Severability, Remedies, and Constitutional Adjudication

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Abstract

In several recent cases, the Supreme Court has described the issue of severability as one of remedy. The Court's reasoning seems to be that once a court has found that one provision or application of a statute is unconstitutional and invalid, it then must decide how much of the statute should be made inoperative through the application of the remedy of invalidation. Aspects of a statute that are constitutionally unobjectionable but inseverable should be made ineffective, while those that are severable should not be eliminated. On the basis of this reasoning, four Justices were prepared to hold that the entire Patient Protection and Affordable Care Act was inoperative because inseverable from unconstitutional components. Those Justices would have reached that conclusion even though no party before the Court had shown that it was burdened by any of the allegedly inseverable provisions. Understanding invalidation for inseverability as a remedy for unconstitutionality facilitated that departure from the Court's ordinary principles of standing, as it has facilitated departure from ordinary principles of constitutional avoidance. Invalidation, however, is a remedy only figuratively, not literally. The Constitution, not any judicial decree, produces invalidity. Severability analysis is statutory construction in light of a conclusion of unconstitutionality. It is not part of the law of remedies, and treating it as such can lead courts into error.

Table of Contents

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INTRODUCTION

> *"I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."*[1]

As Justice Scalia has also said, a court that does the right thing for the wrong reason eventually may find itself doing the wrong thing.[2] In a series of recent cases, the Supreme Court has described the severance of partially unconstitutional statutes as part of a remedy for constitutional violations, and the question of severability as a question of remedy.[3] In the first two cases using that formulation, *United States v.*

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1 James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (emphasis omitted).

2 In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Court "borrowed" the statute of limitations from the Clayton Act and applied it to the Racketeer Influenced and Corrupt Organizations Act, which contained no statute of limitations of its own. *Id.* at 156. In a concurring opinion, Justice Scalia argued that the idea of borrowing statutes of limitations was ill-conceived; it had arisen in a series of cases that were correctly decided, but in which the misleading rationale of borrowing developed. *Id.* at 157 (Scalia, J., concurring). The earlier cases involved the application of state statutes of limitations to federal statutes, not the application of a limitation period found in one federal statute to another. Justice Scalia argued that in those earlier cases the Court had developed the practice of applying state statutes of limitations to federal causes of action that lacked them "first for the right reason, then for the wrong one." *Id.* at 164–65. In his view, the right reason was that state statutes of limitations applied to federal causes of action unless Congress displaced them. *Id.* at 159–61. The wrong reason, which developed in later cases, was that state statutes of limitations were being "borrowed" pursuant to an implicit directive in the federal statute creating the cause of action. *Id.* at 164–65. That incorrect explanation, he maintained, was leading the Court astray in the case before it, which involved two federal statutes—a context in which borrowing was wholly inapposite. *Id.* at 158–59.

3 As explained below, strictly speaking, the federal sentencing statute at issue in one of those cases, *United States v. Booker*, 543 U.S. 220 (2005), was not partially unconstitutional. *See infra* Part I.A. Rather, the Court concluded that it could not be applied as written because another aspect of the federal sentencing system was unconstitutional, and the statute was drafted on the assumption that the other aspect would be operative. *Booker*, 543 U.S. at 248–49. *Booker*, like more conventional severability cases, is about reading a statutory provision in light of the unconstitutionality of a related unconstitutional provision. In most severability cases, the two provisions are in the same statute, so the courts speak of severance of the statute involved. Lines of nonseverance, however, can reach across enactments, as they did in *Booker*, with a constitutional problem in one enactment causing a court to conclude that part of another enactment is inoperative because it is inseverable. As that possibility shows, severability is about implicit conditionality: a provision that is inseverable from another is implicitly conditional on

Booker[4] and *Ayotte v. Planned Parenthood of Northern New England*,[5] nothing turned on it. In a third case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[6] that understanding of severability and severance may have led the Court to decide a constitutional question it properly could have avoided. Finally, in *National Federation of Independent Business v. Sebelius* ("*NFIB*"),[7] it probably led four, and perhaps seven, Justices to depart from ordinary principles governing standing. Most striking is that in *NFIB* Justices Scalia, Kennedy, Thomas, and Alito were prepared to hold that the entire health care reform statute was inseverable from the provisions they thought unconstitutional, even though no party before the Court had shown that it was subject to any of the supposedly inseverable provisions.[8]

Part I of this Article describes the cases in which the remedy-based view of severability developed. It fleshes out that view, according to which courts invalidate unconstitutional statutes to remedy their unconstitutionality and decide on severability in order to decide how much should be invalidated. It explains how that understanding may have led the Court to reach a result otherwise not consistent with ordinary principles of avoidance and standing in *Free Enterprise Fund*, and how it very likely led a number of Justices in *NFIB* to address severability questions that otherwise would have gone unconsidered due to lack of standing.

Part II argues that the explanation of severance discussed in Part I is inconsistent with basic principles of constitutional adjudication. According to those principles, courts do not, strictly speaking, invalidate or nullify statutory rules. They determine whether such rules are valid or invalid and then apply the law to the case before them. If an otherwise valid application or provision of a statute is alleged to be inseverable from an unconstitutional application or provision, a question of statutory interpretation arises. If a part of the statute at issue is held to be inseverable, the statute is not modified, but applied in light of the unconstitutionality of the other part. Invalidation, on grounds of unconstitutionality or inseverability, is not a remedy and

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the other. Enactments frequently interact with one another, so the conditionality the Court identified in *Booker* can easily arise.

4 United States v. Booker, 543 U.S. 220 (2005).

5 Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

6 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

7 Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

8 *Id.* at 2671 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

cannot support decisions that otherwise depart from principles of standing or avoidance.

Part III responds to a natural objection—that the conclusion of Part II rests on an unrealistic account of American judicial review. According to that argument, the function of the judiciary, especially the Supreme Court of the United States, is to resolve important legal questions, particularly constitutional questions. The assumption that courts resolve important legal questions only in order to decide cases should be relaxed when it obstructs that function. The limiting doctrines, however, rest on the opposite premise: as a matter of policy, courts should avoid resolving constitutional questions when they can, and, as a matter of jurisdiction, they may decide any legal question only when necessary to decide a claim of a party with standing. Part III also argues that even if the Supreme Court should operate on the assumption that it can invalidate statutes, because it can do so for practical purposes, lower courts should not, because they cannot. It gives as an example a recent case in which the D.C. Circuit was led badly astray by following the Supreme Court's lead from *Free Enterprise Fund*.

I. Severability as a Remedy in Recent Supreme Court Cases

In a number of recent cases, the Supreme Court has developed an account of severance as part of the remedy of invalidation, which courts use to respond to constitutional violations. The Court speaks as if a remedial decree can change the content of statutory law, making a previously operative provision inoperative for reasons of unconstitutionality or inseverability, just as a decree can change the content of a party's legal obligations, for example by imposing an obligation through an injunction.[9] According to this way of thinking, once a court has decided that part of a statute, or that part of a set of related provisions from different statutes, is unconstitutional and must be invalidated, questions of severability arise in administering the remedy of invalidation. Severability principles govern the scope of invalidation, with inseverable applications and provisions being nullified along with the unconstitutional applications or provisions from which they are inseverable.

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[9] I will argue in Part II that courts have no such power.

A. United States v. Booker

Booker involved a constitutional challenge to the federal sentencing process and a question of the meaning of the Sentencing Reform Act[10] in light of the resolution of that challenge. Booker was convicted by a jury, and the judge in his case then found additional facts under a preponderance of the evidence standard.[11] The judge sentenced Booker under the Federal Sentencing Guidelines, adopted by the U.S. Sentencing Commission pursuant to the Sentencing Reform Act and binding on sentencing judges.[12] Booker's sentence thus rested on both jury factfinding under the beyond a reasonable doubt standard and judicial factfinding under the preponderance of the evidence standard. The Court concluded that under *Apprendi v. New Jersey*[13] and subsequent cases, Booker's sentence had to be based exclusively on facts found by a jury beyond a reasonable doubt.[14] For that reason, Booker's sentence could not stand, and resentencing was required on remand.

By itself, that conclusion did not identify the sentencing process that was to be used once the case was remanded. The Court had not found that any part of the Sentencing Reform Act was unconstitutional; the Act did not prescribe the mode of factfinding for sentences under it, and so no provision in it ran afoul of the Court's principle limiting judicial findings of fact.[15] The Court's conclusion regarding the Sixth Amendment did, however, raise a classic question of the severability type: how should a statute be interpreted in light of the fact that it cannot operate as contemplated because of a constitutional difficulty? In most severability problems, the statute itself is invalid, either in one or more of its applications or one or more of its provisions. But as *Booker* demonstrates, the same question can arise when a constitutional deficiency is found not in a statute itself, but in the larger legal scheme in which it operates. In *Booker*, the larger scheme was the federal sentencing process, of which the Sentencing Reform Act and the Sentencing Guidelines were a part, but only a part. In order to instruct the lower courts concerning the proceedings on remand, the Court had to decide how the Sentencing Guidelines should interact with its holding regarding the Sixth Amendment.

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10 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

11 United States v. Booker, 543 U.S. 220, 227 (2005).

12 *Id.*

13 Apprendi v. New Jersey, 530 U.S. 466 (2000).

14 *Booker*, 543 U.S. at 227–29.

15 *Id.* at 272–73 (Stevens, J., dissenting in part).

Justice Breyer answered that question, speaking for a majority of Justices that was different from the majority that had decided the Sixth Amendment issue. He explained that although the Constitution permits substantial judicial discretion in sentencing, it does not allow judicial factfinding in the application of mandatory sentencing rules contained in statutes or regulations.[16] As a result, judicial factfinding and the Sentencing Reform Act as written were together unconstitutional.[17] Factfinding by juries combined with mandatory guidelines would be constitutional, as would judicial factfinding combined with nonbinding, advisory guidelines.[18]

The Court in *Booker* thus had to decide which of those results the sentencing statute produced when read in light of the case's constitutional holding. Justice Breyer, for the Court, described that question as one of remedy:

> We here turn to the second question presented [by the government's petition for certiorari], a question that concerns the remedy. We must decide whether or to what extent, "as a matter of severability analysis," the Guidelines "as a whole" are "inapplicable . . . such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offence of conviction."[19]

The Court then undertook standard severability analysis under the guise of remedy. It looked to legislative intent to determine what kind of law Congress would have enacted in light of the constitutional holding.[20] The Court was left with two options and concluded that the

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16 "[T]oday's constitutional holding means that it is no longer possible to maintain the judicial factfinding that Congress thought would underpin the mandatory Guidelines system that it sought to create . . . ." *Booker*, 543 U.S. at 246–47. As his careful formulation recognizes, judicial factfinding was an assumption on which the Sentencing Reform Act rested, not a rule that it contained. Justice Breyer himself did not agree that the Constitution forbids the combination of judicial factfinding and mandatory guidelines, *id.* at 326 (Breyer, J., dissenting in part), but he applied that principle when he spoke for the Court as to severability, *id.* at 246 (majority opinion).

17 *Id.* at 245.

18 *Id.* at 246 (describing two possible responses to the Court's holding that judicial factfinding and mandatory guidelines were together unconstitutional).

19 *Id.* at 245 (quoting Petition for Writ of Certiorari at I, *Booker*, 543 U.S. 246 (No. 04-104)).

20 *Id.* at 246 ("We answer the remedial question by looking to legislative intent. We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding. In this instance, we must determine which of the two following remedial approaches is the more compatible with the Legislature's intent as embodied in the 1984 Sentencing Act." (citations omitted)).

correct approach was one that would "make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct."[21] Implementing that approach required "severance and excision."[22] The Court then turned "to the question of *which* portions of the sentencing statute we must sever and excise as inconsistent with the Court's constitutional requirement."[23] The Court concluded:

> [W]e must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range.[24]

With respect to Booker, the Court concluded that his sentence, imposed under the statute as written, violated the Sixth Amendment.[25] It therefore affirmed the court of appeals's judgment reversing the district court and remanded.[26]

The Court referred repeatedly to severance as a remedy and described it as a process of excision.[27] The Court may have meant to use those terms literally, regarding severance as a remedy in the sense that an injunction or a damages judgment is a remedy—a change in legal relations brought about by judicial decree.[28] A typical lawsuit has

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21 *Id.*

22 *Id.*

23 *Id.* at 258.

24 *Id.* at 259 (citations omitted).

25 *Id.* at 267.

26 *Id.* ("On remand, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Court of Appeals for review, the Court of Appeals should apply the review standards set forth in this opinion.").

27 *See*, *e.g.*, *id.* at 246 (adopting severance and excision as the remedy for the unconstitutional application of the statute).

28 In their profound treatment of fundamental legal concepts, Hart and Sacks distinguished between primary law and remedial law. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 122 (1994). A primary legal arrangement "contemplates something which it expects or hopes to happen when the arrangement works successfully." *Id.* Those expectations or hopes will not always be realized, so "[e]very arrangement, however, must contemplate also the possibility that on occasion its directions will not be complied with." *Id.* The provisions that deal with noncompliance are the remedial provisions. *Id.* Having described primary duties as obligations with respect to conduct, *id.* at 130–34, Hart and Sacks discussed remedial legal positions and explained that "[c]ommonly, the judgment of a tribunal of authoritative application, if it is favorable to the complainant, will be accompanied by the settlement of an *adjudicated remedial duty* on the part of the defendant," *id.* at 138. An adjudicated remedial duty is thus an obligation imposed on the defendant by the court's decree and not by the primary legal

three stages. First, the court may be required to identify and resolve any lack of clarity in the applicable legal rules.[29] In a patent suit, for example, the court may have to construe the patent statutes.[30] Second, the court must apply those abstract rules to the facts of the case before it.[31] For instance, it may have to determine whether the conduct in which the defendant is likely to engage constitutes an infringement of the plaintiff's patent.[32] If the answer to that question is yes, the court then must look to a distinct body of legal norms to decide on the remedy that the plaintiff should be given.[33] Often, as in some patent cases, a crucial question under the law of remedies is whether to issue an injunction against future violations or to deny an injunction and leave the plaintiff to collect compensatory damages in the future.[34] If the court issues the injunction, it thereby changes the legal positions of the parties, imposing new duties on the defendant and giving the plaintiff a new right to enforce those duties.[35] If a court grants damages, it creates a new obligation to pay the amount specified in the judgment and a new right to receive and, if necessary, collect that amount.

The Court in *Booker* may have meant that severance is a remedy like an injunction: a change in legal relations that is guided by both the primary legal rules applicable in the case and another body of rules distinctive to the problem of responding to breaches of the primary rules. According to this way of thinking, an unconstitutional legal rule is the breach or violation. The remedy is invalidation, and the decision whether and how to sever a statute is part of that remedy: severance produces less invalidity, nonseverance produces more. Once the court has determined to apply the remedy of invalidation,

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rules themselves. The decree therefore brings about a change in legal positions. As Hart and Sacks note, declaratory remedies do not establish adjudicated remedial duties. *Id.* They conclusively resolve disputes about existing legal relations.

29 In *Booker*, for example, Justice Breyer began his opinion on severability by quoting the government's question presented in its petition for certiorari, "[w]hether the Sixth Amendment is violated" by the statute as written, and he explained that the Court, in Justice Stevens's opinion on the constitutional issue, "answers this question in the affirmative." *Booker*, 543 U.S. at 244–45.

30 *See*, *e.g.*, Bowman v. Monsanto Co., 133 S. Ct. 1761, 1766–67 (2013) (adumbrating the doctrine of patent exhaustion under the Patent Act).

31 *See*, *e.g.*, *id.*

32 *See*, *e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 390–91 (1996) (explaining that the construction of a patent claim is for the judge, not the jury).

33 *See*, *e.g.*, E-bay Inc. v. MercExchange, LLC, 547 U.S. 388, 394 (2006) (setting out standard for grant of injunction under remedy provisions of patent statutes).

34 *See id.*

35 Violating a federal court's injunction is a crime of contempt. 18 U.S.C. § 402 (2012).

severability principles govern its scope. If this way of speaking is taken literally, the remedy of invalidation (and any accompanying nonseverance) differs from most remedies in that it operates on the legal rules in general, and not just the legal relations of the parties before the court.[36]

Nothing in the decision in *Booker* requires this reading of the Court's language. It is also possible that the Court analogized severance and severability analysis to remedies and the law of remedies without meaning to say that severance actually is a remedy or that severability doctrine is part of the law of remedies. As *Booker* emphasizes, severability is determined by an inquiry into statutory meaning.[37] That inquiry is statutory construction in light of a contingency. It is part of the process of interpreting the applicable legal rules in the abstract, a process that comes prior to the rules' application to the parties, which in turn comes prior to a formulation of a remedy.

The actual remedy in *Booker* was not invalidation of judicial factfinding and severance of the sentencing statute. It was the vacation of Booker's sentence and a remand with instructions to the lower courts as to how to proceed.[38] In *Booker*, those instructions included both a direction to the district court that the Sentencing Guidelines were advisory and a direction to the court of appeals concerning its review of the district court's new sentence.[39] In order to give those instructions on remand, the Court had to determine the meaning of the Sentencing Reform Act in light of its constitutional holding regarding judicial factfinding in sentencing.[40]

The Court thus could have reached the same result in *Booker* had it described severability as an inquiry into the meaning of a statute in light of a conclusion about constitutionality. If the Court's formulation is taken literally, however, it was a seed of doctrinal development, or perhaps even a loaded weapon in Justice Jackson's terms describing dangerous precedents.[41]

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36 I argue below that such a remedy would be a major innovation in the American constitutional system. *See infra* Part II.

37 United States v. Booker, 543 U.S. 220, 247 (2005).

38 *Id.* at 267.

39 *Id.*

40 *Id.* at 265–67.

41 Once a judicial decision approves a course of official conduct, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

B. Ayotte v. Planned Parenthood of Northern New England

Ayotte involved New Hampshire's statute regulating abortions for minors. Most of the statute's applications were consistent with the Court's doctrine.[42] It was unconstitutional in some of its applications, however, because its judicial bypass provision was inadequate under the Court's cases.[43] Planned Parenthood of Northern New England, an abortion provider subject to the law in all of its applications, and a physician similarly regulated by the statute, sought an injunction directing Attorney General Ayotte not to enforce the statute against them.[44] The district court concluded that the statute was wholly unenforceable and entered the injunction that the plaintiffs requested, and the First Circuit affirmed.[45]

The Supreme Court determined that some unconstitutional applications did not make the entire statute unconstitutional.[46] Rather, the Constitution would permit enforcement of the permissible applications.[47] That conclusion did not mean that those parts of the statute should be enforceable against the plaintiffs, however, because of the separate question of severability. The New Hampshire statute may have made the constitutional applications conditional on the availability of the unconstitutional applications.[48] Because the district court had not addressed the question of statutory construction, the Supreme Court remanded the case so that that issue could be resolved.[49]

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42 The New Hampshire statute did not authorize physicians to perform abortions in a medical emergency unless the physician had notified the minor's parents or obtained a court order through the judicial bypass process. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 324 (2006). The Court concluded that the statute therefore was unconstitutional in part because an immediate abortion is necessary for health reasons "[i]n some very small percentage of cases," and the judicial bypass process would not enable those abortions "in all emergencies." *Id.* at 328.

43 *Id.* at 326–28.

44 *Id.* at 324–25.

45 *Id.* at 325.

46 *Id.* at 331.

47 "[W]e agree with New Hampshire that the lower courts need not have invalidated the law wholesale. . . . Only a few applications of New Hampshire's parental notification statute would present a constitutional problem." *Id.* at 331.

48 Immediately after saying that only a few applications of the statute would present a constitutional problem, the Court continued: "So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." *Id.* An inquiry into legislative intent was necessary, because there was "some dispute as to whether New Hampshire's legislature intended the statute to be susceptible to such a remedy." *Id.*

49 *Id.* at 332.

As in *Booker*, the Court characterized the question of severability as one of remedy in a way that can be read literally. After reviewing the substantive principles of its abortion doctrine, it began the next section of the opinion: "We turn to the question of remedy: When a statute restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief?"[50] That question was to be answered using severability analysis of the New Hampshire statute.[51] The Court noted that, "[a]fter finding an application or portion of a statute unconstitutional, we must next ask" the question of legislative intent.[52] "Would the legislature have preferred what is left of the statute [minus the unconstitutional applications] to no statute at all?"[53]—the central question of severability.

Issues of severability, when they arise, as a logical matter come after a court has determined that a provision or statute is partially invalid. That sequence by itself does not mean that severability is a matter of remedy, but only that if a statute or provision has no unconstitutional aspects, no question of severability arises. The Court's description of its decision process went beyond that and assimilated the question of severability to the secondary question of remedy, rather than the primary question of parties' rights and obligations.

Further, along those lines, the Court described findings of inseverability in remedial terms. The plaintiffs in *Ayotte* sought an injunction against the enforcement against them of any aspect of the statute.[54] Addressing that form of relief, and the possible scope of such an injunction, the Court explained: "We prefer, for example, to enjoin only the unconstitutional applications of a statute, while leaving other applications in force."[55] To refer to a preference suggests the exercise of remedial discretion.[56] The usual reason to enjoin en-

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50 *Id.* at 328.

51 *Id.* at 330.

52 *Id.*

53 *Id.*

54 *Id.* at 331.

55 *Id.* at 328–29.

56 The Court did not always draw a clear distinction between statutory rules that are void on their face even though some of their applications could be brought about by a different rule and rules that are completely inoperative because their permissible applications are inseverable from their impermissible applications as a matter of statutory construction. For example, the principle that courts do not rewrite statutes in order to save them is a principle of severability and hence statutory construction. As the Court has explained:

> [W]hile it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than

forcement of an application that is not itself unconstitutional is because it is inseverable from applications that the Constitution does not allow.

When the Court articulated a preference for enjoining only unconstitutional applications, it was referring to a remedy at least in a limited sense, because injunctions against enforcement are just that. The Court may, however, have understood the decree at issue as doing much more than that. Describing the lower court's broad injunction, it said, "the courts below chose the most blunt remedy—permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely."[57] The Court found that move "understandable, for we, too, have previously invalidated an abortion statute in its entirety because of the same constitutional flaw."[58] But the lower courts apparently should have done what the Supreme Court says, not what it does. The Court concluded that the district court and the First Circuit had gone too far: "In the case that is before us, however, we agree with New Hampshire that the lower courts need not have invalidated the law wholesale."[59]

As with severance and excision in *Booker*, the Court in *Ayotte* may have meant by invalidation that judicial decrees can cause statutory rules that previously had the force of law to lose that force. Such decrees would be remedies—changes in legal positions imposed by courts—and not descriptions of what the courts had found in the pro-

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> they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

Trade-Mark Cases, 100 U.S. 82, 98 (1879).

The Court in *Ayotte* gave as an example of that principle *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988). *Ayotte*, 546 U.S. at 328. The question in *American Booksellers Ass'n* was whether Virginia's statute that regulated bookstores in order to protect minors banned so many books that it was entirely void, even though some of the books subject to its prohibition could be kept from minors by a narrower rule. *Am. Booksellers Ass'n*, 484 U.S. at 396–97 (stating that broad statutes will be facially valid under the First Amendment if they are subject to a limiting construction). That is a classic problem of overbreadth. In order to determine the scope of the Virginia statute, the Court certified questions to the Supreme Court of Virginia concerning the statute's scope as a primary matter. *Id.* at 398. Invalidity on the basis of overbreadth can be described as a constitutionally mandated form of inseverability, so the confusion is understandable.

The Court also did not distinguish either of the situations in which a rule is completely inoperative from one in which a court grants an injunction against enforcement that is deliberately broader in scope than the unconstitutional aspects of the rule involved.

57 *Ayotte*, 546 U.S. at 330.

58 *Id.* at 330–31. The Court then went on to discuss the case in which it had done so: *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Ayotte*, 546 U.S. at 330.

59 *Ayotte*, 546 U.S. at 331.

cess of identifying the primary legal positions of parties.[60] Following this logic, the remedy of invalidation can be applied for two reasons. First, courts invalidate applications and provisions of statutes because they are unconstitutional. Second, courts invalidate constitutional applications and provisions insofar as they are not severable from unconstitutional applications and provisions.[61]

The second application of the remedy of invalidation, according to this logic, is guided by principles of statutory construction, unlike the first. The court's task is to use its remedial authority to produce a new statute that is both constitutional—so that the wrong before it is remedied—and the statute that the legislature would have adopted had it known more about the constitutional rules. The Court in *Ayotte* also hinted that the legislature had to meet it half way: "we are wary of legislatures who would rely on our intervention" to trim back statutes, because the legislature should not be allowed to cast a very wide net and leave it to the courts to decide who may be prosecuted.[62]

As in *Booker*, the Court in *Ayotte* described the process of severance as if it were a matter of modifying the statute so that it would comply with the Constitution. The remedy of invalidation should be used carefully to "limit the solution to the problem."[63] When the problem is an unconstitutional statute, the solution is some degree of invalidation, but not more than necessary.[64]

Read this way, *Ayotte* fleshes out the understanding of severance as remedy first adumbrated in *Booker*. It too assumes that courts can make statutes inoperative and assimilates invalidation for reasons of inseverability to invalidation for reasons of unconstitutionality. Both are exercises of a remedial power by which a court changes the content of the law. And although the Court in neither case drew out the implication, the former reason for invalidation is predicated on the latter. That is, the remedy of invalidation on grounds of inseverability

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60 A decree that changes the content of statutory law would not be a declaratory remedy, because it would go beyond stating the existing content of the law. Whether it should be called a coercive remedy, as injunctions and damages judgments are coercive in contrast with declaratory judgments, is a more difficult question. A court that simply changes the law without creating new duties for the parties is not coercing anyone.

61 Strictly speaking in this mode, severance is not so much a remedy as the limit of a remedy: when an independently constitutional application or provision is severed from the unconstitutional parts, the remedy of invalidation is not applied to it. The question of severability is one of remedy in that severability principles determine how far the remedy of invalidation will go.

62 *Ayotte*, 546 U.S. at 330.

63 *Id.* at 328.

64 *Id.* at 329 ("[W]e try not to nullify more of a legislature's work than is necessary . . . .").

is available only when some of the statute is to be invalidated on grounds of unconstitutionality. Once the Constitution requires that some of a statute be made inoperative, principles of severability determine how much of it should be nullified. If and only if constitutional aspects of the statute are inseverable from unconstitutional aspects may they be invalidated.[65]

None of these assumptions about invalidation and severability is necessary to explain the Court's decision in *Ayotte*, and the opinion also points in another direction. The Court had before it an injunction forbidding Attorney General Ayotte from enforcing the New Hampshire statute against the plaintiffs.[66] It concluded that the injunction may have been too broad, because the statute included constitutional applications that may have been severable.[67] The Court remanded the case so that the lower courts could address severability as a matter of statutory interpretation.[68] The statute had a severability clause, so the lower courts could conclude that it meant, and had meant from the moment it was adopted, that any constitutional applications were operative even if other applications were ineffective because unconstitutional.[69] If the lower courts so concluded, they could decide that the unconstitutional applications had been void, and the constitutional applications operative, all along. The injunction against enforcement of the unconstitutional aspects would not make those aspects invalid, but would enforce the conclusion that they had always been so. On this account, invalidation, for reasons of either unconstitutionality or inseverability, is a figure of speech, not a literal truth.

Everything that happened in *Ayotte* can be explained on the assumption that the remedy involved was an injunction. Principles of severability were principles of remedies law only insofar as they hap-

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65 Professor David Gans embraces the reading of *Booker* and *Ayotte* that takes literally the idea that severance is a remedy applied by the courts rather than a way of talking about statutory meaning. David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 643 (2008). In his view, the severability doctrine "does not call for an act of statutory interpretation." *Id.* Rather, the doctrine "asks a remedial question" and "requires a court to decide whether to revise the statute by eliminating the offending clause or application . . . or invalidate the statute as a whole." *Id.* I will argue below that courts have no power to revise or wholly invalidate statutes, and therefore can grant no such remedy. *See infra* Part III.

66 The Court sometimes referred seemingly interchangeably to the injunction and the invalidation of the statute: "In this case, the courts below chose the most blunt remedy—permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely." *Ayotte*, 546 U.S. at 330.

67 *Id.* at 331.

68 *Id.*

69 *Id.* at 331.

pened to go into formulating an appropriate injunction. Their status is just the same as that of the constitutional principles that determined that some applications were unconstitutional, so that their enforcement should be forbidden. Every reference to invalidation could be replaced with a reference to a finding of invalidity without affecting the result.

C. Free Enterprise Fund v. Public Company Accounting Oversight Board

Free Enterprise Fund is different from *Booker* and *Ayotte* in that the characterization of severability as a remedial question, and of severance of a statute as a remedy that produces a new statute, may well have influenced the result and not just the opinion. The accounting firm of Beckstead and Watts was subject to regulation by the Public Company Accounting Oversight Board ("PCAOB"), an entity created by the Sarbanes-Oxley Act.[70] Beckstead and Watts, a member of the Free Enterprise Fund, joined with Free Enterprise Fund in a suit against the PCAOB, seeking an injunction against enforcement proceedings by the agency.[71]

The plaintiffs in *Free Enterprise Fund* claimed that the Sarbanes-Oxley Act was unconstitutional on a number of grounds, and that for that reason the agency had no power to regulate.[72] The Court agreed as to one of the grounds, but not as to the conclusion about the agency's power.[73] Under the statute, directors of the PCAOB were appointed by the Securities and Exchange Commission ("SEC") and could be removed by the SEC only for cause.[74] The Court assumed that SEC commissioners themselves may be removed by the President only for cause.[75] It concluded that the two layers of insulation from

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70 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–88 (2010); *see* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

71 *Free Enter. Fund*, 561 U.S. at 487–88.

72 *Id.*

73 *Id.* at 507–09.

74 *Id.* at 483–87.

75 *See id.* at 486–87. Whether the Court should have decided the case on the basis of the parties' agreement that the President may remove SEC commissioners only for cause has been a matter of controversy. Justice Breyer objected, pointing out that the statute governing the SEC does not protect the Commission's commissioners from removal and was adopted at a time when applicable Supreme Court precedent suggested that the Constitution gave the President power to remove executive officers freely. *Id.* at 544–47 (Breyer, J., dissenting). Professor Gary Lawson maintains that though Justice Breyer is correct as a matter of current practice, the majority's approach is correct in principle. Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1195 (2011).

presidential supervision that PCAOB directors enjoyed created too much insulation.[76] The statute as written therefore was unconstitutional.[77]

That conclusion raised a question the Court characterized as one of severability, though strictly speaking it may not have been one. An agency with the PCAOB's regulatory power could not be subject only to limited supervision by an agency that was itself subject only to limited supervision by the President. A wholly advisory agency so constituted would have been constitutional.[78] The statute thus had three features—power in the PCAOB, tenure protection for PCAOB directors, and tenure protection for SEC commissioners—that could not coexist. None of them was unconstitutional in isolation, which is why *Free Enterprise Fund* did not present a standard severability problem.[79] The case did, however, fall into the more general category in which a statute as written is unconstitutional and thus must be interpreted in order to identify the fallback arrangement it provides.[80]

The Court, using the principles of statutory interpretation that apply in ordinary severability cases, concluded that the congressional fallback solution retained the PCAOB's power but eliminated its directors' insulation.[81] It therefore did not order an injunction protecting Beckstead and Watts from PCAOB investigation and enforcement.[82] The Court instead directed the district court to enter a

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76 *Free Enter. Fund*, 561 U.S. at 501–07.

77 *See id.* at 507–08.

78 The Court found that the double-insulation arrangement gave the President too little control over the execution of the laws, *id.* at 497–500, which implies that the requirement of presidential control applies only to exercises of executive power. In a similar situation in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court distinguished between functions that may be performed only by officers of the United States appointed pursuant to the Appointments Clause and advisory and similar functions that may be performed by non-officers. *Free Enter. Fund*, 561 U.S. at 485–86, 506.

79 In an ordinary severability situation, one application or provision is unconstitutional standing alone, and the question is whether other applications or provisions are predicated on it and thus inoperative if it is. For example, in the leading severability case of *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), Alaska Airlines sought relief from substantive statutory requirements that were themselves constitutionally unobjectionable but that, it argued, were inseverable from an unconstitutional legislative veto provision. *Id.* at 682–83. In *Free Enterprise Fund*, however, the constitutional problem was with the whole, not with any of the parts separately. *Free Enter. Fund*, 561 U.S. at 508–11.

80 Professor Michael Dorf has explored the larger category, and the place of severability in it, in depth. Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303 (2007).

81 *Free Enter. Fund*, 561 U.S. at 508–10.

82 *Id.* at 513–14.

declaratory judgment stating that the PCAOB's directors' tenure protection was invalid.[83]

In light of its conclusion regarding severability, the Court's decision to resolve the constitutional issue at all requires explanation. A finding of severability is sometimes used to avoid addressing a constitutional objection. When the aspect of the statute that applies to the party before a court is itself constitutional, and is said to be inoperative only because inseverable from an unconstitutional aspect, a finding of severability pretermits the constitutional inquiry. With that in mind, the Court sometimes turns to severability first. If it finds that the provision that applies to the party is severable from the allegedly unconstitutional provision, it may avoid addressing the constitutional objection.[84]

The Court in *Free Enterprise Fund* thus might have identified the fallback arrangement first. Finding that the PCAOB has authority to regulate parties like Beckstead and Watts under that arrangement, it need not have considered the statute's constitutionality.

The Court simply may have decided not to avoid the constitutional question. The avoidance principle is one of prudence, not jurisdiction, and hence subject to discretionary application.[85] Perhaps more likely is that the Court thought it had given Beckstead and Watts relief, although not the full relief it had sought. The Court said that the plaintiffs should be given a declaratory judgment affirming the SEC's power to remove PCAOB directors at pleasure.[86] That declaration would describe the statute as it would operate in light of the Court's opinion.

A declaratory judgment along those lines cannot be entered without a determination of the constitutional question and differs from a simple denial of any relief. It differs as well from the result that would

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83 *Id.*

84 A classic example is *Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912). In that case, the Jackson Vinegar Company sought to recover a statutory penalty from the Yazoo Railroad, and the railroad argued that the statute providing for the penalty authorized arbitrary and unconstitutional exactions. *Id.* at 219. The Supreme Court rejected the argument, without deciding whether other possible applications were unconstitutional. *Id.* "How the state court may apply [the statute] to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now." *Id.* at 220.

85 Justice Brandeis, in his highly influential formulation of the avoidance doctrines, explained that the Court devised them "for its own governance in the cases confessedly within its jurisdiction." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

86 *Free Enter. Fund*, 561 U.S. at 513–14.

be reached if the statute as written were constitutional, so the constitutional question cannot be avoided by deciding severability first—that strategy works only when the severability analysis produces the same result for the parties that they would obtain if the statute were constitutional. The Court's declaratory judgment in *Free Enterprise Fund*, however, has its own problem under current standing doctrine.

Unlike the practice of avoiding unnecessary constitutional questions, standing is a jurisdictional requirement in the Court's view. One component of standing is causation: a plaintiff is entitled to a decree only if the decree is sufficiently likely to redress the plaintiff's injury in fact.[87] In assessing causation, the Court has been especially skeptical of multistep chains involving the responses of third parties.[88]

Under those principles, it is quite doubtful whether the plaintiffs in *Free Enterprise Fund* had standing to seek the decree that the Court said should be entered. Their standing to request an injunction against enforcement was clear, but the Court denied them that relief. Instead, it told the district court to enter the declaratory judgment just described.[89] Whether that decree satisfied the Declaratory Judgment Act[90] is itself doubtful, but even if it did, its connection to the plaintiffs' injury was tenuous.[91] Beckstead and Watts were burdened by having to comply with PCAOB regulations. They did not allege, and there is no reason to believe, that the PCAOB Directors would treat them more favorably once told about the SEC's removal power. The Directors might reasonably believe that the probability of removal was remote in any event, and regulatory decisions contrary to Beck-

87 *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining that to establish constitutional standing, a plaintiff must show injury in fact, causation—which consists of traceability of the plaintiff's injury to the defendant's conduct—and redressability of that injury by the court's decree).

88 *Id.* at 562 (reasoning that showing standing is more difficult when redress of the plaintiff's injury depends on the responses of third parties, not just the defendant).

89 *See supra* note 86 and accompanying text.

90 Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 (2012).

91 The Declaratory Judgment Act authorizes the federal courts "[i]n a case of actual controversy within its jurisdiction" to "declare the rights and other legal relations of any interested party seeking such declaration." *Id.* § 2201(a). The Court's declaration regarding the PCAOB directors' tenure protection was that the SEC could remove them from office at its pleasure. *Free Enter. Fund*, 561 U.S. at 513–14. That declaration concerned the personal rights of the individual directors to retain their government employment; it was not about their official powers. It purported to resolve an issue that would arise were the SEC to remove or seek to remove a director, but there was no indication that the SEC had any propensity to do so. Even if the directors personally were parties to the lawsuit, it is doubtful whether there was a case of actual controversy concerning the application of the removal provision.

stead and Watts's interest might have been highly congenial to the SEC.[92]

The Court did not even inquire into this problem, although standing is a jurisdictional issue that it is supposed to resolve sua sponte if necessary. The remedial understanding of severance may well have hidden this issue from view. That understanding sees an unconstitutional statute as a constitutional violation, and severance so as to create a constitutional version as a remedy for that violation. Of course, private parties still need standing. Their standing, one might think, comes from being subject to regulation pursuant to an unconstitutional statute. Make the statute constitutional, and their injury goes away.

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92 If the Justices thought about this problem, they may have believed that it is resolved by *Bowsher v. Synar*, 478 U.S. 714 (1986), but it is not. Like *Free Enterprise Fund*, *Bowsher* involved a party that was subject to the official power of an officer, where the affected party claimed that the removal provisions governing the officer were unconstitutional with respect to an officer having that power. *See id.* at 732. The statute at issue in *Bowsher*, the Gramm-Rudman-Hollings Deficit Reduction Act, provided for reductions in federal spending, pursuant to calculations made by the Comptroller General, if Congress's enacted appropriations did not meet specified spending targets. *Id.* at 717–18. Among the plaintiffs challenging the Comptroller General's authority to make those determinations were federal employees who, pursuant to the Comptroller's order, would not receive a scheduled increase in their benefits. *Id.* at 21. The Comptroller General was removable by act of Congress. *Id.* at 727–28. The Court concluded that sequestration authority, being executive, could not be exercised by Congress or someone controlled by it. *Id.* at 726–27. Largely on the basis of the removal provision, the Court then concluded that the Comptroller was controlled by Congress. *Id.* at 726–27. But Congress had taken no steps to remove the Comptroller, and there was no indication that it was likely to do so. *See id.* at 719.

Earlier cases assessing the constitutionality of removal provisions, such as *Myers v. United States*, 272 U.S. 52 (1926), had involved removals, challenges to the removal under a statute restricting presidential authority, and a constitutional challenge to the restriction. The fact that the removal provision had not been put into effect in *Bowsher* produced what the Court called a ripeness problem with respect to that provision: could its constitutionality be determined in a case in which its application was not at issue because no removal had been made or attempted? *Bowsher*, 478 U.S. at 727 n.5. The Court concluded that the question was ripe because the removal protection created a "here-and-now" interest for the officer to comply with Congress's wishes, an interest incompatible with executive functions. *Id.* (internal quotation marks omitted). The Court in *Free Enterprise Fund* thus may have thought that *Bowsher* resolved the causation question by determining that officers do in fact behave differently depending on how they are removable. *Bowsher*, however, did not inquire into the actual effect of the removal provision on Comptroller General Bowsher. Its resolution of the ripeness question can be explained on the theory that the Constitution does not permit executive functions and congressional removal to coexist in an officer, and that the Constitution's rule is a prophylaxis designed to prevent "here-and-now" attention to Congress's desires. The Constitution certainly contains many such rules. Article III's tenure protections for federal judges do not prove that any particular judge lacks the fortitude to ignore congressional pressure, or that most judges do; rather, they assume that some may, and that that danger is enough to justify preventive measures.

This approach to severability implies that severance cannot be used as a method of constitutional avoidance. If severability is a matter of statutory construction, it can readily be looked into and resolved while the constitutional issue remains undecided. If a statute produces the same result in a case under either of two contingencies, it is not necessary for the court to decide which contingency has arisen. But if courts sever statutes in the sense of modifying them, actually changing their content in the exercise of remedial authority, then severance is permissible only after the primary question is resolved, and only if it is resolved against constitutionality. Courts do not grant injunctions in order to keep from deciding whether the defendant's conduct is unlawful. If severance is a remedy, predicated on a finding of unconstitutionality, then a case in which the statute is upheld and one in which it is invalidated and severed have different dispositions. They have different dispositions even if, as in *Free Enterprise Fund*, the severed statute and the statute as written have the same effect on the party challenging it. And if the court concludes that it should not sever the statute in the way that matters, then it must address the constitutional question. Either way, constitutionality must be decided.

The Court's decision in *Free Enterprise Fund* is suspect under ordinary principles of constitutional avoidance and standing. It may well be that the Justices did not see those difficulties because they had come to see severance as a remedy for constitutional violations.

D. National Federation of Independent Business v. Sebelius

Whatever the Justices may have been thinking about severability in the cases just discussed, in *NFIB*, four of them explicitly, and three of them possibly, rejected the argument that parties may seek relief against provisions they claim to be inseverable from unconstitutional provisions only if they are burdened by all those as to which they seek relief.[93] That departure very likely reflected the understanding that severance is a remedy for a constitutional violation.

The statute at issue in *NFIB* imposed on some individuals an obligation to purchase health insurance, called the individual mandate.[94] It also substantially increased the obligations of states that participate in Medicaid, from which they receive significant federal assistance to operate healthcare programs that comply with federal requirements.[95] The plaintiffs in *NFIB* were private individuals who expected to be

93 *NFIB*, 132 S. Ct. 2566, 2607–08 (2012) (opinion of Roberts, C.J.).

94 *Id.* at 2580.

95 *Id.* at 2581–82.

subject to the individual mandate and states that were subject to the new conditions imposed on their participation in Medicaid.[96] They sought injunctions against enforcement against them of those provisions of the statute on the grounds that they were unconstitutional.[97] They also asked the Court to determine that all provisions of the Act were inseverable from the provisions they challenged and hence inoperative, and to enjoin their enforcement.[98]

The severability question was separately briefed and argued.[99] The United States maintained that the Court should not reach the severability issues, because the parties lacked standing to raise them.[100] Neither the private parties nor the states had claimed, let alone proven, that they were required to comply with any aspects of the Act other than the individual mandate and the Medicaid expansion.[101] In the government's view, if the Court did find the individual mandate invalid and did reach the question of severability, it should find that two, and only two, features of the Act were inseverable from the mandate: the requirement that health insurers accept customers without regard to preexisting medical conditions and the "community rating" regulations of health insurance prices.[102] The individual and state plaintiffs argued that the Court should reach the question of severabil-

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96 *Id.* at 2580–82; *see* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1270–71 (N.D. Fla. 2011) (finding individual plaintiffs had standing to challenge the individual mandate).

97 *See NFIB*, 132 S. Ct. at 2580, 2582.

98 *Id.* at 2580. Because the plaintiffs who challenged the individual mandate sought an injunction against the enforcement of a federal tax, the Court had to consider whether the Tax Anti-Injunction Act barred that relief, and it concluded that it did not. *Id.* at 2582–84.

The authorization of declaratory judgments found in the Declaratory Judgment Act excludes cases "with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code." 28 U.S.C. § 2201 (2012). Section 7428 authorizes declaratory proceedings with respect to an entity's classification under § 501(c)(3) of the Internal Revenue Code. I.R.C. § 7428. The Court did not address the limitation in 28 U.S.C. § 2201. Having found that the Tax Anti-Injunction Act did not bar the claim for injunctive relief, the Court could decide whether to grant such relief by determining the question of constitutional power. Having decided that Congress had the power to enact the individual mandate (considered as a tax), and so having decided that the plaintiffs challenging the mandate would obtain no relief, the Court did not have to consider whether they would have been entitled to a declaratory judgment as well as an injunction.

99 *NFIB*, 132 S. Ct. at 2582 n.2.

100 Brief for Respondents (Severability) at 10–11, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393, 11-400).

101 *Id.* at 19–20.

102 *Id.* at 26. In the government's view, the individual mandate and the other two provisions were a package, because in Congress's view, community rating and the must-issue rule were economically feasible only with the levels of participation that would be produced by the individual mandate. *Id.* at 44–51.

ity and that the entire statute was inseverable from the provisions they said were unconstitutional.[103] Bartow Farr, an eminent appellate lawyer appointed by the Court as amicus curiae to address severability, argued that all of the Act's provisions were severable from the individual mandate and the Medicaid expansion.[104]

Seven Justices agreed that the Medicaid expansion was unconstitutional.[105] Four Justices—Scalia, Kennedy, Thomas, and Alito—maintained that the individual mandate was in excess of federal power.[106] Those seven, therefore, were called on to address the question of severability. The Chief Justice, writing for the three who believed that the Medicaid expansion but not the individual mandate was unconstitutional, concluded that the Medicaid expansion was severable from the rest of the Act.[107] He did not explicitly deal with the states' standing to raise that issue.[108] It is possible that he assumed that standing was irrelevant because severability is a remedial issue, but he did not say so.[109]

The joint dissenters, however, did deal with the government's argument regarding standing, and rejected it. "[A]n argument can be made," the dissenters agreed, "that those portions of the Act that none of the parties has standing to challenge cannot be held nonseverable, [but] our cases do not support it."[110] The joint dissenters then cited one case, *Williams* v. *Standard Oil Co. of Louisiana*,[111] that they said held "nonseverable statutory provisions that did not burden the

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103 Brief for Private Petitioners on Severability at 27, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393, 11-400); Brief for State Petitioners on Severability at 35, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393, 11-400).

104 Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability) at 53, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393, 11-400).

105 On that issue, Chief Justice Roberts spoke for himself, Justice Breyer, and Justice Kagan. *NFIB*, 132 S. Ct. at 2601–07. In a jointly authored opinion, Justices Scalia, Kennedy, Thomas, and Alito came to the same conclusion as to the Medicaid expansion. *Id.* at 2656–66 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

106 *Id.* at 2644–55.

107 *Id.* at 2607–08 (opinion of Roberts, C.J.).

108 *See id.*

109 In discussing severability, the Chief Justice quoted language from *Ayotte* saying that legislative intent is the touchstone for deciding questions of remedy, *id.* at 2607, but did not say explicitly that the states had standing to seek an injunction based on inseverability because a holding of inseverability would remedy the injury done to them by the Medicaid expansion.

110 *Id.* at 2671 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

111 Williams v. Standard Oil Co. of La., 278 U.S. 235 (1929).

parties."[112] The dissenters did not explain how *Williams* stands for that principle.[113] *Williams* in fact does not address that issue.[114]

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112 *NFIB*, 132 S. Ct. at 2671 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

113 *See id.*

114 *Williams* did not discuss the question whether a party may seek relief on grounds of nonseverability with respect to provisions that do not apply to it. The case involved a Tennessee statute regulating the retail price of gasoline and imposing other regulatory burdens, such as reporting requirements, as part of its enforcement scheme. *Williams*, 278 U.S. at 238. The statute created a Division of Motors and Motor Fuels to administer the price regulation, required that gasoline retailers provide specified information to the regulator, and imposed a tax on gasoline sellers that was earmarked to fund the regulatory agency. *Id.* at 238, 242–44. The price regulation, the reporting requirements, and the tax all applied to the plaintiffs below, the Standard Oil Company and the Texas Company. *Id.* at 238. Standard Oil and the Texas Company sought injunctions against enforcement of any part of the Act against them. *Id.* at 239.

Justice Sutherland, speaking for the Court, found that the price regulation was unconstitutional. *Id.* at 239–40. He then turned to the question of severability, the State of Tennessee having argued that the rest of the statute was severable from the price regulation. *Id.* Justice Sutherland concluded that even though the statute had a severability clause, the presumption of severability it created was overcome by the fact that the statute's other provisions were "mere adjuncts of the price-fixing provisions," and hence inseverable. *Id.* at 243. Although the Court dealt with severability, Tennessee did not make, and the Court did not consider, the argument that the plaintiffs lacked standing to challenge the other parts of the statute because those parts did not burden them. The standing question that arose in *NFIB* was not addressed by the parties or the Court in *Williams*.

The current Justices' misimpression about *Williams* may have arisen because the Court in the earlier case indicated that it found the entire statute inoperative, *id.* at 245, including the part creating a state agency to enforce it, *id.* at 242–43. The mere existence of a government bureau generally does not burden private parties, so the Justices in *NFIB* may have thought that their predecessors had held that an agency could be declared unconstitutional, or enjoined from operating, even though it did nothing to the prejudice of a private party. As noted, neither the Court nor the parties in *Williams* discussed this issue. The brief for one of the regulated firms, the Texas Company, does provide considerable insight into the parties' thinking, and thereby the Court's. The Texas Company argued that the statute's reporting requirements were inseverable from its unconstitutional provisions and therefore inoperative. Reply Brief for the Texas Company at 42–43, *Williams*, 278 U.S. 235 (No. 764). The reporting requirements did require compliance by regulated parties, so the parties' standing to seek an injunction against their enforcement was clear. The Texas Company seems to have been unconcerned with any operation of the statute that did not impose requirements on it. According to its brief, if the allegedly unconstitutional provisions were indeed void, "there is nothing left in the act but those portions of the act that require the filing of information and a schedule of charges with the Commissioner." *Id.* at 42. As far as the plaintiffs below were concerned, the mere existence of the agency seems not to have counted at all. They were concerned only with those provisions of the statute with which they were required to comply.

There is thus no reason to believe that the plaintiffs in *Williams* sought relief from aspects of the Tennessee statute that did not impose obligations on them, nor that the Court meant to give them any such relief. The parties sought, and the Court gave, relief with respect to provisions that did apply to the parties but that were not themselves unconstitutional. *Williams* was a routine severability case and does not stand for the proposition that parties may challenge allegedly inseverable aspects of a statute that do not apply to them.

The joint dissenters probably rested their reading of *Williams* on the fact that the Court in the earlier case said that "the remaining portions of the act, serving merely to facilitate or con-

Other than the citation to *Williams*, the joint dissenters provided only functional reasons for their conclusion about severability.[115] They said it would be "destructive of sound government" to follow the Solicitor General's rule requiring standing with respect to allegedly inseverable provisions.[116] "It would take years, perhaps decades, for [the severability of all the Act's] provisions to be adjudicated separately," and for some of them probably no party would have standing.[117] "The Federal Government, the States, and private parties ought to know at once whether the entire legislation fails."[118]

Although no Justice described severability as a question of remedy, the joint dissenters very likely assumed that the plaintiffs needed no standing with respect to any of the other provisions, because complete and partial invalidation are remedies, to be determined after the constitutional merits have been decided—guided by severability principles. That is how Bartow Farr, the Court's appointed amicus, responded to the Solicitor General's argument concerning standing.[119] Urging the Court to reach the question of severability and find all the statute's remaining provisions severable from any of those found unconstitutional, Farr said that the Solicitor General mistook

> the place of severability analysis in the resolution of a given case. When the Court considers whether invalidation of one statutory provision should lead to invalidation of some or all of the remaining provisions, it is not deciding a new case or controversy, or a new claim for relief, but rather is seeking to fashion an appropriate remedy for a violation it has found.[120]

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tribute to the consummation of the purpose [of price regulation], must likewise fall." *Williams*, 278 U.S. at 245. Nothing in *Williams* indicates that that statement was anything more than slightly too broad, as opposed to a holding on an issue that the parties did not brief and Justice Sutherland did not address.

115 *NFIB*, 132 S. Ct. at 2671 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

116 *Id.*

117 *Id.*

118 *Id.*

119 Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 104, at 3–4, 19–24 (arguing that severance is a question of remedy).

120 *Id.* at 3–4. Farr was appointed to present the position that all of the Act's constitutional provisions were severable from any unconstitutional provisions; as noted above, the government's position was that if the question of severability was to be reached, two provisions of the statute were inseverable from the individual mandate. Farr was assigned to argue that everything was severable.

The Court's decision to solicit that brief is itself interesting. The government's position on severability agreed with that of the plaintiffs with respect to two features of the statute, those governing preexisting conditions and community rating. There was thus no dispute between the parties as to what should happen as to those provisions if the individual mandate were found to be unconstitutional and the question of severability were reached. The Solicitor General agreed

The states, with which the dissenting Justices agreed as to both constitutionality and severability,[121] similarly argued that no separate standing was needed with respect to allegedly nonseverable provisions, because the parties before the Court were just helping it decide what remedy to adopt.[122] Indeed, the states maintained that the Solicitor General's argument "would frustrate the remedial powers of the courts."[123] That is true if those powers include the invalidation of statutes in a literal sense. If judicial remedies run only to parties with standing, and govern the conduct of parties like the Secretary of Health and Human Services without actually changing the primary law, the Solicitor General's argument properly invokes the constitutional limits on those remedial powers.

Unlike the Court's decisions in *Booker* and *Ayotte*,[124] the conclusion that it should address the question of severability in cases like *NFIB* requires the assumption that severance really is part of a remedy that operates by bringing the statute into line with the Constitution and then further altering it as required by principles of severability.

In the cases just described, the Justices apparently came to think that courts can make statutory provisions inoperative by applying a remedy of invalidation, and that they can apply that remedy to both unconstitutional aspects of statutes and other parts of statutes that are inseverable from those aspects. As I will now explain, that understanding of severability and invalidity is inconsistent with basic principles of American constitutional law.

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that they would be unenforceable because inseverable. That raises the question, what would the Court have done had it found the mandate unconstitutional but agreed with Farr as to severability? Would it have ordered the Secretary to enforce those provisions, even though no party was seeking such a decree?

121 *See NFIB*, 132 S. Ct. at 2676–77 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (finding the whole Act inseverable and unconstitutional).

122 "Whether the party contending that the balance of the statute does not survive the invalidation of the provision it has successfully challenged (and, *a fortiori*, had standing to challenge) has independent standing to challenge the balance of the act is thus irrelevant. That party is not bringing a separate 'non-severability' claim to the balance of the statute, but is merely assisting the Court in ascertaining what remedial consequences flow from the invalidation of the provision successfully challenged, *i.e.*, what remedy will adhere most closely to the legislature's intent." Brief for State Petitioners on Severability, *supra* note 103, at 29.

123 *Id.* at 30.

124 *See supra* Part I.D.

II. Adjudication and Invalidation of Statutes

According to the account of severability set out in Part I, questions of severability arise when a court concludes that a statute is to some extent unconstitutional, and therefore must make at least that part of the statute inoperative by applying the remedy of invalidation. Invalidation, according to this reasoning, is a remedy in that it is a legal change brought about by judicial order, as an injunction creates a new obligation for the defendant. Once a court finds that it must to some extent invalidate a statute, it then must decide how much.

According to the standard explanation of judicial review, however, that account of constitutional invalidity and severability analysis cannot be literally true. As Justice Sutherland put it for the Court:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.[125]

Courts neither have nor need the power to make statutes inoperative by granting a remedy of complete or partial invalidation.[126] Judicial review is based on the assumption that the courts have the power

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125 Frothingham v. Mellon, 262 U.S. 447, 488 (1923). Justice Sutherland went on to link that understanding of constitutional invalidity to the requirement that a plaintiff rely on injury to some personal right, and not just on the unconstitutionality of a statute:

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.

Id.

126 Hart and Sacks explain:

> The sanction of nullity is pervasive in the whole theory of American public law, although the point is not always appreciated. Its most familiar form is the power of the courts to disregard a statute which they deem to be unconstitutional. Familiar as this power is, the basis of it in the sanction of nullity is not always understood. American courts have no general power of control over legislatures. Their power, *tout simple*, is to treat as null an otherwise relevant statute which they believe to be beyond the powers of the legislature . . . .

Hart & Sacks, *supra* note 28, at 154.

to decide cases and to give parties remedies that prevent or alleviate legally cognizable harms.[127] In order to decide cases and determine whether to give remedies, courts must know the law. Because of the Constitution's hierarchical superiority to other law, sometimes they must measure the latter against the former. When some part of the sub-constitutional law is found invalid, they sometimes must determine whether any other legal rule is conditional on, and hence inseverable, from it. In cases of inseverability, legal rules that are not themselves unconstitutional may thus be found to be inoperative, and courts must decide accordingly. But the courts do not make those provisions inoperative any more than they make unconstitutional provisions invalid. Invalidation by courts is a figure of speech.

This Part will point out that there is no remedy of invalidation, set out the orthodox view of judicial review that does not include any such power in the courts, and explain how the idea that courts invalidate statutes arises as a rough description, but no more than that, of the actual operation of the American judiciary.

Standard accounts of the Anglo-American law of remedies do not include the invalidation of statutes among the kinds of remedial orders that courts enter.[128] The most familiar remedies are damages and injunctions, neither of which affect the validity of legislative enactments. Injunctions against enforcement, like the injunctions sought by the plaintiffs in *NFIB*, can make statutory provisions virtually inoperative, but they do not purport to make any law actually inoperative the way its repeal would.[129] Declaratory judgments concerning invalidity may seem like invalidation, but a declaration cannot make a previously valid law invalid, precisely because of its declaratory nature.[130] A declaratory judgment clarifies existing legal relations; it does not

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127 *See infra* text accompanying notes 141–51.

128 Dobbs's very influential treatise on the law of remedies gives an overview of the main categories of remedy given by American courts, listing two kinds of money judgments (damages and restitution), coercive orders like injunctions, and declaratory remedies. 1 DAN B. DOBBS, LAW OF REMEDIES 2–9 (2d ed. 1993). He does not list a power to make statutes invalid. Dobbs's discussion of the difference between public and private remedies also does not include judicial decrees of that kind. *Id.* at 19–20.

129 *See supra* Part I.D.

130 Declaratory judgments that conform to the federal Declaratory Judgment Act cannot be said to invalidate statutory rules for another reason. The Act provides that a court may declare the rights or other legal relations of parties. 28 U.S.C. § 2201(a) (2012). The legal relations of parties, like the right to performance under a contract, are specific to the parties. The invalidity of a statutory provision is general, and so not the proper subject of a declaratory judgment. It is, however, common for federal courts to declare that statutory provisions are invalid in the abstract. That practice is difficult to reconcile with the statute, but it is widespread.

make new ones.[131] Only if a legal rule was invalid before the declaratory judgment was issued can a judgment declaring it invalid be correct.

The distinction between the remedies that courts grant and a remedy that actually would make a previously valid rule invalid is on display in *NFIB* itself. The plaintiffs sought injunctions against enforcement of aspects of the Affordable Care Act[132] and declarations regarding its invalidity.[133] The Tax Anti-Injunction Act[134] bars certain injunctions affecting the revenue laws, and the Declaratory Judgment Act has a corresponding limitation.[135] As a result, the courts in those types of cases devote considerable attention to the availability of the remedies requested, especially the injunctions requested by the plaintiffs.[136] If courts could grant decrees that cause previously operative statutory provisions to become inoperative, that inquiry would be unnecessary. The plaintiffs would have sought a decree of invalidation on grounds of unconstitutionality and inseverability, and the courts would have reached the merits of the constitutional and severability arguments without worrying about the Tax Anti-Injunction Act. The parties and the courts, including the Supreme Court, all simply assumed that a party must seek the kind of relief that American courts grant. Injunctions and declaratory judgments are that kind of relief. Invalidations in a literal sense are not.

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131 Professor Edwin Borchard was a leading advocate for the adoption of declaratory judgment statutes in the first part of the twentieth century. *See* Charles E. Clark, *Edwin Borchard*, 60 YALE L.J. 1071, 1072 (1951). In one of the fundamental works on the subject, he explained the difference between declaratory judgments and other kinds of decrees. Declaratory judgments "do not constitute operative facts creating new legal relations of a secondary or remedial character; they purport merely to declare preexisting relations and create no secondary or remedial ones. Their distinctive characteristic lies in the fact that they constitute merely an authentic confirmation of already existing relations." Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 5 (1918) (footnotes omitted). Borchard contrasted declaratory decrees with remedial orders that create new obligations, such as damages decrees and injunctions, and remedial orders that "effect[ ] some change of status," such as divorce decrees. *Id.* at 4. As their name indicates, the essence of declaratory remedies is that they do not change anything, but only clarify what is already the law.

132 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in sections of 25, 26, 29, and 42 U.S.C.).

133 *See NFIB*, 132 S. Ct. 2566, 2580–82 (2012).

134 Tax Anti-Injunction Act, I.R.C. § 7421(a) (2012).

135 The Tax Anti-Injunction Act bars suits to restrain the assessment or collection of federal taxes. *Id.* The Declaratory Judgment Act excludes nearly all declarations with respect to federal taxes. 28 U.S.C. § 2201(a).

136 The Chief Justice began his discussion of the Tax Anti-Injunction Act by explaining, "Before turning to the merits, we need to be sure we have the authority to do so." *NFIB*, 132 S. Ct. at 2582.

When the State plaintiffs in *NFIB* prevailed as to the Medicaid expansion, they obtained affirmative relief but no judgment of invalidation.[137] A party can also prevail on the grounds that a statute is unconstitutional and invalid without obtaining any affirmative relief at all. Criminal defendants who successfully challenge the constitutional validity of the statute under which they are prosecuted are in that position.[138]

Another way to see that decrees of invalidation do not exist is to ask what form they would take and what their effect would be. There is no well-established answer to the first question. When a legislature decides to alter or eliminate an existing statutory rule, it adopts a new statute amending or repealing the rule. Courts do not purport to do that when they decide cases, nor do they order legislatures to do so. When a court determines that it may lawfully apply a provision of a statute because it is severable from another unconstitutional provision, the court does not revise the statute the way a legislature would, taking a juridical act that purports to eliminate one part while retaining another part.

Difficult problems would arise concerning the effect of such remedial decrees, especially in the lower courts. The litigation over the Affordable Care Act provides an example. During the course of that litigation, the lower courts divided on the constitutionality of the individual mandate.[139] As that demonstrates, federal district courts, for example, can issue decrees based on inconsistent resolutions of a constitutional question. If courts genuinely nullified or invalidated statutes, then under those circumstances the same statute would be both valid and invalid. While that result is illogical, there is nothing illogical in saying that the Secretary of Health and Human Services has been enjoined from enforcing a statute against one plaintiff but not against another.[140]

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137 *See id.* at 2606–07.

138 For example, the defendant in *United States v. Eichman*, 496 U.S. 310 (1990), prevailed on the grounds that the Flag Protection Act was unconstitutional. *Id.* at 312. *Eichman* is naturally described as a case in which the Supreme Court invalidated a federal statute. Eichman had a good defense, but obtained no affirmative remedy—of invalidation or otherwise. *See id.* at 318–19.

139 *NFIB* itself reviewed the Eleventh Circuit's decision that the mandate was unconstitutional, a decision that affirmed a similar judgment by the District Court of the Northern District of Florida. *NFIB*, 132 S. Ct. at 2580–81. As the Court noted, the individual mandate had been upheld against a constitutional challenge by a decision of the Sixth Circuit affirming a similar judgment by the District Court for the Eastern District of Michigan. *Id.* at 2581.

140 As explained in more depth below, invalidation is a figure of speech used to describe the effects of precedent. *See infra* notes 146–55 and accompanying text. That is how it is possi-

As that last observation underlines, a distinctive feature of remedies generally is that they operate with respect to specific parties. They do not operate on legal rules in the abstract, the way the acts of legislatures do. This feature of remedies reflects the difference between courts, which decide particular cases, and legislatures, which make laws of broader applicability.

Courts do address abstract questions, including the question of the validity of statutory provisions, but they do so in the process of determining the content of the legal rules that are applicable to the cases before them. That is the context in which American courts conduct judicial review of constitutionality, and the context in which they have to decide whether provisions or applications of a statute are severable from one another.

Marbury v. Madison[141] provides the canonical account of the invalidity of unconstitutional statutory rules. Chief Justice Marshall did not say that the Constitution instructs and empowers the courts to make unconstitutional statutory laws invalid.[142] He did not ask whether the courts could make statutes that were repugnant to the Constitution void, but rather whether such statutes were void.[143] He thought the answer obvious.[144]

His answer was about the content of the law, not the power of the courts. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."[145] For Marshall, it followed that the courts must follow the superior law and disregard any conflicting inferior law. He asked, though an invalid federal statute "be not law, does it constitute a rule

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ble to say, figuratively, that a statute is valid in the Sixth Circuit and invalid in the Eleventh. That statement is a brief way of expressing a more complicated reality.

141 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

142 *See id.* at 176.

143 *Id.*

144 *Id.* at 176 ("The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest.").

145 *Id.* at 177. As Professor Mary Bilder has shown, Marshall's repeated use of the word "repugnant" was no accident. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 560 (2006). American judicial review derived from British imperial practice. *Id.* at 513–14. When two laws were repugnant to one another, meaning they were logically inconsistent and called for different answers to the same legal question, the superior law was to be followed and the inferior law was void. *Id.*

as operative as if it was a law?"[146] To say that it did would be "to overthrow in fact what was established in theory."[147]

Marshall did discuss the judicial role, but he did not say that role was to make statutes invalid. It was to decide cases according to law. That is the point of the most famous passage from *Marbury*: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[148] That unavoidable judicial function combined with hierarchical supremacy equaled judicial review. Because of the Constitution's superiority, that duty was clear. In case of conflict, "the constitution, and not such ordinary act, must govern the case to which they both apply."[149]

Marshall's argument turned on the judicial duty to decide cases according to law, and the only judicial power involved in the argument is the power to do so. He certainly did not think of invalidation as a remedy for anyone or anything. If any party in *Marbury* obtained a remedy, it was Madison, who prevailed in the lawsuit because there was no jurisdiction.[150] The Court did not issue a decree purporting to invalidate Section 13 of the Judiciary Act.[151]

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146 *Marbury*, 5 U.S. at 177.

147 *Id.*

148 *Id.*

149 *Id.* at 178 ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty."). Marshall's argument echoed Hamilton's explanation of judicial review in Federalist No. 78. Hamilton too claimed that judicial review resulted from the courts' obligation to identify the applicable law, combined with the superiority of the Constitution. THE FEDERALIST NO. 78, at 403–04 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). That superiority made contrary inferior laws void. "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is executed, is void. No legislative act therefore contrary to the constitution can be valid." *Id.* at 403. The courts had to follow that principle in deciding cases:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred . . . .

Id. at 404.

150 *See Marbury*, 5 U.S. at 180.

151 In response to Marbury's application for mandamus, the court had issued a rule to Madison ordering him to show cause why the writ should not issue. *Id.* at 137–38. After explain-

Constitutional invalidity of federal statutes thus is produced by the Constitution itself, not by the order of a court. Invalidation is not a remedy, and the principles that govern constitutional invalidity are not part of the law of remedies. Those principles are a feature of the Constitution, and courts apply them in the process of identifying the applicable primary law so that they can apply it to the parties.

Courts do, to be sure, perform some functions that have an effect similar to the invalidation of statutes, and some, but not all, of those functions involve the exercise of actual remedial powers. When a court enjoins an officer from enforcing a statutory rule, the effect is similar to the repeal of the rule as far as the plaintiff is concerned. When a court declares that a statutory rule is not applicable to a party because the rule is unconstitutional, the declaratory judgment again resembles a judicial act of invalidation with respect to the parties involved. Resemblance is not identity. As noted above, a declaratory judgment clarifies the law as it already stands. Unlike an injunction, it does not create any new rights or obligations. A declaratory judgment cannot alter the law, and a court can declare invalidity only for rules that already were invalid.

Because declaratory judgments, and other judicial orders, conclusively resolve legal issues as to which the parties may previously have been in doubt, their effect is similar to that of legislation. Legislative acts change the law, and the move from uncertainty to certainty can be much like a change. That similarity is especially strong when the latter is not what the parties expected. If *A* believes that he owns Blackacre and title is quieted in *B*, the declaratory remedy will seem to *A* much like a change in ownership.

Declaratory judgments, and the preclusive effects of coercive judgments, bind only parties.[152] Some American courts, however, set precedents that will be followed in the future. If the United States Court of Appeals for the First Circuit rests a judgment on the conclusion that a provision of a federal statute is void because it is inconsis-

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ing that his court had no jurisdiction, Marshall concluded: "The rule must be discharged." *Id.* at 180.

152 "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Hansberry v. Lee, 311 U.S. 32, 40 (1940). That principle extends to the preclusive effect of conclusions reached in the course of deciding a case. In discussing the issue-preclusive effects of judgments, the Court has noted that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979).

tent with the Constitution, that decision will bind district courts in the First Circuit, and panels of that court, in subsequent cases. That precedent will resemble a legislative act eliminating the provision for the purposes of those who expect to litigate subject to First Circuit precedent in the future. Despite that resemblance, such a decision by the First Circuit is not the practical equivalent of the repeal or amendment of the statute by Congress, because it operates only as to courts bound by that court's precedents. A party that expects never to be before such a court will be concerned with the First Circuit's doctrine only insofar as it might persuade another tribunal.[153] For practical purposes, a holding by any court other than the Supreme Court of the United States that a statute is wholly invalid under the federal Constitution is quite different from the repeal of the statute by the legislature that adopted it.[154]

Courts do not invalidate statutory rules in a literal sense, and therefore do not, strictly speaking, grant a remedy that makes a statutory provision ineffective. That is true whether the court's decision is founded on the Constitution or on severability and its relatives. The Supreme Court's standard account of severability, like its standard account of judicial review on constitutional grounds, assumes that severability is a question that must be answered in order to identify the applicable law. Questions of severability are questions of statutory construction.[155] In particular, they are questions of statutory construction in light of the occurrence of a contingency: that the statute is in part unconstitutional.[156] Courts do not excise parts of statutes on

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153 As noted above, *supra* note 139, the federal courts of appeals divided on the constitutionality of the individual mandate at issue in *NFIB*.

154 Professor Richard Fallon makes a similar point in discussing the phenomena of facial invalidity and overbreadth: "A court has no power to remove a law from the statute books. When a court rules that a statute is invalid—whether as applied, in part, or on its face—the legal force of its decision resides in doctrines of claim and issue preclusion and of precedent." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000) (footnote omitted). He points out that different courts set precedents to different degrees, and that the precedential effect of a decision by the Supreme Court of the United States is very different from that of a federal district court. *Id.* at 1339–40. By contrast, Professor Matthew Adler rests his account of rule-level unconstitutionality in part on the claim that courts actually produce invalidity rather than find it. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 8 (1998).

155 For example, the Court's leading current discussion of severability, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), was decided on the basis of "clear congressional intent of severability both in the language and structure of the Act and in its legislative history." *Id.* at 687.

156 Michael Dorf frames the question as a contingency faced by a legislator who fears that a provision the legislator supports and believes to be constitutional may be held invalid by a court. "[H]ow can you insure against the risk of judicial invalidation?" Dorf, *supra* note 80, at 310. Dorf, like many courts and commentators, refers to judicial invalidation of statutes. In general,

grounds of inseverability, they determine that parts of statutes are ineffective as written for that reason.

The account of severance given by the plaintiffs and by Bartow Farr in *NFIB* is thus at odds with the premises on which American courts engage in judicial review and severability analysis. A court that has found part of a statute unconstitutional need not decide on the scope of the remedy of invalidation. It must decide what the statute means in light of its partial unconstitutionality, which is a question of interpretation and not remedy.

At least four Justices appear to have relied on Farr's rationale. Without that rationale, the claim that the parties in *NFIB* had standing to seek an injunction with respect to the rest of the statute on grounds of inseverability is untenable. According to the Court's standing cases, standing is a jurisdictional prerequisite under Article III, a party must have standing with respect to every separate item of relief it seeks, and the general interest in having the defendant comply with the law does not support standing for a private person.[157]

No plaintiff in *NFIB* claimed to be burdened by any provision of the statute except the individual mandate and the Medicaid expansion.[158] In the absence of any such effect, they had no standing to seek an injunction against the enforcement of those other provisions on the

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that figure of speech is useful, but the burden of my argument is that it is sometimes dangerously misleading.

157 As the Court now understands it, the doctrine of Article III standing, which requires that a plaintiff "must show actual injury," is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." Lewis v. Casey, 518 U.S. 343, 349 (1996). Each item of relief that a plaintiff seeks must redress an injury suffered by or imminently threatened as to that plaintiff:

> The actual-injury requirement would hardly serve the purpose we have described above—of preventing 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. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.

Id. at 357.

A plaintiff must show harm to that plaintiff's concrete interests, because the government's failure to comply with the law, by itself, gives rise only to a "generalized grievance," which does not satisfy the Article III standing requirement:

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).

158 Brief for Respondents (Severability), *supra* note 100, at 19–20.

grounds that they were inoperative because inseverable from unconstitutional parts of the statute.[159] The plaintiffs had no standing to seek the remedy of invalidation or to raise the issue of the proper extent of invalidation, because there is no such remedy. There thus was no occasion to address severability and no occasion to find any of the other provisions inoperative because inseverable, as four Justices were prepared to do.

Less clear is how *Free Enterprise Fund* would have been approached had the Court not conceived of severance as a remedy for a constitutional violation. It might have found that the declaratory judgment it directed would remedy the plaintiffs' injury, although, as argued above, that conclusion is hard to sustain.[160] If the plaintiffs had no standing to seek that remedy, then the Court definitely could have moved first to identify the fallback arrangement that should be followed in case of unconstitutionality of the primary statutory scheme. It had no need to first find the primary rules unconstitutional, as a predicate for the remedy of severance. Because the fallback arrangement produced the same practical result for the plaintiffs as the statute's primary rule, the principle of constitutional avoidance would have kept the Court from addressing the constitutional issue.

III. Declaring Law and Deciding Cases

A natural response to the argument just set out is that *NFIB* and *Free Enterprise Fund* are instances of candor on the part of the Supreme Court. That institution's real function, in Henry Monaghan's terms, is law declaration and not case decision.[161] The Court resolves abstract questions, its precedents count far more than its judgments,

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159 The inseverability of provisions that will not be enforced against the plaintiff is no more relevant in a case like *NFIB* than it would be in an actual enforcement proceeding. If an individual defendant in a proceeding to collect the penalty were to point to other aspects of the statute and say that they were inseverable from the mandate, that would be of no concern to the court.

160 *See supra* Part I.C.

161 "While the Court takes no overt notice of the distinction, legal scholars have long posited that, heuristically at least, two basic adjudicatory models—the case or dispute resolution model and the law declaration model—compete for the Court's affection along a wide spectrum of issues." Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 668 (2012). In that essay, Monaghan maintains that the law declaration model is now dominant with respect to the Supreme Court's relationship with lower courts. "While still formally disclaiming any general superintendence over the conduct of other organs of government, the Court seeks to ensure and expand its hierarchical superiority in our judicial system." *Id.* at 669. I am concerned here not with the Supreme Court's place in the judicial system, but with the judiciary's relation to other organs of government.

and doctrines like avoidance and standing simply obstruct its real work.

The Court says, however, that the principle of constitutional avoidance and the doctrine of standing are designed to keep courts from deciding constitutional questions, and indeed many legal questions in the case of standing. Those doctrines are designed so that the interpretation of the Constitution will often be left to other branches of government. They limit the courts' law-declaring function, and are justified on the grounds that they do so. Standing in particular is designed to allow the law-declaring function to be performed only along with the case-deciding function. Insofar as the understanding of severability the Court has developed since *Booker* facilitates sub rosa departures from those principles, it is inconsistent with them.

Moreover, although it is natural for students of American constitutional law to focus on the Supreme Court of the United States, that focus is sometimes misleading and is dangerously so here. Under current doctrines of precedent, Supreme Court holdings have an effect that is often nearly indistinguishable from that of legislation. When the Supreme Court says that it is severing a statute, the consequence is almost identical to that of an amendment to the statute. Because the law-making power of courts derives from the rules of precedent, lower courts cannot make as much law as can the Supreme Court of the United States. A way of describing the lower courts' function that causes them to think that they can decide more than they are actually able to can lead them into serious error, as I will explain.

A. The Supreme Court, Avoidance, and Standing

It is easy to see why the Court or its Justices would have wanted to reach the constitutional question in *Free Enterprise Fund* or the severability question in *NFIB*. Both are issues of great practical importance. They had been well briefed and argued; in *NFIB*, the connection between severability and the policy aims of the statute meant that judicial economy would be served by resolving severability along with constitutionality. In both cases a postponement might have been long, if not permanent. In *Free Enterprise Fund*, addressing severability first would have meant that the SEC's removal power would be tested only if exercised, which it might never be.[162] In *NFIB*, at the

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162 In *Free Enterprise Fund*, the question that the Court called one of severability was this: forced to choose between granting the PCAOB regulatory power and giving its members protection from removal, which would Congress have chosen? The answer, the Court found, was the regulatory power. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–09

least, a remand would have been necessary. On remand, it probably would have emerged that no party, and perhaps no possible party, would have standing with respect to many provisions of the Act. Judicial resolution of the severability issue, an issue on which the continuing operation of the Act depended, would have happened later, if at all.

A Supreme Court that gives priority to its law-declaring function would find those results very unfortunate. Major governmental decisions are best made with firm knowledge of the applicable law. Had the joint dissenters prevailed in *NFIB*, for example, it would have been up to Congress to decide whether to enact any or all of the rest of the Act, all of which would have been held inoperative because inseverable. Had those Justices prevailed as to the individual mandate but not reached severability, Congress would have been in the dark. Some or all of the Act might yet be held inoperative, and that possibility would give strong reason for the legislature to act. On the other hand, some or all might yet be held severable, and that possibility would give a strong reason not to reopen those hotly contested issues.

Though the argument for a broad law-declaring function is familiar, it is just as familiar that constitutional avoidance principles, with respect to judicial practice, and standing requirements, with respect to the Article III jurisdiction, rest on the opposite rationale. Supporters of those principles justify them on the grounds that limiting the courts' ability to reach and resolve important issues is desirable.

Ashwander v. Tennessee Valley Authority,[163] in which Justice Brandeis's concurrence provides a classic formulation of the avoidance doctrine, illustrates the point. By authorizing the Tennessee Valley Authority ("TVA"), Congress had put the federal government into the business of producing and selling electric power.[164] Whether that act was within enumerated federal authority was hotly contested, by those who objected on constitutional principle and those who had to compete with the TVA.[165] Producing electricity and selling it does not violate ordinary private-law rights, including the private-law rights of

(2010). That meant that whether the combination of the two was constitutional or not, the regulatory power would be intact. It also meant that in a future case involving a removal by the SEC, the constitutional question could not be avoided. Because, by hypothesis, Congress would have chosen to give the removal protection only if it was constitutional in combination with the power, the removal protection could operate only if the two together were permissible. That in turn would require the court to decide the constitutional question.

163 Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

164 *See id.* at 315 (discussing contract including provision limiting TVA sales area).

165 *See id.* at 317.

competitors, so ordinary modes of constitutional litigation were ill-suited to raising the constitutional question. For those who thought that the courts' role was to interpret and enforce the Constitution, that feature of the TVA was an obstacle to be overcome.

For Justice Brandeis, however, the fact that "it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from" settled principles of law limiting the courts' power to address such issues.[166] "On the contrary, the fact that such is the nature of the enquiry proposed should deepen the reluctance of courts to entertain" suits like that in *Ashwander*.[167] In Justice Brandeis's view, the imperative of avoiding challenges to congressional acts not only led to a "rigid insistence" on respecting jurisdictional limits, but also had caused the Court to develop, "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[168] One of those was the principle that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[169] Conclusions about severability, a question of statutory construction and not of constitutional interpretation, have provided just such grounds for avoidance.[170]

As Brandeis recognized, avoidance is a matter of practice, and hence not as rigid as the jurisdictional limits that he also emphasized. Brandeis believed that the plaintiffs in *Ashwander* lacked standing to sue, but he may have regarded that as a nonjurisdictional problem.[171] In more recent cases, the Court has concluded that Article III con-

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166 *Id.* at 345.

167 *Id.*

168 *Id.* at 345–46.

169 *Id.* at 347.

170 An example decided during Brandeis's tenure on the Court is *Champlin Refining Co. v. Corp. Commission of Oklahoma*, 286 U.S. 210 (1932). The Court in that case declined to address a constitutional objection to a part of the relevant statute that was not being applied to the plaintiff, explaining that that other part, if unconstitutional, was also severable. "And if section 2 were to be held unconstitutional, the provisions on which the orders rest would remain in force. The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions." *Id.* at 234.

171 Brandeis explained that the government had throughout the lawsuit denied that the plaintiffs had standing to challenge the constitutionality of the legislation, and he said that the bill in equity should have been dismissed. *Ashwander*, 297 U.S. at 341. But he concurred in the Court's judgment, which rested on the merits of the plaintiffs' constitutional arguments, and not on jurisdiction. *Id*. at 326–40. Brandeis's discussion of the standing question also indicates that

tains a standing requirement, and it has explained that one of its functions is to limit the circumstances in which the courts will review the constitutionality of actions by the other branches of government. The Court made clear that its standing doctrine has a constitutional component and is rooted in separation of powers in *Allen v. Wright*,[172] in which plaintiffs sought to challenge the Internal Revenue Service's ("IRS") rules governing the tax-exempt status of certain private schools.

As in *Ashwander*, the government action in *Allen* was not easily brought into court. When the IRS gives tax-exempt status to a taxpayer, it imposes no private-law harm on anyone else. The resulting reduction in federal revenue produces such an attenuated effect on other taxpayers that they have no standing to challenge it.[173] The plaintiffs in *Allen* argued that the IRS's guidelines were lax enough that they would allow racially discriminatory schools to have exempt status, that the exempt status would enable more white students to attend those schools, and that as a result their own children, enrolled in public schools, would be less likely to be educated in racially integrated environments.[174] Absent some litigation mode like that suggested by the plaintiffs, no court would be able to decide whether the IRS's guidelines were consistent with the Constitution.

The Court regarded that consequence of the standing doctrine as a virtue and not a vice. It derived the standing requirement from Article III's limitation of the judicial power to cases and controversies. That limitation "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."[175] Standing and the other doctrines that implement the case or controversy requirement "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'"[176] When executive action is challenged, those limitations confine the courts to enforcing "specific legal obligations whose violation works a direct harm," and reflect the fact that the executive, and not the judiciary, has the duty "to 'take Care that the Laws be faithfully executed.'"[177]

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he did not regard it as jurisdictional: he characterized the requirement that a plaintiff show harm as a practice of the Court regarding cases within its jurisdiction. *Id.* at 347.

172 Allen v. Wright, 468 U.S. 737 (1984).

173 Frothingham v. Mellon, 262 U.S. 447, 487–88 (1923).

174 *Allen*, 468 U.S. at 743–46.

175 *Id.* at 750.

176 *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

177 *Id.* at 761 (quoting U.S. CONST. art. II, § 3).

In his extra-judicial writings, Justice Scalia has emphasized the connection between standing doctrine and limits on the courts' law-declaring role. The title of his leading article makes the point by itself: *The Doctrine of Standing as an Essential Element of the Separation of Powers*.[178] Beyond the title, then-Judge Scalia's argument was that standing principles confine the courts to the protection of concrete, individual interests, leaving the protection of the public interest to the political branches.[179] He agreed that the courts operate to "assure the regularity of executive action."[180] The important question was whether doing that by itself was "'the judicial role,' or rather merely the incidental effect of what *Marbury v. Madison* took to be the judges' proper business—'solely, to decide on the rights of individuals.'"[181] His answer was the latter.[182]

According to Justice Scalia, the presence of a constitutional issue made no difference.[183] No matter what source of law is involved, judges have the countermajoritarian task of protecting the rights of individuals, not the majoritarian and political task of furthering the public interest.[184] The public interest, in his view, included the taxpayers' interest in ensuring that their money be spent only as the Constitution permits.[185] On those grounds he criticized *Flast v. Cohen*,[186] which allowed taxpayers to bring an Establishment Clause challenge to a spending program that did not otherwise invade private rights.[187] He well understood that standing limitations would keep some constitutional issues from coming before the courts altogether, and he gave the constitutionality of spending programs as an example.[188] In his view, that was exactly the point, and he praised cases both before and after *Flast* that took a more restrictive view of standing.[189] As the Jus-

178 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

179 *See id.* at 894.

180 *Id.* at 884.

181 *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

182 *See id.* at 894.

183 *See id.*

184 *Id.* at 896–97.

185 *See id.* at 891.

186 Flast v. Cohen, 392 U.S. 83 (1968).

187 Scalia, *supra* note 178, at 890–92.

188 *Id.* at 892.

189 *Id.* at 898. *Flast*, he maintained, was a virtual repudiation of *Frothingham v. Mellon*, 262 U.S. 447 (1923), which denied federal taxpayers standing to challenge a spending program and made it generally impossible to challenge spending programs on constitutional grounds. Much better in his view were *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). *Schlesinger* denied citizen standing to

tices in *NFIB* probably recognized, the Affordable Care Act includes a number of spending programs that no one would have standing to challenge on grounds of inseverability from any unconstitutional part of the statute.

Insofar as the Justices subscribe to the canon of constitutional avoidance, they are limiting the Court's law-declaring role. Insofar as they subscribe to the standing doctrine, and other constitutional principles that limit their adjudicatory authority, they are adopting an even more fundamental principle: that the law-declaring function is a consequence of the adjudicatory function. That is how constitutional review is presented in *Marbury*.[190] If that is the Court's approach, then judicial legislation, judicial nullification of statutory rules, and judicial severance of statutes are all figures of speech. Those metaphors are derived from a literal truth of decisions in cases and are misleading when they suggest results that cannot be reconciled with that literal truth.

This Article does not seek to contribute to the debate over the proper scope of, and the proper limits on, the courts' law-declaring function. It does not argue that the canon of constitutional avoidance is desirable, or that the Court's standing doctrine is a sound reading of Article III. Its point is that the rationale for avoidance, and the structural justification for the standing requirement, apply with great force to *Free Enterprise Fund*, *NFIB*, and cases like them. Reaching out to decide the constitutional question in the former and the severability question in the latter expanded the scope of judicial authority. Hence, in those cases some or all of the Justices may have exceeded what they themselves regard as the limits of the law-declaring function, because they treated the question of severability as being genuinely one of remedy. Their understanding of severance may represent not a deliberate modification of their views about the courts' proper role, but it is mistaken in light of principles they otherwise embrace.

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object on constitutional grounds to the presence of commissioned military officers in Congress, and so enforce Article I, Section 6 of the Constitution, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art I, § 6. *Schlesinger* made it virtually impossible for that constitutional provision to come before the courts. *Richardson* denied citizen and taxpayer standing to demand that the CIA's budget be made public, and so made it effectively impossible for the courts to enforce the Statement of Accounts Clause of Article I, Section 9 of the Constitution.

190 *See supra* text accompanying notes 141, 147.

B. Severance by Lower Courts

In an important case, in which the Supreme Court recently denied certiorari, the D.C. Circuit followed the Supreme Court's lead in *Free Enterprise Fund*. But the D.C. Circuit, important as it is, is not the Supreme Court of the United States.

In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*,[191] a webcaster challenged in the D.C. Circuit the royalty awarded to rights-holders by the Copyright Royalty Board.[192] The Copyright Royalty Board is composed of three Copyright Royalty Judges ("CRJ"), who are appointed by the Librarian of Congress for six-year terms.[193] The statute provides that royalty judges may be removed by the Librarian only for misconduct, neglect of duty, or disqualifying disability.[194] The webcaster, Intercollegiate Broadcasting System, raised constitutional objections to the royalty judges' authority. Because royalty judges are not appointed by the President with the advice and consent of the Senate, the office of royalty judge is an inferior office under the Constitution. Inferior officers may be appointed only by the President acting alone, the courts of law, and the heads of department.[195] According to Supreme Court precedent, inferior officers must be subject to substantial supervision by a superior other than the President.[196] Intercollegiate, adversely affected by the royalty award, argued that the Librarian of Congress is a legislative officer and hence not a head of department for purposes of the Appointments Clause. Intercollegiate also maintained that even if royalty judges are properly appointed, their protection from removal

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191 Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013).

192 *Id.* at 1334. The copyright statutes grant webcasters a "statutory license" to transmit copyrighted material, subject to payment of a licensing fee. 17 U.S.C. § 114(d) (2012). If the webcaster and the copyright holder are unable to agree on a royalty, the royalty is set by a Copyright Royalty Judge (the Copyright Royalty Judges together make up the Copyright Royalty Board, although they decide royalty disputes individually). *Id.* § 114(f) (providing for setting royalty); *id.* § 801 (providing for appointment of Copyright Royalty Judges).

193 17 U.S.C. §§ 801–802.

194 *Id.* § 802(i).

195 The Appointments Clause provides that officers of the United States shall be appointed by the President with the advice and consent of the Senate, but that inferior officers may be appointed by the President alone, a head of department, or a court of law, if Congress so directs. U.S. CONST. art. II, § 2, cl. 2.

196 *See*, *e.g.*, Edmond v. United States, 520 U.S. 651, 663 (1997) (explaining that for an office to be inferior, its holder must be subject to substantial supervision by a superior other than the President).

gives their superior, the Librarian of Congress, inadequate power to supervise them.[197]

The D.C. Circuit concluded that the Librarian of Congress is a head of department for purposes of the Appointments Clause, and therefore rejected the argument that he may not appoint royalty judges.[198] It agreed, however, that the statute does not provide for enough supervision of royalty judges to satisfy the Supreme Court's cases concerning inferior officers.[199] It thus found itself presented with the question the Supreme Court had confronted in *Free Enterprise Fund*: when a statutory grant of power to an officer and a statutory tenure protection cannot constitutionally coexist, which should remain operative and which should not, as a matter of statutory interpretation? Like the Court in *Free Enterprise Fund*, the D.C. Circuit concluded that the power should survive and the tenure protection become ineffective.[200]

The court of appeals described its judgment in terms that should now be familiar: "But we agree with Intercollegiate that the position of the CRJs, as currently constituted, violates the Appointments Clause. To remedy the violation, we follow the Supreme Court's approach in [*Free Enterprise Fund*], by invalidating and severing the restrictions on the Librarian of Congress's ability to remove the CRJs."[201] The court seems to have followed the Supreme Court in taking the idea of violation quite seriously: "Because of the Appointments Clause violation at the time of decision, we vacate and remand the determination challenged here . . . ."[202] The court of appeals spoke as if the statute had earlier been contrary to the Constitution, but has now been changed so that it is not.[203]

Sometimes, however, lower courts cannot follow the Supreme Court, even when they think they are doing so. The Supreme Court's precedents as to federal law bind all American courts, and thus make law in quite a strong sense. D.C. Circuit precedents bind the United

197 *Intercollegiate*, 684 F.3d at 1336.

198 *Id.* at 1341–42.

199 *Id.* at 1340.

200 *Id.* at 1340–41. That conclusion regarding severability is itself doubtful. Congress might well have thought that substantial independence is a requisite for impartial adjudication and implicitly conditioned the power of the royalty judges, or the existence of their office, on their protection from removal at the will of the Librarian of Congress.

201 *Id.* at 1334 (citations omitted).

202 *Id.*

203 According to the standard view of invalidity, if the D.C. Circuit was right about the Constitution and about severability, the royalty judges were subject to at-will removal by the Librarian when they made the initial decision, even if they did not know that.

States District Court for the District of Columbia, subsequent panels of the D.C. Circuit, and no other court. The D.C. Circuit thus makes law, and can in effect change the meaning of a statute, only more narrowly. That difference matters with respect to the effect of the D.C. Circuit's decision in *Intercollegiate*. Despite that case, well-counseled royalty judges would realize that the constitutionality of their statutory tenure protection is still an open question for practical purposes. If the Librarian of Congress were to remove a royalty judge, the judge could seek back pay in the United States Court of Federal Claims.[204] Decisions of that court are appealable to the Court of Appeals for the Federal Circuit, not the D.C. Circuit.[205] In a case brought by a removed officer, the Federal Circuit might conclude either that the statute as written is constitutional, or that if the whole system is unconstitutional, the power rather than the tenure protection is inoperative. The Federal Circuit would be under no obligation to follow the D.C. Circuit's precedents, including *Intercollegiate*.[206] The D.C. Circuit did not make as much law in that case as its judges appear to have thought it did.

The court of appeals's decision thus did not provide any relief to Intercollegiate. It did not bring the statute into conformity with the Constitution, because even if the Supreme Court can do that, a lower court cannot. Nor did it conclusively inform the royalty judges that they must assume that the Librarian of Congress can remove them at will, because that question has not been conclusively determined. For that reason, the decision's effect on Intercollegiate was the same as that of a decision that the royalty judges' power is operative because the statute as written is constitutional. Under the canon of constitu-

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204 A removed royalty judge would claim that the removal was inconsistent with the judge's statutory appointment because the removal restriction is valid and *Intercollegiate* was wrong on this point. The Tucker Act gives the Court of Federal Claims jurisdiction over claims for money damages founded on federal statutes and contracts with the federal government. 28 U.S.C. § 1491(a) (2012). Two of the leading cases on the constitutionality of removal restrictions, *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), involved removals followed by suits for back pay. *Humphrey's Executor*, 295 U.S. at 604; *Myers*, 273 U.S. at 56.

205 Under 28 U.S.C. § 1295(a)(3), the Federal Circuit has jurisdiction over all appeals from the Court of Federal Claims.

206 Decisions of the Copyright Royalty Board are appealed directly to the D.C. Circuit, 17 U.S.C. § 803(d)(1), so there were no proceedings in a lower court. The court of appeals did not enter a declaratory judgment. It is doubtful whether the court of appeals's decision would collaterally bind the royalty judges in a case seeking back pay for unlawful removal, because they were not parties to *Intercollegiate* in their individual capacities, whereas they would be removed in their personal capacities. In any event, judges appointed after the D.C. Circuit's decision, who were not parties in any capacity, would not be bound.

tional avoidance, the court of appeals should not have reached the constitutional question. Had the court not been influenced by *Free Enterprise Fund*, it might have considered and adopted that approach.

Conclusion

As Justice Scalia pointed out in *James B. Beam Distilling Co. v. Georgia*,[207] judges do make law, but they make it the way judges make it.[208] Their method is not to modify statutes and constitutions, the way legislatures and constitution-makers do. Judges make law by deciding cases and setting precedents, and their ability to make law is derived from and limited to their ability to decide cases and set precedents. Sometimes they fail to see the difference between their own mode of lawmaking and the mode that actually changes the authoritative text. Thinking that courts actually invalidate statutes, on grounds of unconstitutionality or inseverability, reflects a failure to see that difference. In failing to see that difference the courts can, as judged by their own stated standards and the principles that underlie their practices, make not only law, but also mistakes.

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207 James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991).

208 *See id.* at 549 (Scalia, J., concurring).