" treat children born abroad to married parents less favorably than those born abroad to unmarried parents (citation and internal quotation marks omitted)); *Califano*, 443 U.S. at 90 ("[A]n injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect."); Myers v. Anderson, 238 U.S. 368, 381–82 (1915) (holding a state statute governing voting qualifications entirely inapplicable where the statute effectively exempted whites from qualifications and the application of qualifications without exemption would have had the "incongruous" result of allowing all naturalized, but not all natural-born, citizens to vote); see also Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984) ("[T]he court . . . should . . . 'consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" (quoting *Welsh*, 398 U.S. at 365 (Harlan, J., concurring in the result))).

[253] See Ginsburg, supra note 240, at 318; see also *Morales-Santana*, 137 S. Ct. at 1701 (giving effect to the aspect of the statute that applied to "a substantial majority of children born abroad to one U.S.-citizen parent and one foreign-citizen parent").

[254] See Caminker, supra note 116, at 1189.

[255] Ginsburg, supra note 240, at 317.

[256] See id.

clear through enacted fallback law, however, a court must do its best to ascertain the lawmaker's design by considering all relevant indicia of the lawmaker's likely intent. By doing so, the court can adjudicate the case before it while respecting, as best it can, the law-making primacy of other governmental actors—i.e., Congress and the states.

## IV. SEVERABILITY OUTSIDE OF THE THREE-STAGE FRAMEWORK

To this point, this Article has discussed contexts in which severability doctrine fits within the accepted, three-stage framework of adjudication. In each of those contexts, a court applies severability doctrine as part of its effort to resolve the litigation before it—either to determine whether there exists an Article III "case" or "controversy" or to work toward resolution of claims within that "case" or "controversy." The Court, however, has applied severability doctrine in a different context—one that does not fit comfortably within the Article III adjudicatory framework. This Part considers these gratuitous severability rulings.

### *A. Gratuitous Severability Rulings and Article III*

The Supreme Court on occasion has addressed severability *after* resolving the Article III "case" or "controversy" before it. In these cases, the Court has decided the severability of statutory provisions or applications that *did not* injure the litigants in the case, and it has done so *after* holding that provisions or applications that did injure the litigants impermissibly conflicted with higher law. Stated differently, the Court: (1) resolved the relevant claims in the litigation; (2) determined in the process that aspects of law that injured a litigant conflicted with higher law and thus could not be applied; and (3) then applied severability doctrine to assess whether other provisions or applications of law could continue in operation, without requiring a showing that those provisions or applications injured a litigant.

There is seemingly a problem with such gratuitous severability determinations. Specifically, these rulings appear to contravene the claim-specific approach to Article III standing.[257] Recall that the Court

[257] A few scholars have noted the tension between Article III standing doctrine and the Court's practice of issuing gratuitous severability rulings. See Fish, supra note 16, at 1311–12, 1344–45; Harrison, supra note 18, at 89–90; Zimmerman, supra note 18, at 316–18; Nightingale, supra note 116, at 1736–37.

has insisted that a plaintiff must satisfy the Article III standing requirements with respect to every statutory provision or application that she seeks to challenge. Recall also that the Court reasoned that its claim-specific approach to Article III standing was needed to prevent the federal courts from exceeding their Article III power by adjudicating legal issues that lie outside of a "case" or "controversy" before them.[258] But a court does just that when it determines the severability—and thus validity or invalidity—of statutory provisions or applications that do not injure a litigant *after* addressing all of the claims that the litigant has standing to raise.[259]

Nevertheless, the Court issues gratuitous severability rulings, and it has done so with increasing frequency in recent decades.[260] Consider the Court's opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[261] That case arose when Northern Pipeline sued Marathon Pipe Line on various state law claims. Because Northern had earlier filed for bankruptcy, it filed its claims in bankruptcy court, as permitted by Section 1471 of the Bankruptcy Act of 1978.[262] Six Justices agreed that, as applied to Northern's state law claims against Marathon, Section 1471 violated the Constitution in authorizing adjudication of state-created rights by judges lacking the protections required by Article III.[263] Those same six Justices went on to hold inseverable, and thus inoperative, Section 1471's other applications—even though those

[258] See supra notes 76–86 and accompanying text.

[259] Describing severability as "remedial" does not eliminate the tension between gratuitous severability rulings and the claim-specific approach to Article III standing. See supra notes 116–128 and accompanying text (criticizing the Court's recent practice of describing severability as remedial). Indeed, the Supreme Court has explicitly extended the claim-specific standing approach to the remedial context, and, as a result, a federal court may not award a remedy that sweeps beyond the provisions or actions that the plaintiff has standing to challenge. See Zimmerman, supra note 18, at 321–22; supra notes 81–82, 86 and accompanying text. But see Nightingale, supra note 116, at 1736–37 (arguing that gratuitous severability rulings pose no Article III problem because (1) severability is a remedial issue and (2) the Court has issued gratuitous severability rulings in the past).

[260] The Court has issued gratuitous severability rulings on rare occasion since the 1890s. See Williams v. Standard Oil Co. of La., 278 U.S. 235, 241–43, 245 (1929); Hill, Jr. v. Wallace, 259 U.S. 44, 70–72 (1922); Pollack v. Farmers' Loan & Tr. Co., 158 U.S. 601, 634–37 (1895).

[261] 458 U.S. 50 (1982).

[262] Id. at 54–57 (plurality opinion).

[263] See id. at 87 n.40 (plurality opinion); id. at 91 (Rehnquist, J., concurring in the judgment).

applications did not injure the litigants and could not have affected the case at hand.[264] In other words, the Court used severability doctrine to invalidate statutory applications that the litigants lacked Article III standing to challenge.[265]

*NFIB v. Sebelius*, and in particular the joint dissent, offers another striking example of the practice of gratuitously addressing severability.[266] The plaintiffs in that case—states, some individuals, and an association of small businesses—challenged President Obama's signature healthcare legislation, the ACA. The plaintiffs launched constitutional attacks on the individual mandate provisions of the ACA—which required most individuals to either purchase health insurance or make a payment to the government—and the ACA's Medicaid expansion provisions—which put states to a choice between expanding their Medicaid programs or risking the loss of all access to federal Medicaid funds.[267] For each of those claims, some plaintiffs clearly had standing: the individual mandate applied to the individual plaintiffs and caused them redressable injury, and the Medicaid expansion did the same to the states.[268]

But the plaintiffs also argued that every single provision of the ACA must fall because the remainder of the statute could not be severed from the (allegedly invalid) individual mandate and Medicaid expansion.[269] And, to be clear, the ACA had *a lot of* provisions. They included, as examples: consumer-protective provisions regulating the terms under

[264] See id. at 87 n.40 (plurality opinion); id. at 91–92 (Rehnquist, J., concurring in the judgment).

[265] The Supreme Court on occasion has declined to issue a gratuitous severability ruling, apparently in the exercise of discretion or prudence. See Clinton v. City of New York, 524 U.S. 417, 448 n.43 (1998); E. Enters. v. Apfel, 524 U.S. 498, 538 (1998) (plurality opinion); Zimmerman, supra note 18, at 303 & n.110 (collecting cases). That reasoning presupposes a judicial power to issue gratuitous severability rulings.

[266] 132 S. Ct. 2566, 2643 (2012). For other cases in which the Court issued a gratuitous severability ruling, see *Reno v. ACLU*, 521 U.S. 844, 883 (1997); *Brockett v. Spokane Arcades*, 472 U.S. 491, 494, 504–07 (1985); *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975); and *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

[267] See *NFIB*, 132 S. Ct. at 2580–82 (plurality opinion).

[268] See Zimmerman, supra note 18, at 290 & n.25 (citing Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243–44 (11th Cir. 2011)).

[269] See Brief for State Petitioners on Severability at 59, *NFIB*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400); Brief for Private Petitioners on Severability at 61, *NFIB*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400).

which insurers may issue health insurance contracts;[270] provisions imposing new taxes on insurance companies;[271] provisions creating tax credits for the purchase of health insurance[272] and for businesses that offer health insurance to their employees;[273] provisions reducing Medicare expenditures[274] and payments to hospitals;[275] a provision prohibiting the use of federal funds to pay for abortions;[276] and provisions extending federal funds to specified individuals, states, or institutions.[277] These provisions—and no doubt many others in the ACA—neither applied to nor injured the *NFIB* plaintiffs. Indeed, the plaintiffs did not even attempt to show that they had standing to challenge each of the many provisions of the ACA beyond the individual mandate and the Medicaid expansion.[278]

Yet every member of the Court entertained on its merits the plaintiffs' argument that every provision of the ACA must fall on grounds of inseverability. Through several opinions and a shifting lineup, a majority of the Court held the individual mandate constitutional,[279] the Medicaid expansion unconstitutional,[280] and the entirety of the ACA severable from the Medicaid expansion.[281] In addressing severability, no member of the majority addressed whether the plaintiffs had standing to

[270] See, e.g., 42 U.S.C. § 300gg-1 et seq. (2012) (guaranteed issue); id. § 300gg (community rating); id. § 300gg-11 (eliminating coverage limits).

[271] Affordable Care Act, Pub. L. No. 111-148, §§ 9010, 10905, 124 Stat. 865, 1017 (2010) [hereinafter ACA]; Health Care and Education Reconciliation Act, Pub. L. No. 11-152, § 1401, 124 Stat. 1059 (2010).

[272] ACA § 36B, 124 Stat. 213 (2010).

[273] 26 U.S.C. § 45R (2012).

[274] ACA § 9012, 124 Stat. 868 (2010).

[275] 42 U.S.C. §§ 1395ww, 1396r-4 (2012).

[276] ACA § 1303, 125 Stat. 896–97 (2010).

[277] Id. §§ 2006, 10323, 10502.

[278] The plaintiffs argued that they did not need to make that showing because "[s]everability" involves only a "remedial" inquiry, rather than "a distinct challenge to the remaining provisions of an act that must be supported by independent standing." Brief for State Petitioners on Severability at 27, *NFIB*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400). This argument fails both because statutory nonseverance is not a remedy, see supra notes 116–128 and accompanying text, and because gratuitous severability rulings would violate the claim-specific approach to Article III standing even if statutory nonseverance could be described as a remedy, see supra note 259.

[279] See *NFIB*, 132 S. Ct. at 2600.

[280] See id. at 2606–07 (opinion of Roberts, C.J.); id. at 2666 (joint dissent).

[281] See id. at 2607–08 (opinion of Roberts, C.J.); id. at 2630–31, 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

challenge the remaining provisions of the ACA. Instead, in keeping with decisions like *Marathon Pipe Line*, the majority addressed the severability question without regard to standing. Nevertheless, the majority's severability ruling can be reconciled with Article III: because the remainder of the ACA included the individual mandate, and because the individual mandate injured the individual plaintiffs, the *NFIB* majority's severability ruling can be justified as the adjudication of a *jus tertii* inseverability claim asserted by the individual plaintiffs against the individual mandate.[282]

The same, however, cannot be said of the dissenters' proposed severability ruling. The dissenters would have held both the individual mandate and the Medicaid expansion unconstitutional.[283] After setting out that position, the dissenters addressed the severability question. Examining the ACA's remaining provisions chunk by chunk, the dissenters explained that they would have held each and every provision of the ACA inseverable from the individual mandate and Medicaid expansion and, thus, invalid.[284] In doing so, the dissenters, relying on the Court's past issuance of gratuitous severability rulings, deemed it irrelevant that the plaintiffs had not established standing to challenge the provisions that they sought to attack on grounds of inseverability.[285] The 900-page ACA thus came within a single vote of decimation in a lawsuit where the plaintiffs had established standing to challenge only a few of its many, many provisions.

*NFIB* illustrates the potentially awesome power of a gratuitous severability ruling. But, as noted, gratuitous severability rulings seem to run afoul of the claim-specific approach to Article III standing. How, then, should that inconsistency be resolved? One thing appears certain: if there exists a truly irreconcilable conflict between the (according to the Court) constitutionally mandated Article III standing doctrine and the non–constitutionally mandated practice of issuing gratuitous severability rulings, the practice of issuing gratuitous severability rulings must give way. It makes no difference that gratuitous severability rulings turn on the intent of the lawmaker that created the challenged

[282] See Zimmerman, supra note 18, at 324–25; infra note 318.
[283] See *NFIB*, 132 S. Ct. at 2643 (joint dissent).
[284] See id. at 2671–76.
[285] See id. at 2671 (citing Williams v. Standard Oil Co. of La., 278 U.S. 235, 242–44 (1929)).

law, such that the court arguably might be said to act pursuant to that lawmaker's authorization in deciding the continuing operability of the remainder of the law. The Court has made abundantly clear that the standing requirements' constitutional status precludes a legislature—including Congress—from overriding or eliminating them.[286] In short, the practice of issuing gratuitous severability rulings should be abandoned if it cannot be reconciled with the Article III standing doctrine.

### *B. The (Unavailing) Defenses of Gratuitous Severability Rulings*

The tension between gratuitous severability rulings and the Article III standing doctrine began receiving notice only recently.[287] Some of those who have taken notice have offered arguments in support of the practice of issuing gratuitous severability rulings. This Section considers those arguments, none of which satisfactorily resolves the inconsistency between gratuitous severability rulings and the Court's claim-specific approach to Article III standing.

*The Analogy to Supplemental Jurisdiction.* Erik Zimmerman argues that the Court should adopt a doctrine of "supplemental standing" that would allow federal courts to issue gratuitous severability rulings. Zimmerman's argument turns on an analogy to the doctrine of supplemental jurisdiction. Supplemental jurisdiction permits a "plaintiff who asserts a federal claim to assert related state law claims even if those state law claims do not independently fall within the subject matter jurisdiction" conferred on federal courts by Congress in accordance with Article III.[288] If that is permissible, the reasoning goes, a litigant with Article III standing to challenge one provision or application of law should also be permitted to challenge other provisions or applications on grounds of inseverability, even if the litigant cannot independently establish Article III standing with respect to the allegedly inseverable provisions or applications.[289]

[286] See, e.g., Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).
[287] See *NFIB*, 132 S. Ct. at 2671 (joint dissent); supra note 257.
[288] Zimmerman, supra note 18, at 286–87.
[289] See id. at 310–11.

As Zimmerman acknowledges,[290] the Supreme Court in *DaimlerChrysler Corp. v. Cuno* expressly considered and rejected the concept of supplemental standing.[291] And quite rightly, at least if one accepts the Court's conception of Article III standing doctrine as a fundamental limit on the federal judiciary's authority to review the actions and work products of other governmental actors. Recall that the standing requirements define what constitutes a "case" or "controversy" within the meaning of Article III and that they permit the federal courts to decide legal issues only in the course of adjudicating such a "case" or "controversy."[292] Recall also that the Court has taken the view that, in so limiting the federal courts, the Article III standing requirements prevent those courts from exceeding their authority through issuance of advisory opinions and from invading the province of the political branches.[293]

Whatever its merit, the doctrine of supplemental jurisdiction over state law claims does not undermine those goals. That doctrine only permits a federal court with subject matter jurisdiction over one claim to address another claim that arises out of the same "nucleus of operative fact" and that the plaintiff has standing to raise.[294] In adjudicating the second claim, then, the federal court resolves an "actual dispute[] between adverse parties."[295] That court neither issues an advisory opinion nor usurps the power of the political branches.[296]

Supplemental standing, in contrast, violates the basic principles of Article III. That is so because it would allow—indeed, its whole purpose is to allow—litigants to press and courts to decide legal issues beyond the confines of a "case" or "controversy," as defined by Article III standing doctrine. Article III standing doctrine is premised on the view that a court exceeds its authority and steps on the toes of politically

[290] See id. at 287, 314.
[291] See 547 U.S. 332, 351–53 (2006).
[292] See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 132 (2011).
[293] See supra notes 68–86 and accompanying text.
[294] See, e.g., United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).
[295] Richardson v. Ramirez, 418 U.S. 24, 36 (1974).
[296] Though supplemental jurisdiction does not undermine the goals of Article III standing doctrine, it is a closer question whether it undermines the goals of Article III's limitation of the federal judicial power to enumerated categories of "cases" and "controversies." The Court's willingness to accept supplemental jurisdiction while rejecting supplemental standing perhaps suggests that the Court believes that Article III's limitation of the federal "judicial power" to *"cases"* and *"controversies"* is more fundamental than Article III's limitation of the federal judicial power to *certain types* of "cases" and "controversies."

accountable actors when it does so. Thus, it should not matter whether the plaintiff has no Article III case at all or a different Article III case that happens not to involve the legal question that he is asking the court to decide as a matter of supplemental standing. Either way, the plaintiff is asking the Court to stray outside of an Article III case to answer a legal question, which is precisely what the Court says Article III standing doctrine is designed to prevent.[297] To paraphrase the Court's opinion in *Lewis v. Casey*, Article III standing doctrine "would hardly . . . prevent[] courts from undertaking tasks assigned to the political branches . . . if once a plaintiff demonstrated harm from one particular [alleged] inadequacy in government administration, the court were authorized to" decide "*all*" related aspects of that administration.[298]

Allowance of supplemental standing would also carry troubling implications. First, no principled basis exists for limiting supplemental standing under Article III to situations involving gratuitous severability determinations. If the Article III standing requirements are to define the outer limits of a constitutional "case" no longer, some other criteria must do so. The most likely candidate is the "common nucleus of operative fact" standard for supplemental jurisdiction.[299] That standard would permit a litigant to mount full-blown constitutional attacks against governmental conduct that does not injure him, so long as that conduct bears a factual relationship to governmental conduct that does injure him. Second, acceptance of supplemental standing would call into question other justiciability doctrines. As the Court explained in *Cuno*, "The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."[300] Thus, if a plaintiff's standing to assert one claim can dispense with the Article III standing requirements for other claims, the same would seem to be true for the mootness, ripeness, and political question doctrines. To accept supplemental standing, then, would require "a significant revision of [the Court's] precedent interpreting Article III."[301]

[297] See, e.g., *Winn*, 563 U.S. at 133; *Cuno*, 547 U.S. at 341, 346, 352–53.

[298] 518 U.S. 343, 357 (1996).

[299] *Gibbs*, 383 U.S. at 725. Ironically, the *Gibbs* standard might not even allow supplemental standing for gratuitous inseverability claims, given that "it is not clear that a constitutional claim and a severability claim are factually related in the sense of *Gibbs*." Zimmerman, supra note 18, at 339.

[300] 547 U.S. at 352.

[301] Id. at 353.

Accepting the purposes of Article III standing as articulated by the Court, any such revision is both unlikely and ill-advised.

*The Analogy to Standing in Cases Involving Multiple Plaintiffs.* In defending the federal courts' practice of issuing gratuitous severability rulings, Zimmerman also relies on a familiar standing rule applicable in cases involving multiple plaintiffs.[302] That rule provides that a federal court may adjudicate a claim so long as one of the litigants in the case has standing to raise that claim.[303] As a result of that rule, litigants sometimes may participate in the assertion of, and benefit from a remedy based on, claims for which they lack Article III standing.[304] Thus, the thinking goes, a litigant with standing to challenge one statutory provision or application should be permitted to challenge other provisions or applications on inseverability grounds, even if he cannot meet the Article III standing requirements with respect to those other provisions or applications.

That argument ignores an important distinction between multiple-plaintiff cases and cases involving gratuitous severability rulings. The distinction is this: whereas at least one litigant has Article III standing to raise the asserted claim in cases triggering the multiple-plaintiff rule, that is not true in cases involving gratuitous severability rulings.[305] That distinction makes all the difference for purposes of Article III. When one plaintiff has Article III standing to assert a claim, a federal court's resolution of that claim occurs as part of an exercise of the "judicial power" to adjudicate a "case," as defined by the Court's Article III standing doctrine. In resolving that claim, the court neither exceeds its authority nor usurps the power of the political branches.[306] That other plaintiffs in the case would like to see the claim succeed does nothing to change that fact. In contrast, a federal court that addresses severability in a gratuitous severability ruling acts outside of the bounds of an Article III "case" by determining the operability of statutory provisions or

[302] See Zimmerman, supra note 18, at 337–38.

[303] See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263–64 & n.9 (1977).

[304] See Joan Steinman, The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part 1: Justiciability and Jurisdiction (Original and Appellate), 42 UCLA L. Rev. 717, 730–31 (1995).

[305] If a litigant had Article III standing to challenge the allegedly inseverable provisions or applications, that litigant would be asserting an inseverability claim. See supra Section III.A.

[306] See Steinman, supra note 304, at 729.

applications that do not injure any party to the litigation. Accepting the Court's account of Article III standing, federal courts necessarily exceed their proper role when they issue such gratuitous severability rulings.

*The Analogy to Facial Challenges.* Some have defended the Court's practice of issuing gratuitous severability rulings on the ground that it resembles the Court's facial challenge practice. This argument goes as follows: when a facial challenge succeeds, the court's ruling means that the challenged provision cannot be applied to anyone.[307] Thus, courts allow litigants to attack applications that do not injure them when they entertain facial challenges, and they effectively invalidate those applications when they sustain facial challenges. By analogy, courts should be able to determine the severability—and thus the operability—of statutory provisions or applications that the parties to the litigation lack Article III standing to challenge.[308]

That argument misconceives the nature and effect of a successful facial challenge. A litigant asserting a facial challenge does not, strictly speaking, challenge statutory applications that do not injure her. Rather, "all constitutional challenges to a rule of law—whether denominated as as-applied or facial—begin with a challenger who maintains that the Constitution forbids the enforcement of that rule against her."[309] And it is that application of the law to the litigant that is the object of the court's judgment.[310]

[307] See Dorf, supra note 39, at 236; Fallon, supra note 150, at 1321, 1327–28.

[308] See Zimmerman, supra note 18, at 333–37.

[309] See Richard H. Fallon, Jr., Fact and Fiction About Facial Challenges, 99 Calif. L. Rev. 915, 923 (2011) (citation omitted). Not all facial challenges involve a claim that the Constitution of its own force bars application of the law to the litigant making the challenge. For instance, consider inseverability claims. They turn on legislative intent: the litigant argues that a particular provision or application cannot be applied to him because the relevant lawmaker intended it to be inseverable from other provisions or applications that violate the rights of those to whom they apply. See supra Section III.A. But inseverability claims can be facial challenges. For example, assume that an appellate court holds that Provision *A* cannot be applied to a litigant because it is inseverable from invalid Provision *B*. In that scenario, the court has held Provisions *A* and *B* facially invalid. Litigants in later cases may rely on the appellate court's holding that Provision *B* is independently invalid in resisting its application. And litigants in later cases may rely on the appellate court's holding that Provision *A* is inseverable from invalid Provision *B* in resisting application of Provision *A*.

[310] See City of Los Angeles v. Patel, 135 S. Ct. 2443, 2457–58 (2015) (Scalia, J., dissenting); Fallon, supra note 150, at 1336–37.

A successful facial challenge's distinctive character, then, has nothing to do with Article III standing. Rather, the distinctive character of a successful facial challenge lies in the reasoning on which the court bases its holding that the statute's application to the litigant is impermissible. Specifically, a court in a successful facial challenge bases its decision that the statute cannot be applied to the litigant on grounds indicating that other—or even any—applications of the law would be impermissible.[311] For example, the court might reason that the law cannot be applied to the litigant because it fails to give fair notice of what is prescribed and therefore is impermissibly vague.[312] Or the court might conclude that the type of law at issue—say, a poll tax[313] or a licensing scheme or other prior restraint[314] lacking certain safeguards—inherently conflicts with the constitutional provision asserted by the litigant.[315] If an appellate court issues a ruling based on that sort of reasoning, different litigants in later cases in courts subject to the first court's appellate jurisdiction might rely on the earlier decision to

[311] See *Patel*, 135 S. Ct. at 2457 (Scalia, J., dissenting); Fallon, supra note 150, at 1324.

[312] See Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015).

[313] See Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

[314] See Staub v. City of Baxley, 355 U.S. 313, 321–22, 325 (1958).

[315] Marc Isserles has described facial challenges involving laws of the sort discussed in the text as "valid rule facial challenge[s]" that "predicate[] facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute's application to particular cases." Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 363–64, 390–94, 405 n.205, 411–12 (1998) (identifying, inter alia, impermissibly vague laws, poll taxes, and prior restraints). Isserles also discusses facial challenges premised on an argument that the rule of law applied to the litigant—whose own conduct need not be constitutionally privileged—fails an applicable narrow tailoring test. See id. at 388–89; see also Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3–4, 37–38 (describing the First Amendment overbreadth doctrine in these terms). The theory in support of this sort of facial challenge depends on the premise that every litigant has a constitutional right to be judged only in accordance with a law satisfying an applicable narrow tailoring requirement, which will determine how many unconstitutional applications must be shown for the facial challenge to succeed. See Isserles, supra, at 388. I have argued elsewhere that the theory behind this sort of facial challenge is flawed because there is no such right to be judged only in accordance with a valid rule of law. See Lea, supra note 97, at 315–23. Even accepting the right to a valid rule, however, everything said in the text applies to this sort of facial challenge. The litigant still seeks to challenge the statute's application to her. And application of the statute to the litigant remains the object of the court's judgment, even if the court's conclusion that the statute cannot be applied to the litigant rests on reasoning that will prove useful to litigants challenging other applications of the statute.

successfully challenge other applications of the statute.[316] Thus, the initial decision involving the successful facial challenge can be said to have rendered the statute inoperable. But that is simply a result of stare decisis,[317] rather than of a failure to apply Article III standing requirements in the initial facial challenge case.[318]

Gratuitous severability determinations, in contrast, do involve a failure to apply Article III standing requirements. They do so because those determinations do *not* concern the operability of provisions or applications that injure the litigants before the court. Rather, gratuitous severability rulings occur after the court has resolved the litigants' challenges to the statutory provisions or applications that injure them and has concluded that one or more of those provisions or applications impermissibly conflict with higher law. And such rulings concern only the operability of provisions or applications that do not injure the

[316] See *Patel*, 135 S. Ct. at 2457 (Scalia, J., dissenting).

[317] See id.; Fallon, supra note 309, at 923–24 n.31.

[318] See Fallon, supra note 150, at 1336–37 (noting that Article III standing requirements apply fully in cases involving facial challenges). A similar dynamic could come into play in cases involving inseverability claims. Imagine, for example, a statute containing three provisions: major provision *A* and minor provisions *B* and *C*. Imagine further that the court holds that a plaintiff has standing to challenge Provisions *A* and *B*, but not provision *C*. The plaintiff successfully challenges Provision *A* on the ground that it violates his constitutional rights, and he asserts a first-person inseverability claim based on Provision *B*'s inseverability from Provision *A*. In addressing the plaintiff's inseverability claim challenging Provision *B*, the court might frame its ruling broadly, in terms of the entire statute. For instance, the court might reason that, "Provision *B* cannot be applied to the plaintiff because the remainder of the statute cannot be severed from Provision *A*." A court cannot render such a broad ruling unless Provisions *B* and *C* are inseverable from Provision *A* for the same reason. See Fish, supra note 16, at 1346 n.173. If a court does render a severability ruling of that sort, however, it will have cast doubt on a provision that the plaintiff did not have standing to challenge (Provision *C*) in the course of adjudicating an inseverability claim (challenging Provision *B*) that the litigant had standing to assert. But, because they concern a provision that a litigant has standing to challenge, rulings of that sort are not gratuitous severability rulings. The members of the *NFIB* majority could have justified their severability ruling in *NFIB* on this basis. After holding the ACA's Medicaid expansion unconstitutional, the majority addressed the severability of the remainder of the ACA. See supra notes 279–281 and accompanying text. The majority could have reasoned that this approach complied with Article III because the remainder of the ACA included the individual mandate, which the individual plaintiffs had standing to challenge via an inseverability claim. The majority did not, however, explain its decision in this manner. Instead, consistent with the Court's practice of issuing gratuitous severability rulings, the majority addressed the severability of each of the ACA's many provisions without mentioning the Article III standing requirements. See supra note 283 and accompanying text.

litigants in the case at hand.[319] Rulings on facial challenges thus differ from gratuitous severability rulings in this respect: a court that adjudicates a facial challenge asks whether it should hold that a statutory provision *that would injure a litigant* cannot be applied to her for some reason that casts doubt on other applications of that provision; a court that issues a gratuitous severability ruling, in contrast, asks whether it should deem statutory provisions or applications *that do not injure a litigant* inoperable because of the invalidity of a provision or application that does injure that litigant. Viewed in light of the Court's claim-specific approach to Article III standing, that distinction makes all the difference. Facial challenges comply with the accepted approach to Article III standing, and gratuitous severability determinations do not. Thus, the Court's facial challenge practice provides no support for the Court's practice of issuing gratuitous severability rulings.

*The Separation-of-Powers Argument for Gratuitous Severability Determinations.* Some, including members of the Supreme Court, have argued that gratuitous severability rulings are necessary to give effect to the separation of powers.[320] Recall that a gratuitous severability determination by definition occurs after a court has held that a provision or application of law that injures a litigant impermissibly conflicts with superior law.[321] To preclude a ruling on severability in that circumstance, the thinking goes, would sometimes "force[] [a court] to leave in place" what amounts to "a new version of the statute that [the legislature] never would have enacted"[322]—i.e., the original statute without its independently invalid provisions or applications.

Defenders of gratuitous severability rulings see that as problematic for two reasons. First, no one might have Article III standing to challenge some otherwise inseverable provisions of law, such as, for example, provisions that merely expend funds.[323] As a result, those provisions could remain on the statute books indefinitely. Second, even when other litigants would have Article III standing to assert inseverability claims challenging the other applications or provisions of

[319] See supra Section IV.A.

[320] See *NFIB*, 132 S. Ct. at 2668, 2671, 2676 (joint dissent); Zimmerman, supra note 18, at 327–30.

[321] See supra Section IV.A.

[322] Zimmerman, supra note 18, at 327.

[323] See *NFIB*, 132 S. Ct. at 2671 (joint dissent).

the law, a bar on gratuitous severability rulings would "create uncertainty regarding the state of the law."[324] During the period between the first case holding the challenged statute partially invalid and later inseverability claims, no one would know whether the remainder of the statute is inseverable and, thus, inoperative. As a result, governments and private parties would not definitely know their rights and duties under the law,[325] and the lawmaker that created the law "would not know whether a legislative solution is necessary" to effectuate its intent.[326]

These arguments turn Article III standing doctrine on its head. According to the Court, Article III standing doctrine by design precludes federal courts from resolving open or disputed issues of law whenever its requirements are not satisfied.[327] And, by doing so, Article III standing doctrine effectuates the separation of powers.[328] If that is true, as the Court insists it is, then refusing to apply the Article III standing requirements for the purpose of allowing federal courts to resolve severability issues they could not otherwise resolve hardly serves the separation of powers.

Nor does it make any difference that no one might have Article III standing to challenge some allegedly inseverable provisions of partially invalid laws. The Court has made clear that the fact that no one could satisfy the Article III standing requirements "is not a reason to find standing," even if the challenged law or government action is alleged to independently conflict with the Constitution.[329] Moreover, it is not as though an allegedly inseverable provision of a partially invalid statute must remain operative forever if no litigant would have Article III standing to challenge it and gratuitous severability rulings are forbidden. If the lawmaker that enacted the partially invalid law dislikes what remains after a holding of partial invalidity, it can replace the law or repeal it either in whole or in part. In sum, the fate of the remainder of

[324] Zimmerman, supra note 18, at 328.
[325] See *NFIB*, 132 S. Ct. at 2671 (joint dissent).
[326] Zimmerman, supra note 18, at 328.
[327] See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 132–33 (2011).
[328] See id.; Harrison, supra note 18, at 91–96.
[329] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 489 (1982) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)).

the partially invalid law can be determined in the political arena, where it properly belongs on the Court's understanding of Article III.[330]

In any event, future litigants would have Article III standing to challenge many—perhaps all, in many cases—provisions or applications of a statute held partially invalid in an earlier decision. These litigants could assert inseverability claims arguing that (1) the statute has already been held invalid in some respect and (2) the invalid aspects of the statute are inseverable from the provisions or applications that injure them.[331] And, because those litigants would have Article III standing to raise their claims, federal courts would have authority to finally decide the associated questions of severability.[332]

To be sure, this process of resolving issues of severability as they arise in inseverability claims will perpetuate uncertainties about severability that a court could eliminate with a gratuitous severability ruling.[333] The risk of persisting legal uncertainties, however, hardly justifies a practice of addressing severability in a gratuitous ruling, in contravention of Article III standing requirements.[334] Article III standing doctrine *often* prevents federal courts from resolving open and vexing questions of law.[335] Indeed, according to the Court, that is one point of the Article III standing requirements: by preventing the federal courts from adjudicating legal questions outside of a "case" or "controversy,"

[330] See United States v. Richardson, 418 U.S. 166, 179 (1974) (noting that a lack of litigants with standing to challenge government action suggests that "the subject matter is committed to the surveillance of Congress, and ultimately to the political process").

[331] See supra notes 176–179 and accompanying text (explaining that inseverability claims comply with Article III standing requirements).

[332] The continued operability of the remaining provisions or applications need not be decided via inseverability claims. Those provisions or applications could be challenged directly, in nonseverability-based challenges.

[333] Adoption of this Article's proposed standard for resolving inseverability claims would greatly reduce that uncertainty because that standard would allow such claims to succeed in only a few narrowly defined circumstances. See supra notes 200–206 and accompanying text. The discussion here, however, does not assume any specific standard for resolving inseverability claims.

[334] See Fish, supra note 16, at 1345; Harrison, supra note 18, at 92; see also Muskrat v. United States, 219 U.S. 346, 361–62 (1911) (Supreme Court lacked jurisdiction "to settle the doubtful character" of specified Acts outside of an Article III "case" or "controversy," even though Congress purported to authorize it to do so).

[335] See, e.g., Raines v. Byrd, 521 U.S. 811, 820 (1997) (Article III standing doctrine requires courts to "put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency.").

the Article III standing requirements leave such questions, at least temporarily, to government bodies closer to the people—i.e., the political branches of the federal government and the states.[336]

## CONCLUSION

Familiar legal practice sometimes obscures more fundamental legal principles.[337] This Article has argued that this problem marks modern severability doctrine. Severability determinations serve different purposes in different contexts, and those contexts implicate unique concerns regarding the proper role of the federal courts. Yet the federal courts apply a unitary, one-size-fits-all form of analysis whenever they address severability in the face of an invalid provision or application of law. The courts' failure to take into account the different contexts in which severability applies has caused them to deploy severability

[336] See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 145–46 (2011); *Cuno*, 547 U.S. at 341–42; Harrison, supra note 18, at 91. Zimmerman also argues that a rule barring courts from issuing gratuitous severability rulings would incentivize litigants to raise *jus tertii* inseverability claims, thereby "channel[ing]" inseverability claims into that posture. Zimmerman, supra note 18, at 329. He views this as problematic because a court addressing a *jus tertii* inseverability claim might decide abstract constitutional questions concerning the validity of allegedly inseverable statutory provisions or applications that do not injure the litigant. See id. at 329–31. This concern seems misplaced. First, Zimmerman accepts *jus tertii* inseverability claims, so he does not consider them inherently problematic. See id. at 333–34. Second, courts can and should resolve many *jus tertii* inseverability claims on grounds of severability, without reaching the associated constitutional issue. See id. at 329. Third, it does not seem that a bar on gratuitous severability rulings would incentivize litigants to assert *jus tertii* inseverability claims raising Zimmerman's concern. If permitted, any possible gratuitous severability determination must occur in a decision holding a statute partially invalid. *Before that decision*, the incentive of any litigant injured by the statutory scheme to mount a *jus tertii* inseverability claim would remain the same regardless of whether a later court can or might gratuitously deem the statute inseverable. True, if gratuitous severability rulings are unavailable, litigants might be incentivized to raise *jus tertii* inseverability claims *after* a holding of partial unconstitutionality. But at that point the court that issued the earlier decision will have resolved the constitutional question most likely to serve as the basis for such *jus tertii* inseverability claims—i.e., the constitutional question on which the original holding of partial invalidity was based and which would have served as the foundation of a gratuitous severability determination had such a determination been permitted. Disallowance of gratuitous severability determinations thus will not give rise to a flood of abstract constitutional rulings.

[337] Cf. Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring) ("A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.").

doctrine in ways that contravene fundamental principles of Article III standing and statutory interpretation.

This Article has proposed important refinements to the law of severability. This new approach would allow federal courts to address severability only when doing so is consistent with Article III standing doctrine. Thus, it would postpone severability determinations to the merits stage of adjudication, and it would not allow courts to address the severability of statutory provisions or applications that do not injure the litigants in the case at hand. This new approach would also tailor the severability standard to better fit the functions played by severability in different merits-stage contexts. In particular, it would preclude courts from inferring a legislative desire for inseverability in the context of inseverability claims, where a conclusion of inseverability permits a litigant to assert rights that would otherwise be unavailable. But it would allow courts to engage in a more freewheeling search for indicia of likely legislative intent in the context of impermissible convergences of law, where doing so is necessary if the court is to have any hope of accurately identifying the substantive fallback law applicable to the dispute. This Article, in short, proposes that the severability standard should be situational—just like severability itself.