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## Let Sleeping Dogs Lie: Defending Severability After *Murphy*, *Collins*, and *Seila Law*

Gregory Hilbert

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— Note —

LET SLEEPING DOGS LIE: DEFENDING  
SEVERABILITY AFTER *MURPHY*,  
*COLLINS*, AND *SEILA LAW*

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INTRODUCTION

The Patient Protection and Affordable Care Act<sup>1</sup> is 907 pages long in the United States Statutes at Large.<sup>2</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act is 848 pages long.<sup>3</sup> Though the number of bills that Congress passes has declined in recent years, both the total and average page length of those bills have increased.<sup>4</sup> When a statute is several hundred pages long and incredibly complex, what should a reviewing court do when confronted with a single section, page, or clause that offends the Constitution?

For at least 150 years, the widely accepted answer has been that the reviewing court should “sever” the unconstitutional provision from

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010).  
2. See 124 Stat. 119–1025 (2010).  
3. 124 Stat. 1376–2223 (2010).  
4. See Christopher Beam, *Is 1,000 Pages Long for a Piece of Legislation?*, SLATE (Aug. 20, 2009), <https://slate.com/news-and-politics/2009/08/is-1000-pages-long-for-a-piece-of-legislation.html> [<https://perma.cc/QA93-AZFF>].

the rest of the law.<sup>5</sup> These cases are “governed by the normal rule”<sup>6</sup> that courts should prefer partial over total invalidation of a legislative act. When confronted with a statute’s unconstitutional clause, a court must ask “whether Congress would have wanted the rest of the [statute] to stand . . . . Unless it is ‘evident’ that the answer is no, we must leave the rest of the [statute] intact.”<sup>7</sup>

But recently this long-settled principle<sup>8</sup> of judicial review has come under attack.<sup>9</sup> Critics claim that the severability doctrine is “dubious”<sup>10</sup> and is “in tension with traditional limits on judicial authority.”<sup>11</sup> They argue that severing an offending provision from a statute is not an exercise in judicial humility, but rather an unconstitutional judicial usurpation of power.<sup>12</sup>

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5. *See, e.g.*, *Warren v. City of Charlestown*, 68 Mass. (2 Gray) 84, 99 (1854); *Allen v. City of Louisiana*, 103 U.S. 80, 83–84 (1880) (“It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.”).
  6. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).
  7. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 587 (2012) (quoting *Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932)).
  8. *See* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 76 (1937) (noting that “the Supreme Court, the state courts, and secondary authorities all appear to agree” as to the severability doctrine’s fundamental rules); *see also* *Howard v. Ill. Cent. R.R. Co.*, 207 U.S. 463, 501 (1908) (“[Severability] principles are so clearly settled as not to be open to controversy.”); *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2208 (2020) (Roberts, C.J., joined by Alito & Kavanaugh, JJ.) (“It has long been settled that ‘one section of a statute may be repugnant to the Constitution without rendering the whole act void.’” (quoting *Loeb v. Columbia Twp. Trs.*, 179 U.S. 472, 490 (1900))).
  9. *See* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring); *see also* *Seila Law*, 140 S. Ct. at 2219–20 (2020) (Thomas, J., concurring in part and dissenting in part); *Barr v. Am. Ass’n Pol. Consultants*, 140 S. Ct. 2335, 2365 (2020) (Gorsuch, J., concurring in part and dissenting in part); *Collins v. Mnuchin*, 938 F.3d 553, 610 (5th Cir. 2019) (en banc) (Oldham & Ho, JJ., concurring in part and dissenting in part), *cert. granted*, No. 19-422, 2020 WL 3865249 (U.S. July 9, 2020).
  10. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring).
  11. *Id.* at 1485.
  12. *Collins*, 938 F.3d at 611 (Oldham & Ho, JJ., concurring in part and dissenting in part) (“The Constitution does not empower courts to delete sections of state and federal codes. The Founders expressly considered the possibility of a judicial veto, and they rejected it multiple times during the Constitutional Convention.”).

Whatever the weaknesses of the severability doctrine—and there are many<sup>13</sup>—it is too late in the day to discard 175 years of Supreme Court precedent upon which legislatures continue to rely. Severability analyses are entrenched in our Article III jurisprudence—at this point a “systematic, unbroken . . . practice”<sup>14</sup> of federal courts.<sup>15</sup> Opponents of the doctrine cannot win the day by resorting solely to first principles.<sup>16</sup> That said, the doctrine can and should be improved to make its application less political and more predictable.<sup>17</sup>

This Note explores some such possible improvements. But first, Part I offers a brief history of the severability doctrine. Part II examines recent criticisms of the doctrine. Part III responds to the recent criticisms and argues that although severability principles in practice have left much to be desired in terms of clarity and consistency, severability is defensible as a doctrine.

## I. BRIEF HISTORY OF SEVERABILITY

### A. *Development of the Doctrine*

Severability is nearly as old as judicial review itself. In *Marbury v. Madison*,<sup>18</sup> the Supreme Court partially invalidated the Judiciary Act of 1789.<sup>19</sup> The last clause of section 13 of the Act impermissibly purported to enlarge the Court’s original jurisdiction, and so the Court invalidated that provision while leaving the rest of section 13 intact, as well as the rest of the Judiciary Act of 1789.<sup>20</sup> Though the Court did not use the terminology that has become common in severability analyses, “everybody at that time in history, and everyone since, simply

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13. *See infra* Part III.B.

14. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

15. Going a step further, Professor Michael Dorf has questioned whether, without the severability doctrine, any provision of the U.S. Code could stand at all in the face of a court determination that a statute is unconstitutional. Michael C. Dorf, *Fallback Provisions*, 107 COLUM. L. REV. 303, 310 (2007) (“A *real* rule of nonseverability would treat any invalid provision of law as invalidating the entire legal code.”).

16. *Cf. Youngstown Sheet & Tube Co.*, 343 U.S. at 610 (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

17. *See infra* Part IV.

18. 5 U.S. (1 Cranch) 137 (1803).

19. *Id.* at 176; 1 Stat. 73 (1789); *see also* Barr v. Am. Ass’n Pol. Consultants, 140 S. Ct. 2335, 2350 (2020).

20. *Marbury*, 5 U.S. (1 Cranch) at 174.

assumed that the provision held invalid in *Marbury* could be (and was) severed from the remainder of the Act.”<sup>21</sup>

It is unsurprising that contemporaries never questioned that section 13’s unconstitutional provision could be excised from the rest of the Act. Indeed the Supreme Court, in its early decisions, “assumed as obvious” that a single unconstitutional clause would not render an entire legislative act inoperative.<sup>22</sup> In *Bank of Hamilton v. Dudley’s Lessee*,<sup>23</sup> for example, Chief Justice Marshall wrote: “If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States or of the state . . . .”<sup>24</sup> State courts of last resort similarly assumed that a single offending provision did not necessitate invalidating an entire statute.<sup>25</sup>

Scholars consider *Warren v. City of Charlestown*<sup>26</sup> to be the first case in which a court held as inseverable a statute with an offending provision, such that the entire act must fall.<sup>27</sup> In *Warren*, the legislature enacted a law to merge the cities of Charlestown and Boston.<sup>28</sup> The law’s challengers argued that Charlestown residents were not afforded proper political representation in the new township.<sup>29</sup> The Supreme Judicial Court of Massachusetts set forth a sort of severability test by acknowledging that when a legislative act has both constitutional and unconstitutional provisions, “the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other.”<sup>30</sup> Thus, if the valid text is intertwined with or dependent on the

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21. Michael C. Dorf, *Severability May Hold the Key to Obamacare’s Future: How Much of the Law Will Survive the Supreme Court’s Review?*, JUSTIA (Apr. 9, 2012), <https://verdict.justia.com/2012/04/09/severability-may-hold-the-key-to-obamacares-future> [https://perma.cc/6FRL-5ZPM]; see Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 V.A. L. REV. 933, 965 (2018) (noting that section 13 “continued to exist” after *Marbury* and that litigants could still “seek mandamus from the Supreme Court” in ways not proscribed by *Marbury*).

22. Stern, *supra* note 8, at 79.

23. 27 U.S. (2 Pet.) 492 (1829).

24. *Id.* at 526.

25. Stern, *supra* note 8, at 79 & n.10.

26. 68 Mass. (2 Gray) 84 (1854).

27. See Stern, *supra* note 8, at 80; see also Eric S. Fish, *Severability as Conditionality*, 64 EMORY L.J. 1293, 1301 (2015).

28. Robert L. Nightingale, Note, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 YALE L.J. 1672, 1714 (2016).

29. *Id.*; *Warren*, 68 Mass. (2 Gray) at 92–93.

30. *Warren*, 68 Mass. (2 Gray) at 99.

invalid provision “as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently . . . [then] all the provisions which are thus dependent . . . must fall.”<sup>31</sup> The court struck down the entire act as unconstitutional and void.<sup>32</sup>

*Warren* stands for the proposition that a reviewing court decides whether the provisions of a partially unconstitutional act are sufficiently independent of each other, and considers a counterfactual: would the legislature have passed the legislation without the unconstitutional provision(s)? Other state courts of last resort adopted tests with the same principles, and this *Warren* formulation was met with widespread approval.<sup>33</sup>

In *Allen v. City of Louisiana*,<sup>34</sup> the United States Supreme Court adopted *Warren*’s severability formulation. Quoting Chief Justice Shaw’s opinion in *Warren*, the Court captured the essence of the inquiry: “The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.”<sup>35</sup> Within fifty years, the severability test based on legislative intent was routine.<sup>36</sup>

Important to the discussion of the severability doctrine is Congress’s subsequent use of severability clauses in statutes. Lawmakers include severability clauses in legislation to “guide courts” on the question of “whether to sever the defective provision or to invalidate the entire statute.”<sup>37</sup> A typical severability clause may read as follows:

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31. *Id.*
  32. *See id.* at 106–07 (considering and subsequently declining to sever unconstitutional provisions of the act).
  33. *See Stern, supra* note 8, at 80 & n.16 (collecting cases).
  34. 103 U.S. 80 (1880).
  35. *Id.* at 84.
  36. *See, e.g., Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932) (“The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions.”). In addition to legislative intent, the *Champlin* Court also posited that the remainder of the statute, absent the unconstitutional provision, must still be “fully operative as a law.” *Id.*
  37. Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 903 (1997). Friedman argues that because these clauses have become boilerplate, “courts all but ignore” them. *Id.*; *see also* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 744 (2010) (noting that severability clauses “are neither necessary nor sufficient to control the judicial determination of severability”). *But see* *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020) (Roberts, C.J., joined by Alito &

“If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.”<sup>38</sup> These severability clauses evidence Congress’s “long-continued acquiescence” to the judiciary’s use of severability as a bedrock legal principle in adjudicating cases.<sup>39</sup>

*B. Recent High-Profile Applications of Severability Doctrine*

The Supreme Court has recently reaffirmed its use of the severability doctrine in many high-profile cases—approaching the question of whether a statute can stand without an unconstitutional provision. Though the Court has come out on both sides of the question depending on the dispute,<sup>40</sup> its application of the doctrine has been mostly consistent. Three recent examples are illustrative in an historical analysis of the severability doctrine: *Immigration and Naturalization Service v. Chadha*,<sup>41</sup> *Alaska Airlines v. Brock*,<sup>42</sup> and *National Federation of Independent Business v. Sebelius*.<sup>43</sup>

*Chadha* was concerned with the constitutionality of a unicameral legislative veto. By way of background, the Immigration and Nationality Act as passed gave the executive branch the authority to “allow a particular deportable alien to remain in the United States.”<sup>44</sup> The Act also authorized one house of Congress to “invalidate” that decision, thereby reinstating removal proceedings.<sup>45</sup> The Court held that this legislative-veto provision was unconstitutional because it failed the

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Kavanaugh, JJ.) (“But boilerplate is boilerplate for a reason—because it offers tried-and-true language to ensure a precise and predictable result.”).

38. 52 U.S.C. § 30144 (2018); *see also* *United States v. Booker*, 543 U.S. 220, 320 n.8 (2005) (Thomas, J., dissenting in part) (collecting severability clauses).

39. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J. concurring) (concurring with the Court’s holding that the President had impermissibly exceeded his executive authority in the case, but noting that the dispute does not arise against a backdrop of Congress’s “long-continued acquiescence” to the executive’s construction of its powers).

40. *See, e.g., Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578, 586 (2012) (holding that although the Affordable Care Act’s Medicaid expansion was unconstitutional, it was severable from the rest of the Act); *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318–20 (2016) (holding that the Texas law’s unconstitutional provisions were not severable from the rest of the law).

41. 462 U.S. 919 (1983).

42. 480 U.S. 678 (1987).

43. 567 U.S. 519 (2012).

44. *Chadha*, 462 U.S. at 923.

45. *Id.*

Constitution's bicameralism and presentment requirements.<sup>46</sup> The Court severed the offending provision from the Act,<sup>47</sup> even though Congress argued that the provision was inseverable.<sup>48</sup>

Four years later, in *Alaska Airlines v. Brock*,<sup>49</sup> the Court considered the constitutionality of another legislative-veto provision—this time in the context of airline regulation.<sup>50</sup> At issue was the Employee Protection Program (EPP) that was included in the Airline Deregulation Act of 1978.<sup>51</sup> Congress wanted to ensure that airline industry employees would not be unduly harmed by deregulation, and created the EPP to protect “employees who had been employed by a certified carrier for at least four years” as of the effective date of the Act.<sup>52</sup> The Act gave the Secretary of Labor authority to promulgate rules to administer the EPP,<sup>53</sup> but the Act provided that “any final rule issued . . . shall be submitted to Congress and shall become effective after 60 legislative days, unless during that 60-day period either House of Congress adopts a resolution disapproving the rule.”<sup>54</sup> The Court, relying on *Chadha*, held that the legislative-veto provision, though unconstitutional, was severable from the rest of the Act.<sup>55</sup>

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46. *Id.* at 945–46, 954, 959.

47. *Id.* at 959.

48. *Id.* at 931 (“Congress also contends that the provision for the one-House veto in § 244(c)(2) cannot be severed from § 244. Congress argues that if the provision for the one-House veto is held unconstitutional, all of § 244 must fall.”). Notably, Congress’s argument was in stark contrast to the text of the Act itself, which contained a severability clause:

Here, however, we need not embark on [a complete severability analysis] since Congress itself has provided the answer to the question of severability in § 406 of the [Act] . . . :

“If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.”

*Id.* at 932 (emphasis in original) (quoting 8 U.S.C. § 1101 (2018)).

49. 480 U.S. 678 (1987).

50. *Id.* at 680.

51. *See id.* at 680–81.

52. *Id.*

53. Among other protections and benefits, the EPP was to aid employees by establishing a monthly compensation program for displaced employees and to require airlines to consider protected employees first when making hiring decisions. *Id.* at 681–82.

54. *Id.* at 682.

55. *Id.* at 680, 683.



One might argue that the severability doctrine's biggest recent impact, at least outside of the administrative law context, was in *National Federation of Independent Business v. Sebelius*.<sup>56</sup> On the merits, the Court considered whether two provisions of the Affordable Care Act (ACA) were unconstitutional. First, the Act's challengers argued that Congress exceeded its legislative authority when it enacted the "individual mandate"<sup>57</sup> that requires all individuals to obtain health insurance—that there was no Constitutional basis for that provision.<sup>58</sup> Second, the challengers argued that Congress coercively and unconstitutionally exercised its spending power when it conditioned states' future Medicaid funding on their acceptance of the Act's Medicaid expansion.<sup>59</sup>

In a splintered decision, the Court held that though Congress exceeded its commerce power by enacting the individual mandate, the provision was justifiable as a tax.<sup>60</sup> The Court held that the Medicaid expansion, however, was indeed unconstitutionally coercive.<sup>61</sup> Because of this holding, the Court proceeded to a severability analysis and concluded that the ACA can stand apart from the unconstitutional provision.<sup>62</sup> As a result, Congress may not take away funding from states that refuse to participate in the Medicaid expansion.<sup>63</sup> All other portions of the ACA remained intact after *Sebelius*.<sup>64</sup>

It is important to note also that the four dissenting justices would not have applied severability in the case, maintaining that the ACA cannot stand without the individual mandate and the Medicaid expansion, calling them "pillars" of the statutory scheme.<sup>65</sup> Because the

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56. 567 U.S. 519 (2012).

57. *See id.* at 539 (citing 26 U.S.C. § 5000A (2018)).

58. *Id.* at 540.

59. *Id.* at 542.

60. *Id.* at 561 (holding that the individual mandate is not supported by the Commerce Clause); *id.* at 574 ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.").

61. *Id.* at 580; *id.* at 681 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

62. *Id.* at 585 (Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 626 (Ginsburg, J., joined by Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

63. *Id.* at 585 (Roberts, C.J., joined by Breyer & Kagan, JJ.).

64. *Id.* at 588 ("Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.").

65. *Id.* at 691 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). At this point in the dissent, contrary to the majority's holding, the dissenting justices had concluded that the individual mandate was unconstitutional. *Id.* at 649–69.

dissenting justices argued that the Act’s provisions were “closely interrelated” and that “it is judicial usurpation to impose an entirely new mechanism for withdrawal of Medicaid funding,” they would have struck down as unconstitutional the entire Act.<sup>66</sup> That the Court would have sounded the death knell for a President’s signature policy accomplishment illustrates the tremendous stakes inherent in the future of the severability doctrine and its applicability to modern legislation.

*C. Severability and Structure in Administrative Agencies*

The severability doctrine is also prominent in administrative law, where constitutional challenges to agency structures can pose unique questions of standing and traceability of injury.<sup>67</sup>

This past term, *Seila Law v. Consumer Financial Protection Bureau*<sup>68</sup> presented a significant example of the importance of severability in the administrative law context. After the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau (CFPB) with a single Director “who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance.”<sup>69</sup> The Director “wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy.”<sup>70</sup> In 2017 the CFPB issued a civil investigative demand to Seila Law, a California-based law firm.<sup>71</sup> “Seila Law asked the CFPB to set aside the demand, objecting that the agency’s leadership by a single Director removable only for cause violated the separation of powers.”<sup>72</sup> The CFPB filed a petition in court to enforce the demand.<sup>73</sup>

The Court agreed with Seila Law that the CFPB’s unique structure violates the separation of powers.<sup>74</sup> After holding that the CFPB was unconstitutional as structured, the Court analyzed whether the CFPB Director’s for-cause removal protection was severable from the rest of the Dodd-Frank Act.<sup>75</sup> Because “[t]he provisions of the Dodd-Frank Act

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66. *Id.* at 691.

67. For background on the “traceability” requirement in the standing context see *Clapper v. Amnesty International*, 568 U.S. 398, 410–14 (2013) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–63 (1992).

68. 140 S. Ct. 2183 (2020).

69. *Id.* at 2191.

70. *Id.*

71. *Id.* at 2194.

72. *Id.*

73. *Id.*; see also *Consumer Fin. Prot. Bureau v. Seila Law*, No. 8:17-cv-01081-JLS-JEM, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017).

74. *Seila Law*, 140 S. Ct. at 2197.

75. *Id.* at 2207 (Roberts, C.J., joined by Alito & Kavanaugh, JJ.).

bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction," and because "there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President," the Court held that the offending removal protection was severable.<sup>76</sup> The Court remanded the case for fact-finding as to whether a CFPB Director properly accountable to the President ratified the CFPB's investigative demand.<sup>77</sup>

A notable question that remains is the extent to which a litigant is entitled to backward-looking relief in this type of constitutional challenge to an agency's structure.<sup>78</sup> The Court will soon take up this prospective vs. backward-looking remedies issue.<sup>79</sup> In the meantime, questions of standing, traceability of injury, and incentives for litigants to bring separation-of-powers challenges remain unanswered.

For example, suppose a shareholder in Fannie Mae and Freddie Mac objects to the Federal Housing Finance Agency's directive that "Fannie and Freddie give the Treasury nearly all their net worth each quarter as a dividend."<sup>80</sup> Suppose further that the litigant has a colorable argument that the Federal Housing Finance Agency is unconstitutionally structured as an independent agency headed by a single director removable only for cause.<sup>81</sup> Our discontented litigant has every incentive to challenge the Agency's action by arguing that the Agency is unconstitutional as structured. But assuming the Agency violates separation-of-powers principles, can it fairly be said that the plaintiff's injury is traceable to the unconstitutional structure of the Agency? What about when the President—the one whose power is actually diminished by the removal protection at issue—approves of or sanctions the Agency's policy?<sup>82</sup> The en banc Fifth Circuit issued eight separate

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76. *Id.* at 2209; *see also id.* at 2245 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., concurring in the judgment with respect to severability and dissenting in part).

77. *Id.* at 2211 (Roberts, C.J., joined by Alito & Kavanaugh, JJ.).

78. *See id.* at 2208 n.12; *id.* at 2221 (Thomas, J., concurring in part and dissenting in part) ("[E]ven if the CFPB's ratification theory is valid, Seila still has an injury: It has been (and continues to be) subjected to enforcement of an investigative demand by [a Director] who remains statutorily insulated from removal." (quoting Reply Brief for Respondent at 7, *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7))).

79. Petition for Writ of Certiorari at \*i, *Collins v. Mnuchin*, No. 19-422, 2019 WL 4858934 (U.S. Sept. 25, 2019).

80. *Collins v. Mnuchin*, 938 F.3d 553, 563 (5th Cir. 2019) (en banc), *cert. granted*, No. 19-422, 2020 WL 3865249 (U.S. July 9, 2020).

81. *Id.* at 568.

82. The traceability requirement in this case splintered the Fifth Circuit. *See id.* at 586 ("The Shareholders' injury is traceable to the removal protection.");

opinions and took seventy-six pages to analyze all of the questions posed by *Collins v. Mnuchin*.<sup>83</sup>

*Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>84</sup> provides another noteworthy example of the Supreme Court's application of the severability doctrine in the administrative context. Congress created the Public Company Accounting Oversight Board (PCAOB) and vested it with authority to enforce the Sarbanes-Oxley Act.<sup>85</sup> Congress creatively protected PCAOB members with "dual for-cause"<sup>86</sup> limitations on removal—Board members could be removed only for good cause, and whether good cause exists was vested in the members of the Securities and Exchange Commission, rather than the President.<sup>87</sup> The Court held that this double insulation from the President's removal authority violated the Constitution's separation of powers.<sup>88</sup> The Court concluded that the Sarbanes-Oxley Act could still remain "fully operative as a law"<sup>89</sup> and that Congress would have preferred a Board with members removable at will to no Board at all.<sup>90</sup>

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*id.* at 621 (Costa, J., joined by Higginson, J., dissenting in part) ("[T]he Net Worth Sweep is not traceable to the for-cause limitation on the President's power to remove the FHFA Director."). In this case, the Fifth Circuit held that the FHFA was unconstitutionally structured and severed the FHFA Director's "for cause" removal protection. *Id.* at 595 (Haynes, J., joined by Stewart, C.J., Dennis, Owen, Southwick, Graves, Higginson, Costa & Duncan, JJ.). The court did not, however, set aside the Agency action that directly harmed the plaintiffs. *Id.* at 592–94.

83. The case produced two majority opinions and six separate opinions. *Id.* at 562 (Willett, J., joined by Jones, Smith, Owen, Elrod, Ho, Duncan, Engelhardt & Oldham, JJ.); *id.* at 591 (Haynes, J., joined by Stewart, C.J., Dennis, Owen, Southwick, Graves, Higginson, Costa & Duncan, JJ.); *id.* at 595 (Duncan, J., joined by Owen, J., concurring); *id.* at 596 (Oldham & Ho, JJ., concurring in part and dissenting in part); *id.* at 611 (Haynes, J., joined by Stewart, C.J., Dennis, Southwick, Graves, Higginson & Costa, JJ., dissenting in part); *id.* at 614 (Higginson, J., joined by Stewart, C.J., Dennis & Costa, JJ., dissenting in part); *id.* at 620 (Costa, J., joined by Higginson, J., dissenting in part); *id.* at 626 (Willett, J., joined by Jones, Smith, Elrod, Ho, Engelhardt & Oldham, JJ., dissenting in part).
84. 561 U.S. 477 (2010).
85. *Id.* at 484–85; *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.).
86. *Free Enter. Fund*, 561 U.S. at 492.
87. *Id.* at 495.
88. *Id.* at 492.
89. *Id.* at 509 (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)).
90. *See id.* (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

Consequently, the Court severed the for-cause protection, allowing Board members to be removed by Commissioners at will.<sup>91</sup>

These recent cases have all given substantial treatment to the severability doctrine in varying contexts. More are in the pipeline and will soon present new and difficult questions for the Supreme Court.<sup>92</sup> At bottom, Article III courts have time and again analyzed whether an offending provision of a statute can be severed from the remainder to leave the rest of the law intact.<sup>93</sup> It certainly cannot be said that severability analyses are “no more than a remnant of abandoned doctrine.”<sup>94</sup>

## II. SEVERABILITY DOCTRINE UNDER ATTACK

It is against this backdrop of consistent judicial practice and repeated historical application that the severability doctrine’s critics levy their attack. To be sure, severability cases are open to legitimate criticism that courts have improperly applied the doctrine, or have selectively applied the doctrine while driving cases to desired political outcomes.<sup>95</sup> But a new criticism has recently emerged—one that argues from first principles that the severability doctrine is illegitimate as an Article III function.

The primary contemporary attack on the doctrine, at least from the Supreme Court itself rather than from scholars, appears in *Murphy v. National Collegiate Athletic Association*.<sup>96</sup> Before delving into the Court’s treatment of the severability doctrine in this case, some background information on the merits is helpful.

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91. *Id.*

92. *See, e.g.,* Texas v. United States, 945 F.3d 355 (5th Cir. 2019) (addressing whether the zeroing out of the individual mandate’s tax penalty makes the entire ACA unconstitutional), *cert. granted sub nom.*, Texas v. California, 140 S. Ct. 1262 (2020) (No. 19-1019); *see also supra* notes 78–79 and accompanying text.

93. In addition to the examples provided in this section, see also, for example, *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318–19 (2016) and *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25, 36 (2014). Numerous additional examples abound.

94. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (discussing the Court’s considerations for when it is appropriate to create new rules by overruling prior cases). *See also* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) (setting forth Justice Kavanaugh’s view of stare decisis and reliance interests).

95. *See infra* Part III.B.

96. 138 S. Ct. 1461 (2018). What is essentially a restatement of the same argument appears in *Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2219–20 (2020) (Thomas J., concurring in part and dissenting in part).

In 1992 Congress passed the Professional and Amateur Sports Protection Act (PASPA).<sup>97</sup> Proponents of PASPA argued that the Act would protect college athletes and “safeguard the integrity of sports”<sup>98</sup> by making it “unlawful” for government entities—and private persons operating pursuant to the law of a government entity—to operate gambling schemes based on the outcome of sporting events.<sup>99</sup> “PASPA does not make sports gambling a federal crime . . . . Instead, PASPA allows the Attorney General, as well as professional amateur sports organizations, to bring civil actions to enjoin violations.”<sup>100</sup> To account for already-existing gambling operations, PASPA contained grandfather provisions for Las Vegas casinos and gave New Jersey the opportunity to legalize gambling in Atlantic City within one year of PASPA’s effective date.<sup>101</sup>

New Jersey passed a law authorizing sports gambling, but this was after the time frame allowed by PASPA.<sup>102</sup> Responding to a suit by the National Collegiate Athletic Association, New Jersey argued that Congress, by passing PASPA, unconstitutionally commandeered state legislatures and directed them to regulate according to federal dictates.<sup>103</sup> New Jersey lost in the first round of litigation<sup>104</sup> but then passed a new law which, instead of affirmatively authorizing new gambling schemes, purported to repeal any old prohibition on sports gambling that was on the books before PASPA.<sup>105</sup>

After a new suit ensued, the Supreme Court held that PASPA violated the anticommandeering principle because it impermissibly “dictates what a state legislature may and may not do.”<sup>106</sup> Congress may not command “state legislatures to enact or refrain from enacting state law.”<sup>107</sup> Having concluded that PASPA had an unconstitutional provision, the majority proceeded with a somewhat typical severability analysis. The Court concluded that Congress would not have intended

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97. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§ 3701–04).

98. *Murphy*, 138 S. Ct. at 1470.

99. 28 U.S.C. § 3702 (2018).

100. *Murphy*, 138 S. Ct. at 1470–71 (citing 28 U.S.C. § 3703 (2018)).

101. *Id.* at 1471 (citing 28 U.S.C. § 3704(a)(1)–(3) (2018)).

102. *Id.*

103. *See id.*; *see generally* New York v. United States, 505 U.S. 144 (1992) (applying the anticommandeering principle to federal legislation).

104. *Murphy*, 138 S. Ct. at 1471.

105. *Id.* at 1472.

106. *Id.* at 1478.

107. *Id.*

for the remainder of PASPA to stand absent the unconstitutional provision.<sup>108</sup> The majority held that severing the offending provisions from PASPA would result “in a scheme sharply different from what Congress contemplated when PASPA was enacted.”<sup>109</sup>

Justice Thomas wrote separately to “express [his] growing discomfort with [the Court’s] modern severability precedents.”<sup>110</sup> Justice Thomas concurred with the majority opinion because he agreed with the Court’s treatment of the severability question in this case, “and no party [had] asked [the Court] to apply a different test.”<sup>111</sup> That said, he raised several objections to the severability doctrine as a whole.

First, and as a threshold matter, Justice Thomas argued that severability cannot be properly considered a “remedy” for constitutional violations.<sup>112</sup> He contended that early American courts did not use severability because they “recognized that the judicial power is, fundamentally, the power to render judgments in *individual cases*.”<sup>113</sup> Thus, because courts have no power to promulgate abstract legal rules, a holding that a statute is unconstitutional as applied to a particular litigant should lead a court to “simply decline to enforce it in the case before them. . . . [T]here [is] no ‘next step’ in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder.”<sup>114</sup>

Second, and because of this institutional limitation, Justice Thomas argued that severability is not really a remedy but an “exercise in statutory interpretation.”<sup>115</sup> As Justice Thomas is a textualist who rejects inquiries into legislative intent, it is no surprise that he also rejects inquiries into Congress’s hypothetical intent.<sup>116</sup> And even if an inquiry into legislative intent were appropriate as an interpretive matter, Justice Thomas argued that “it seems unlikely that the enacting Congress has any intent on [what to do with the statute after a provision is held unconstitutional]; Congress typically does not pass

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108. *Id.* at 1482–83.

109. *Id.* at 1482.

110. *Murphy*, 138 S. Ct. at 1485 (Thomas, J. concurring).

111. *Id.*

112. *Id.* at 1486.

113. *Id.* at 1485 (emphasis added).

114. *Id.* at 1486 (citing Walsh, *supra* note 37, at 755–66); *see also* *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2219 (2020) (Thomas J., concurring in part and dissenting in part).

115. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring); *see also Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part).

116. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

statutes with the expectation that some part will later be deemed unconstitutional.”<sup>117</sup>

Finally, Justice Thomas argued that the severability doctrine leads the Court to make rulings that are “dangerously close” to “advisory opinions.”<sup>118</sup> Calling the doctrine “an unexplained exception to the normal rules of standing,”<sup>119</sup> Justice Thomas argued that litigants regularly call upon the Court to make constitutional pronouncements on provisions of a statute that a plaintiff does not have standing to challenge. “[T]he severability doctrine comes into play only *after* the court has resolved [the dispute regarding the challenged provision] . . . . In every other context, a plaintiff must demonstrate standing for each part of the statute that he wants to challenge.”<sup>120</sup>

In *Seila Law*, Justice Thomas again advanced his criticisms of the severability doctrine.<sup>121</sup> On top of the arguments already presented in *Murphy*, Justice Thomas raised one additional attack on the severability doctrine—he argued that the constitutional infirmity presented by the CFPB “results from, at a minimum, the combination of the removal provision, 12 U.S.C. § 5491(c)(3), and the provision allowing the CFPB to seek enforcement of a civil investigative demand, § 5562(e)(1).”<sup>122</sup> To Justice Thomas, this “convergence” problem means checkmate for the severability doctrine. “When confronted with two provisions that operate together to violate the Constitution, the text of the severability clause provides no guidance as to *which* provision should be severed. Thus, we must choose, based on something other than the severability clause, which provision to sever.”<sup>123</sup> In response to the Court’s assertion that “[i]f the Director were removable at will by the President, the constitutional violation would disappear,”<sup>124</sup> Justice Thomas asserted that “if the Director lacked executive authority under the statute to seek enforcement of a civil investigative demand, § 5562(e)(1), the constitutional violation in this case would also disappear. The [Court] thus *chooses* which of the provisions to sever.”<sup>125</sup>

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117. *Id.*

118. *Id.*; *see also Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part).

119. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

120. *Id.*

121. *See Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2219–24 (2020) (Thomas, J., concurring in part and dissenting in part).

122. *Id.* at 2223.

123. *Id.*

124. *Id.* at 2209 (Roberts, C.J., joined by Alito & Kavanaugh, JJ.).

125. *Id.* at 2224 (Thomas, J., concurring in part and dissenting in part).



Justice Thomas’s argument from first principles has found support in recent circuit court opinions. Judges Oldham and Ho recently echoed many of Justice Thomas’s critiques of the severability doctrine.<sup>126</sup> In *Collins v. Mnuchin*, Judges Oldham and Ho wrote separately to dissent from the majority’s remedial conclusion after the court held that the Federal Housing Finance Agency was unconstitutionally structured. By way of background, a majority of the en banc court held that the combination of “for cause” removal and the vesting of “full agency leadership” in the FHFA director violated the Constitution.<sup>127</sup> To remedy this violation, the Fifth Circuit severed the FHFA director’s “for cause” removal protection from the rest of the statute.<sup>128</sup>

Judges Oldham and Ho made two points in response to the court’s decision on remedies. First, they argued that the court’s remedy did not redress the plaintiffs’ injury, which was caused by the Net Worth Sweep.<sup>129</sup> Second, they took up Justice Thomas’s argument from *Murphy* and argued that severability is illegitimate as an Article III function.<sup>130</sup> Their first argument—which is a disagreement with using severability as a remedy on the facts of this particular case<sup>131</sup>—is more persuasive than their second, which is more analogous to a facial criticism of the severability doctrine writ large.

Judges Oldham and Ho began this section of their partial dissent with a citation to Justice Thomas’s concurrence in *Murphy* and an echoing of his audacious claim: “[W]e do not believe Article III of the Constitution permits us to ‘strike’ the FHFA Director’s for-cause protection from the statute.”<sup>132</sup> They criticized as imprecise the common vernacular of judicial review<sup>133</sup> and blamed Chief Justice Marshall’s

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126. *See Collins v. Mnuchin*, 938 F.3d 553, 608–11 (5th Cir. 2019) (en banc) (Oldham & Ho, JJ., concurring in part and dissenting in part), *cert. granted*, No. 19-422, 2020 WL 3865249 (U.S. July 9, 2020).

127. *Id.* at 591 (Willett, J., joined by Jones, Smith, Owen, Elrod, Ho, Duncan, Engelhardt & Oldham, JJ.).

128. *Id.* at 592.

129. *Id.* at 609–10 (Oldham & Ho, JJ., concurring in part and dissenting in part); *see also supra* text accompanying note 80 (explaining the Net Worth Sweep).

130. *Collins*, 938 F.3d at 610–11 (Oldham & Ho, JJ., concurring in part and dissenting in part).

131. They argued that severability in this case did not provide the plaintiffs with a remedy because the plaintiffs’ injury was caused by the Net Worth Sweep, not the unconstitutional structure of the FHFA. *Id.* at 609.

132. *Id.* at 610 (citation omitted). Of course, reasonable minds can differ about whether the court *should* sever. *See infra* notes 220–226 and accompanying text.

133. *Id.* at 611 (“[W]hen a court concludes that a statute is unconstitutional, it is not ‘striking down’ or ‘voiding’ or ‘invalidating’ the law. It is merely holding that the law may not be applied to the parties in the dispute.”).

decision in *Marbury v. Madison*<sup>134</sup> for “obscur[ing]” the history of Article III judicial power.<sup>135</sup> Finally, they insisted that “[o]ur Court should not add to the confusion about the judiciary’s limited powers by claiming to ‘sever’ a statute based on open-ended speculation about how Congress would have solved the separation-of-powers problem.”<sup>136</sup>

Litigants have paid attention and have followed suit. Though its argument was ultimately rejected by the Court, Seila Law relied on Justice Thomas’s *Murphy* opinion to argue “it is questionable whether the Court even has Article III power to invalidate statutory provisions under the guise of ‘severability’ . . . . It would seem to exceed [the bounds of judicial power under Article III] for a federal court to take an eraser to statutory provisions . . . .”<sup>137</sup> Seila Law cautiously hedged the “severability-is-illegitimate-under-Article-III” argument with a qualifier, cabining it to only cases where severability is unnecessary to provide a law’s challenger with complete relief.<sup>138</sup> But the message is clear that litigants may continue to press this line of argument, especially because there are now likely two votes on the Court to scrap severability.<sup>139</sup>

Before proceeding to defending the severability doctrine as a legitimate Article III function, it is important to acknowledge that courts indeed have been too willing to engage in severability analyses when severance does not grant a plaintiff relief.<sup>140</sup> To that extent, Judges Oldham and Ho’s first argument in *Collins* is not without merit.<sup>141</sup> One step further, the “convergence problem,”<sup>142</sup> properly understood, presents real challenges to severability analyses. But improper or overzealous use does not an illegitimate process make.

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134. 5 U.S. (1 Cranch) 137 (1803).

135. *Collins*, 938 F.3d at 611 (Oldham & Ho, JJ., concurring in part and dissenting in part).

136. *Id.*

137. Brief for Petitioner at 38, *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 6727093.

138. *Id.* Here, Seila Law asked the Court to set aside the agency action and end the CFPB’s enforcement proceeding against it. *Id.*

139. Justice Gorsuch signed on to Justice Thomas’s separate opinion in *Seila Law*, and later wrote his own partial concurrence to criticize the severability doctrine. See *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring in part and dissenting in part); *Barr v. Am. Ass’n Pol. Consultants*, 140 S. Ct. 2335, 2365–66 (2020) (Gorsuch, J., concurring in part and dissenting in part).

140. See *infra* Part IV.

141. See *supra* note 131.

142. For an introduction to the “convergence problem,” see *supra* notes 122–125 and accompanying text.

### III. DEFENDING SEVERABILITY

Though these attacks on the severability doctrine may appeal to reasonable contemporary textualist and formalistic instincts, they should not win the day, and the doctrine need not yield. This section defends the severability doctrine but also directly acknowledges courts' inconsistent and incorrect severability applications.

A. *Severability Doctrine's Legitimacy—Responding Directly to Justice Thomas in Murphy and Seila Law*

Courts can, and should, use severability analyses when the issue of what to do with an unconstitutional provision of a statute is properly before them. First, the criticisms of the severability doctrine start from a very faulty presumption—that legislatures do not plan for a court's pronouncement that a statute is unconstitutional. Second, counterfactual analyses are hardly unique to severability contexts; courts engage in counterfactual analyses all the time. Third, an attack on severability's vocabulary offers nothing new. Finally, the Supreme Court should consider governmental reliance and the degree to which Congress and state legislatures rely on the Court's long-settled severability doctrine precedents. There simply is no better alternative than to press forward with the severability doctrine and attempt to improve it rather than scrap it.<sup>143</sup>

Start with Justice Thomas's primary criticism of the severability doctrine in *Murphy*.<sup>144</sup> He argues that severability is not reliable as a doctrine because it requires "a nebulous inquiry into hypothetical congressional intent."<sup>145</sup> After all, "it seems unlikely that the enacting Congress had any intent" regarding a preference between a law with the unconstitutional provision excised and no law at all; "Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional."<sup>146</sup>

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143. See Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1477 (2018) (expressing reservations about using severability in separation-of-powers cases but conceding that it might be "the best alternative available" in such cases).

144. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring); see also *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2219–20 (2020) (Thomas J., concurring in part and dissenting in part).

145. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (quoting *United States v. Booker*, 543 U.S. 220, 320 n.7 (2005) (Thomas, J., dissenting in part)); *Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part).

146. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

But doesn't it? Is it farfetched to suppose that Congress may want to legislate right up to the constitutional line?<sup>147</sup> Moreover, isn't it plausible that Congress may want to *exceed* their constitutional authority as an invitation for the Court to draw a new line?

Justice Thomas cites articles by Professor Walsh<sup>148</sup> and former Acting Solicitor General Stern<sup>149</sup> for the proposition that Congress does not pass statutes with the expectation that they will later be deemed unconstitutional.<sup>150</sup> But both Walsh and Stern present their assertions as assumptions.<sup>151</sup> This is not a safe assumption. Indeed, separation-of-powers principles have long been described with reference to checking the ambitions of one branch of government and protecting each branch from the encroachment of another.<sup>152</sup> Why, then, would we assume that this context is different and that legislators intend to not encroach?<sup>153</sup>

What's more, severability clauses generally—and especially broad clauses such as the clause at issue in *Whole Women's Health v.*

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147. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2146 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

148. Walsh, *supra* note 37, at 740–41.

149. Stern, *supra* note 8, at 98.

150. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

151. Walsh hedges a bit by formulating his assertion as a possibility, whereas Stern expressly formulates his assertion as a presumption. See Walsh, *supra* note 37, at 740–41 (“Legislatures that enact partially unconstitutional laws may not foresee their constitutional flaws and may not articulate a preference about how to cure any constitutional flaws that they do foresee.”); Stern, *supra* note 8, at 98 (“[S]ince presumably the legislative body would not have enacted the statute in a form known to be invalid, would it have passed the law at all with the constitutional defects removed?”). It is important to note further that Stern is actually describing with approval the counterfactual formulation of the severability inquiry. *Id.* at 99.

152. “Ambition must be made to counteract ambition.” THE FEDERALIST NO. 51 (James Madison) (New York Packet, Feb. 18, 1788); see also Donald Applestein, *Why James Madison Thought Ambition Was a Good Thing*, NAT'L CONST. CTR. (Feb. 6, 2013), <https://constitutioncenter.org/blog/why-james-madison-thought-ambition-was-a-good-thing> [<https://perma.cc/EZR5-6DQG>].

153. Sometimes legislatures say the quiet part out loud. See Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Alabama Abortion Law Temporarily Blocked by Federal Judge*, WASH. POST (Oct. 29, 2019, 1:41 PM), <https://www.washingtonpost.com/health/2019/10/29/alabama-abortion-law-temporarily-blocked-by-federal-judge/> [<https://perma.cc/NU6B-SE6B>] (“The bill’s author, state Rep. Terri Collins, has said it was intended to serve as a direct challenge to *Roe v. Wade*.”); see generally 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, 700 (2008).

*Hellerstedt*<sup>154</sup>—provide further evidence that legislatures routinely make suppositions about federal courts’ possible constitutional pronouncements. These clauses explicitly instruct courts what to do with the rest of the law after the court holds that a provision is unconstitutional. In this day and age of “constitutional hardball”<sup>155</sup> it is simply unrealistic to presume that Congress does not legislate with the possibility in mind that a court may later deem their bill unconstitutional.

Setting aside the flawed premise upon which part of Justice Thomas’s critique of the severability doctrine rests, consider the broader implications of his anti-counterfactual position. To be sure, analyzing counterfactual scenarios is a difficult undertaking. But “[i]n law, as in the rest of life, we indulge, indeed, require, many speculations on what might have been.”<sup>156</sup> Courts regularly, for example, consider counter-factuals when determining causation and remedies in tort actions.<sup>157</sup> But-for causation requires a court to consider a counter-factual—what would the state of the world be had the defendant not acted (or failed to act)? Indeed, isn’t the application of the “reasonable person standard”<sup>158</sup> legal fiction, ubiquitous in first-year law school courses, an explicit call for counterfactual considerations?

Consider another example, this time exclusive to Article III courts—“*Erie* guesses.”<sup>159</sup> When sitting in diversity and state law provides the rule of decision, federal courts regularly need to predict

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154. 136 S. Ct. 2292 (2016). The Court described the severability clause in the case as follows:

The severability clause says that “every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provision [sic] in this Act, are severable from each other.” . . . [I]f “any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected.”

*Id.* at 2318–19 (quoting H.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013)). Nevertheless, the Court held that the law was inseverable, and struck down the abortion restrictions in their entirety. *Id.* at 2319–20.

155. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 531 (2004).

156. Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 342 (1992).

157. *Id.* at 345.

158. *Id.* at 346.

159. *See id.* at 347 n.38; *see also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

how a state court would resolve an issue if it were before them.<sup>160</sup> Again, this is a counterfactual analysis—after all, there is no state law settling the legal issue and the federal court is called upon to consider how the state court would rule in the hypothetical alternative universe in which the issue is presented to the state court.

More examples abound, but one additional is particularly appropriate here, as the Federal Rules of Criminal Procedure expressly call for it—“Harmless Error.”<sup>161</sup> When analyzing for harmless error, a court considers if the outcome of the trial would have been the same in the counterfactual hypothetical universe where the trial court did not err.<sup>162</sup> In other words, an appellate court faced with a trial court’s error must determine how the jury would have reacted had there been no error. This sounds very much like a routine severability determination once you substitute a legislature for a jury and a statute’s unconstitutional provision for a trial court’s error.

Turning to Judges Oldham and Ho’s criticism of the vocabulary used in severability analyses,<sup>163</sup> it is hard to understand why objecting to the use of “striking down,” “voiding,” or “invalidating” is an objection to the severability doctrine, rather than an objection to the whole idea of judicial review. Assuming that an argument to overturn *Marbury v. Madison* is not seriously on the table, the vocabulary attack does not add much to the severability conversation.<sup>164</sup> Besides, one can argue that it is better to construe severability as a judicial determination that the legislature did not have the constitutional authority to

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160. See Haley N. Schaffer & David F. Herr, *Why Guess? Erie Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010).

161. See Strassfeld, *supra* note 156, at 347 n.38; FED. R. CRIM. P. 52(a).

162. See *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946).

163. *Collins v. Mnuchin*, 938 F.3d 553, 610–11 (5th Cir. 2019) (en banc) (Oldham & Ho, JJ., concurring in part and dissenting in part), *cert. granted*, No. 19-422, 2020 WL 3865249 (U.S. July 9, 2020). See also *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas J., concurring in part and dissenting in part) (criticizing the Court’s “rhetoric” when discussing severance).

164. See *Barr v. Am. Ass’n Pol. Consultants*, 140 S. Ct. 2335, 2351 n.8 (2020) (Kavanaugh, J., joined by Roberts, C.J. & Alito, J.) (“The term ‘invalidate’ is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff . . . [T]he Court of course does not formally repeal the law from the U.S. Code . . .”).

enact the unconstitutional provision in the first place<sup>165</sup>—rather than a judicial “re-writ[ing]”<sup>166</sup> of the statute.

What remains of the criticism of this centuries-old doctrine, reaffirmed time and again, are attacks on a court’s use of legislative intent as a general matter,<sup>167</sup> comments on standing,<sup>168</sup> and the rare “convergence problem” in severability jurisprudence. As to the first, this Note does not seek to resolve the debate about the role of legislative intent generally in Article III jurisprudence,<sup>169</sup> but severability should not be singled out for special treatment—especially when legislatures often anchor their intent in text via severability clauses. The criticisms from standing, however, have more merit. That said, it may be best to consider the standing arguments as particularized against severability analyses in individual cases, rather than an attack on the doctrine as a whole.<sup>170</sup>

The “convergence problem” presents a difficult issue, but is not as ubiquitous as Justice Thomas argues.<sup>171</sup> Contrary to Justice Thomas’s assertions, the “convergence problem” is really not even applicable in *Seila Law*. Of course, the Director’s executive authority to seek the “enforcement of a civil investigative demand” is a necessary predicate for the legal dispute in the case—without the investigative demand the parties would not be in court litigating.<sup>172</sup> This executive authority is necessary *but not sufficient* to create the constitutional problem.<sup>173</sup> The

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165. *See* *Chi., Indianapolis, & Louisville Ry. Co. v. Hackett*, 228 U.S. 559, 566 (1913) (“That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law.”).

166. *Collins*, 938 F.3d at 611 (Oldham & Ho, JJ., concurring in part and dissenting in part).

167. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1486–87 (2018) (Thomas, J., concurring).

168. *Id.* at 1487.

169. Justices Breyer and Scalia provide an excellent survey of each side of this debate. *See generally* STEPHEN BREYER, ACTIVE LIBERTY 85–101; ANTONIN SCALIA, A MATTER OF INTERPRETATION 23–40 (Amy Gutmann ed., 1997).

170. For more on standing, see *infra* Part IV.

171. For a discussion on Justice Thomas’s raising of the “convergence problem” in *Seila Law*, see *supra* notes 122–125 and accompanying text. The “convergence problem” presents difficulties when two or more provisions of a law, or multiple laws, combine to create a constitutional violation *and* each provision, standing alone, is constitutional. For an example, see *infra* notes 200–213 and accompanying text.

172. *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2224 (2020) (Thomas, J., concurring in part and dissenting in part).

173. Many other actors within the executive branch have the exact same authority to petition a court for enforcement of a civil investigative demand

real constitutional infirmity is caused by the Director's insulation from presidential oversight.<sup>174</sup> True enough, every factual predicate that is necessary to the litigants being in court may be understood to help "cause" the constitutional problem—but without the impermissible removal restriction, none of these other factual predicates are constitutionally problematic. In a car accident, there can be an incalculable number of but-for, necessary-but-insufficient causes, including everything dating back to the plaintiff's birth. Where one provision of a law is *always* unconstitutional, like the CFPB Director's removal protection in *Seila Law*, the Court's severability options should be straightforward. Unless the constitutional infirmity truly arises from a convergence of provisions that standing alone are constitutional, framing a routine severability analysis as a "convergence problem" is a red herring.

Finally, a brief word on reliance: Severability is not an isolated precedent, but rather is an oft-applied jurisprudential doctrine.<sup>175</sup> To be sure, *stare decisis* carries less weight in constitutional cases.<sup>176</sup> But here, the *stare decisis* considerations do not attach to an individual case, but to an entire doctrine.<sup>177</sup> As such, the reliance interests are more entrenched here as compared to when the Court considers whether to overrule a single case or even a line of cases.<sup>178</sup> And it is clear that legislatures rely—their regular inclusion of severability clauses evidence it.<sup>179</sup> It is important to consider how drastic a departure scrapping the entire doctrine of severability would be.<sup>180</sup>

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without a constitutional problem. *See* 15 U.S.C. § 57b-1(e) (2018) (FTC's authority); 31 U.S.C. § 3733(j)(1) (2018) (Attorney General's authority).

174. *Seila Law*, 140 S. Ct. at 2207.

175. *See supra* Part I.

176. *E.g.*, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

177. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (noting in an analogous administrative law context that asking the Court to overrule "not a single case, but a 'long line of precedents'" can introduce severe instability into "many areas of law, all in one blow").

178. The Court has recognized legislative reliance as an important consideration. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006); *see also* Alexander Lazaro Mills, *Reliance by Whom: The False Promise of Societal Reliance in Stare Decisis Analysis*, 92 N.Y.U. L. REV. 2094, 2103 (2017). Severability implicates what Mills calls "governmental reliance" and "doctrinal reliance." *See id.* at 2103–04.

179. *See supra* notes 37–39 and accompanying text.

180. Chief Justice Roberts's opinion in *Seila Law* recognized Congress's reliance interest in the Court's severability jurisprudence. *See Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (Roberts, C.J., joined by Alito & Kavanaugh, JJ.) (noting that Congress "enacted Dodd-Frank against the background of our established severability doctrine").



*B. Addressing Courts' Inconsistent Application of Severability*

Make no mistake: to defend severability as a legitimate jurisprudential doctrine is not to defend courts' use of the severability doctrine in all cases. The larger point is that just because courts get it wrong does not mean that the severability doctrine is indefensible. Though by no means a comprehensive account, this section will offer for analysis some high-profile improper applications of the doctrine.

One way that courts can get the severability analysis wrong is by improperly applying existing severability principles to the case before them. *Texas v. United States*<sup>181</sup> is such a case.

In *Texas*, the plaintiffs presented a novel challenge to the Affordable Care Act. In short, “the Plaintiffs allege[d] that, following passage of the Tax Cuts and Jobs Act of 2017 (TCJA), the Individual Mandate in the Patient Protection and Affordable Care Act (ACA) [was] unconstitutional.”<sup>182</sup> Because Congress eliminated the individual-mandate tax, so the plaintiffs argued, the individual mandate was no longer a constitutional exercise of Congress’s power to tax.<sup>183</sup> Moreover, they argued that the individual mandate was inseverable from the rest of the ACA and therefore urged the court to strike down as unconstitutional the entire act.<sup>184</sup> The court agreed.<sup>185</sup> The court held that the 2010 Congress that passed the ACA “expressed through plain text an unambiguous intent that the Individual Mandate not be severed from the ACA.”<sup>186</sup>

The court’s application of severability was roundly criticized by the academy.<sup>187</sup> Critics from both the “left” and the “right” agree—

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181. 340 F. Supp. 3d 579 (N.D. Tex. 2018), *aff’d in part*, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom.*, *Texas v. California*, No. 19-1019, 2020 WL 981805 (U.S. Mar. 2, 2020).

182. *Id.* at 585.

183. *Id.*

184. *Id.*

185. *Id.* at 598, 610.

186. *Id.* at 607.

187. *See, e.g.*, Brief of Amici Curiae Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, and Ilya Somin in Support of Intervenors-Defendants-Appellants at 1, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011); Leah Litman, *Supreme Court to Review Obamacare Ruling That Was a Sick Joke*, NBC NEWS: THINK (Dec. 19, 2019, 12:59 PM), <https://www.nbcnews.com/think/opinion/obamacare-ruling-voiding-part-health-care-law-joke-s-really-ncna1104976> [<https://perma.cc/2G5B-NZJ3>]; Erin Hawley, *What Right and Left Get Wrong About the Court Challenge to Obamacare’s Insurance Mandate*, THE FEDERALIST, <https://thefederalist.com/2019/07/15/right-left-get-wrong-court-challenge-obamacares-insurance-mandate/> [<https://perma.cc/EZ5N-6SRA>] (last visited Mar. 16, 2020).

Congress did not want to repeal the ACA by implication and intended an ACA that operates with an individual-mandate penalty of zero.<sup>188</sup>

To show that improper application of severability principles does not only apply to one side of the political spectrum, consider *Whole Women's Health v. Hellerstedt*.<sup>189</sup> In *Whole Women's Health*, the Supreme Court struck down as unconstitutional a Texas law that unduly burdened the right to abortion.<sup>190</sup> The law at issue contained the broadest imaginable severability clause.<sup>191</sup> But the majority opinion devoted a mere four paragraphs to explaining why the severability clause should not save the rest of the Texas law from its unconstitutional provisions.<sup>192</sup> Justice Breyer wrote that the severability clause does not save the Texas law because “[t]he provisions are unconstitutional on their face: Including a severability provision in the law does not change that conclusion.”<sup>193</sup>

This “facially-unconstitutional” language may be right to the extent that the severability clause tried to insulate constitutional applications of the law from unconstitutional applications.<sup>194</sup> And the majority opinion is probably correct that the admitting-privileges requirement cannot be severed case by case as it is an unconstitutionally undue burden in all applications. But the Texas bill also required abortion facilities to comply with surgical-center requirements, sweeping facilities into a comprehensive legislative scheme.<sup>195</sup> Justice Alito’s dissent is probably correct when it notes that the severability provision “indisputably requires that all surgical center regulations that are not themselves unconstitutional be left standing.”<sup>196</sup> There simply is no compelling reason why the Court could not employ severability to strike down regulations that pose an unconstitutional burden on the right to abortion while at the same time respecting the Texas legislature’s clearly expressed intentions to leave constitutional provisions of the law in place.<sup>197</sup>

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188. Brief of Amici Curiae Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, & Ilya Somin in Support of Intervenors-Defendants-Appellants, *supra* note 187, at 10–12; *see also* Litman, *supra* note 187; Hawley, *supra* note 187.

189. 136 S. Ct. 2292 (2016).

190. *Id.* at 2310–18.

191. *Id.* at 2318–19; *see supra* note 154.

192. *Whole Women's Health*, 136 S. Ct. at 2318–20.

193. *Id.* at 2319.

194. *See id.*

195. *See id.* at 2351 (Alito, J., dissenting).

196. *Id.*

197. Justice Alito accuses the majority of not honoring the severability provision simply because “doing so would be too burdensome.” *Id.* To be fair, the

Though perhaps reaching the wrong severability outcome, the *Whole Women's Health* majority was undoubtedly correct to be concerned about legislating from the bench.<sup>198</sup> Severability has at times been used to fundamentally change a statutory scheme.<sup>199</sup> Courts that confront severability analyses should guard against this possibility. *United States v. Booker* provides one such example, and is also the archetype “convergence problem.”<sup>200</sup>

In *Booker*, the Court considered whether the Sixth Amendment is violated when a judge enhances a criminal defendant's sentence based on the judge's determination of a fact that was not found by the jury.<sup>201</sup> Further complicating the constitutional question was that the Sentencing Reform Act made Federal Sentencing Guidelines mandatory.<sup>202</sup> For *Booker* this meant a sentence “almost [ten] years longer” than he would have received based solely on jury-determined facts.<sup>203</sup> The Court held that the confluence of the Sentencing Reform Act and the Sentencing Guidelines violated *Booker*'s Sixth Amendment rights.<sup>204</sup>

A separate majority of the Court then took up the issue of severability in the remedial context. The Court used severability to change the Sentencing Guidelines from a mandatory to an advisory scheme.<sup>205</sup>

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majority's opinion was a bit more nuanced, as the majority strove to not “devise a judicial remedy that . . . entail[s] quintessentially legislative work.” *Id.* at 2319 (majority opinion) (alterations in original) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)). But consider the ramifications of this argument. Suppose a law subjects a business to ten regulations, eight of which are constitutional. This is a rudimentary example, but it is hard to understand why a court is impermissibly legislating when it holds that the business may properly be subjected to the eight constitutional regulations and therefore severs the two unconstitutional provisions. This is not a case that entails a fundamental change in a statutory scheme, or even a “convergence problem.” To be sure, legislating from the bench can be a valid concern in the severability context. *See infra* notes 205–213 and accompanying text. But this hypothetical, in which a court goes through in a binary fashion either exempting as unconstitutional or applying as constitutional a regulation, is not a case where a court's severability decision is fundamentally changing a statutory scheme.

198. *See Whole Women's Health*, 136 S. Ct. at 2319.

199. *See* Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 737 (2017).

200. 543 U.S. 220 (2005).

201. *Id.* at 229 n.1 (Stevens, J., joined by Scalia, Souter, Thomas & Ginsburg, JJ.).

202. *Id.* at 233; *see also* Lea, *supra* note 199, at 777.

203. *Booker*, 543 U.S. at 235.

204. *Id.* at 226–27; *see also* Lea, *supra* note 199, at 778.

205. *Booker*, 543 U.S. at 245 (Breyer, J., joined by Rehnquist, C.J., O'Connor, Kennedy & Ginsburg, JJ.).

Justice Breyer’s opinion considered the remedial decision in *Booker* as a choice between two alternatives: either “engraft” the Sixth Amendment’s jury-trial requirement onto the guidelines and prohibit trial courts from increasing a sentence based on facts that were not found by a jury,<sup>206</sup> or “make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct . . . .”<sup>207</sup> The Court concluded that Congress would have preferred no act at all over a scheme that required jury fact finding for enhancements and that Congress would prefer an advisory scheme to no scheme at all.<sup>208</sup>

But this is an aggressive application of severability that probably transgressed the Court’s Article III powers. As Justice Stevens noted in dissent, the Court’s remedy for the “convergence problem” was not to sever any unconstitutional provision.<sup>209</sup> Indeed, the Court’s severability analysis here is best understood as creating “entirely new law.”<sup>210</sup> The constitutional infirmity in the case was created by a convergence of statutes, each of which is perfectly constitutional standing apart.<sup>211</sup> Thus, the severability analysis in this case cannot rely on the “void ab initio” line of thought<sup>212</sup> where a court is merely pronouncing that Congress did not have the authority in the first place to enact an unconstitutional provision of a law. As an additional matter, Justice Stevens persuasively argued that Congress had already considered and rejected the scheme that functionally results from the Court’s purported use of severability.<sup>213</sup>

Simply put, and for multiple reasons, *Booker* represents an incoherent application of the Court’s severability doctrine.<sup>214</sup> Though

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206. *Id.* at 246.

207. *Id.*

208. *Id.* at 249.

209. *Id.* at 282 (Stevens, J., dissenting in part).

210. *Id.*

211. *Id.*; see also *id.* at 280–81. This true “convergence problem” in *Booker* should not be confused with the facts in *Seila Law*, contrary to Justice Thomas’s suggestion. See *supra* notes 171–174.

212. See *supra* notes 163–166 and accompanying text. Justice Stevens explained the point succinctly: “When a provision of a statute is unconstitutional, that provision is void . . . . Here, however, the provisions the majority has excised from the statute are perfectly valid . . . . [Thus,] the Court does not have the constitutional authority to invalidate [the statute].” *Booker*, 543 U.S. at 283 (Stevens, J., dissenting in part).

213. *Booker*, 543 U.S. at 291–98 (Stevens, J., dissenting in part).

214. Indeed, Justice Thomas seizes on the *Booker* example to highlight egregious applications of the Court’s severability doctrine. See *Seila Law v. Consumer*

by no means an exhaustive list, this section has made clear that courts have inconsistently applied severability principles.

#### IV. IMPROVING SEVERABILITY

What's left is a jurisprudential doctrine that is necessary for a workable system of judicial review<sup>215</sup> but is also subject to controversial applications and legitimate criticisms. Scholars have proposed various strategies to improve the doctrine and to guard against some of the inconsistent applications described in Part III of this Note. This Part explores some such strategies. There may not be an ideal solution, but the stakes are such that courts should continue to strive to improve the doctrine to the greatest extent possible—scrapping severability is simply not an option.

Sometimes courts should punt the question. Recall Judges Oldham and Ho's separate opinion from *Collins v. Mnuchin*.<sup>216</sup> Though their broad argument against severability is unavailing,<sup>217</sup> their argument against severability's application in the particular case is persuasive. The *Collins* plaintiffs sued because they were harmed by the "Net Worth Sweep."<sup>218</sup> The plaintiffs did not "complain about the possibility of future regulatory activity."<sup>219</sup> Yet the court granted a prospective remedy<sup>220</sup> and refused to set aside the agency action.<sup>221</sup> Applying severability rather than a backward-looking remedy in *Collins* thus meant that even though "the challenging part[y] won . . . the agency action[] that prompted them to bring [the case] at the outset remained unchanged by the supposedly favorable court decision."<sup>222</sup>

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Fin. Prot. Bureau, 140 S. Ct. 2183, 2223–24 (2020) (Thomas J. concurring in part and dissenting in part).

215. See *supra* note 15.

216. *Collins v. Mnuchin*, 938 F.3d 553, 596 (5th Cir. 2019) (en banc) (Oldham & Ho, JJ., concurring in part and dissenting in part), *cert. granted*, No. 19-563, 2020 WL 3865249 (U.S. July 9, 2020).

217. See *supra* note 130 and accompanying text.

218. *Collins*, 938 F.3d at 609 (Oldham & Ho, JJ., concurring in part and dissenting in part).

219. *Id.*

220. *Id.* at 563 (Willett, J., joined by Jones, Smith, Owen, Elrod, Ho, Duncan, Engelhardt & Oldham, JJ.).

221. *Id.* at 594–95 (Haynes, J., joined by Stewart, C.J., Dennis, Owen, Southwick, Graves, Higginson, Costa & Duncan, JJ.).

222. Hickman, *supra* note 143, at 1488 (discussing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 73–74 (D.C. Cir. 2009)).

To avoid this absurd result, courts should ensure that a plaintiff's injury in the case is both redressable by severing an offending provision and is fairly traceable to the unconstitutional provision to which the court applies the severability doctrine.<sup>223</sup> To be sure, this suggestion poses unique challenges in the administrative law context, where plaintiffs have incentives to bring any conceivable challenge to an agency that has acted in a manner that harms them. The obvious drawback to this proposal is that courts may face a choice: either set aside, case by case where appropriate, agency actions initiated by unconstitutionally structured agencies or require that an aggrieved plaintiff show that their injury is actually caused by the unconstitutional structure of the agency.<sup>224</sup> But when severability will result in administrative restructuring, courts should prudentially defer until the proper parties are before it.<sup>225</sup> This approach would also conform with the Court's long-held practice of constitutional avoidance.<sup>226</sup>

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(per curiam)). Lea defines this problem as a court's practice of issuing "gratuitous severability rulings." Lea, *supra* note 199, at 742.

223. Court-appointed amicus for the CFPB tried to press this argument in *Seila Law*. See Brief for Court-Appointed Amicus Curiae in Support of Judgment Below at 21–27, *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7), 2020 WL 353477. The Court rejected this argument because *Seila Law* "is the defendant and did not invoke the Court's jurisdiction." *Seila Law*, 140 S. Ct. at 2195. *Seila Law* "is compelled to comply with the civil investigative demand and to provide documents it would prefer to withhold, a concrete injury. That injury is traceable to the decision below and would be fully redressed if we were to reverse the judgment of the Court of Appeals . . ." *Id.* at 2196.
224. Ironically, this would also require a counterfactual analysis. Indeed, the Supreme Court has rejected this option as a standing requirement. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010). Revisiting this point as an "either-or" as proposed is preferable to scrapping the severability doctrine entirely. Alternatively, and significantly less likely, the Court could embrace "supplemental standing" when ruling on the severability of statutes. See generally Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. U. L. REV. 285 (2015).
225. See, e.g., *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926). This suggested approach is significantly less likely post-*Seila Law*. See *Seila Law*, 140 S. Ct. at 2196 ("While that is certainly one way to review a removal restriction, it is not the only way. Our precedents have long permitted private parties aggrieved by an official's exercise of executive power to challenge the official's authority to wield that power while insulated from removal by the President.").
226. *But see* Kavanaugh, *supra* note 147, at 2145–49 (arguing that the Court should abandon constitutional avoidance).

Next, courts should consider severability clauses as providing more than just a mere presumption of severability.<sup>227</sup> A court should regard a severability clause (or nonseverability clause) as dispositive to the greatest extent possible—unless, for example, the resulting scheme would be patently unconstitutional.<sup>228</sup> By deferring to legislatures' intentions that are “enshrined in a text,”<sup>229</sup> the court is guarded from the attack that it is legislating from the bench. To be sure, some severability clauses are “boilerplate” and perhaps are not discussed or deliberated before passing.<sup>230</sup> But that does not change the fact that severability clauses are law. At least where federal legislation is concerned, the clause has made “it through the constitutional process of bicameralism and presentment.”<sup>231</sup> And, as Chief Justice Roberts wrote in *Seila Law*, “boilerplate is boilerplate for a reason—because it offers tried-and-true language to ensure a precise and predictable result.”<sup>232</sup>

Justice Kavanaugh, when still a judge on the D.C. Circuit, came at the issue of how to improve severability with a different, but related, suggestion. In making his argument for more robust protection of narrow applications of severability, he wrote: “[C]ourts might institute a new default rule: sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in

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227. *See Barr v. Am. Ass'n Pol. Consultants*, 140 S. Ct. 2335, 2350 (2020) (Kavanaugh, J., joined by Roberts, C.J. & Alito, J.) (“The Court’s cases have instead developed a strong presumption of severability.”). Justice Thomas seems to agree that a “strong presumption” is insufficient or abnormal. *See Seila Law*, 140 S. Ct. at 2222 (Thomas, J., concurring in part and dissenting in part) (“Generally, when we interpret a statute, we do not hold that the text sets out a ‘presum[ption]’ that can be rebutted by looking to atextual evidence of legislative intent.”) (alteration in original). *See also* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 206 (1993) (“Moreover, the Court treats severability clauses as merely creating a presumption of severability and thus ignores the plain meaning of the clauses themselves.”).

228. Nagle argues that courts should defer to severability clauses unless this yields an absurd result or one that would defeat the purpose of the statute. Nagle, *supra* note 227 at 234. This is a good start, but may leave too much room for creative judging—hence the suggestion for a standard of patent unconstitutionality. But Nagle makes a persuasive argument, and reasonable minds can differ here. Most recently, Justice Kavanaugh has set forth the inquiry thusly: “At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause.” *Am. Ass'n Pol. Consultants*, 140 S. Ct. at 2349 (Kavanaugh, J., joined by Roberts, C.J. & Alito, J.).

229. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring).

230. *See Friedman*, *supra* note 37, at 910–11.

231. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

232. *Seila Law*, 140 S. Ct. at 2209 (2020) (Roberts, C.J., joined by Alito & Kavanaugh, JJ.).

the text of the statute.”<sup>233</sup> This default rule could stand in as a substitute for increased deference to severability clauses, but it does not carry the same weight as a default respect to text, bicameralism, and presentment. Nevertheless, what is important is that courts should take care to consistently apply whichever default rule they ultimately embrace.

Finally, and specifically in the context of “convergence problems,” a court has no business using severability to strike from a law provisions that are perfectly constitutional, as in *Booker*.<sup>234</sup> Courts must understand that severability is context-specific,<sup>235</sup> and should be used as a final resort before striking down an entire law as unconstitutional.

Though this Note does not purport to offer a solution for every conceivable improper application of the severability doctrine, it has sought to at least continue the conversation of how to improve it. This is vastly preferable to scrapping a centuries-old bedrock of our legal system.

### CONCLUSION

Severability is controversial. Moreover, the stakes are tremendously high.<sup>236</sup> Further complicating the controversy is that courts indisputably apply severability principles inconsistently—making the entire doctrine vulnerable to both reasonable and unreasonable criticisms. In arguing that severability is too important and well-established to be scrapped in its entirety, this Note has attempted to concede the reasonable and confront the unreasonable. On the one hand, arguments that the entire doctrine must be abandoned as a matter of first principles are unreasonable. But this does not save severability from reasonable, as-applied criticisms.

“Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute.”<sup>237</sup> Of course, courts would be wise to avoid gratuitous severability rulings; adopt robust deference to severability clauses; and avoid “severing” constitutional parts of laws as a remedial bandage for a constitutional injury

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233. Kavanaugh, *supra* note 147, at 2148. Then-Judge Kavanaugh also recognized the legislative reliance interests inherent in severability, noting that his proposal would have “the additional benefit of telling Congress what to expect.” *Id.*

234. *See supra* notes 205–213 and accompanying text.

235. *See* Lea, *supra* note 199, at 739.

236. *Id.* at 738.

237. *Barr v. Am. Ass’n Pol. Consultants*, 140 S. Ct. 2335, 2351 (2020) (Kavanaugh, J., joined by Roberts, C.J. & Alito, J.).



caused by a convergence of statutory provisions. And, to be sure, “there is no magic solution to severability that solves every conundrum . . . but the Court’s current approach . . . is constitutional, stable, predictable, and commonsensical.”<sup>238</sup> The message is clear to those that would argue that severability is illegitimate as an Article III function: it is best to let sleeping dogs lie.

*Gregory Hilbert*<sup>†</sup>

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238. *Id.* at 2356.

<sup>†</sup> J.D. Candidate, 2021, Case Western Reserve University School of Law; winner of the 2019–2020 *Case Western Reserve Law Review* Outstanding Student Note Award. I would like to thank Professor Emeritus Jonathan Entin, Professor Jonathan Adler, and Professor Cassandra Robertson for their invaluable guidance. I would also like to thank my wife, Heidi, and my mother, Maureen Swain, for their constant love and support.