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Legislatures sometimes address the risk that a court will declare all or part of a law unconstitutional by including "fallback" provisions that take effect on condition of such total or partial invalidation. The most common kind of fallback provision is a severability clause, which effectively creates a fallback of the original law minus its invalid provisions or applications, but fallback law can also take the form of substitute provisions. Whether phrased in terms of severance or substitution, fallback law gives rise to serious constitutional and policy questions. When does a fallback cure the defects of the original provision? Should legislatures be permitted to adopt punitive fallbacks designed to coerce the courts into sustaining otherwise questionable provisions? Does the use of a fallback violate the legislator's duty, if any, of independent constitutional judgment? What court's decision should trigger the substitution of a fallback for the original provision, and for what parties? These questions lack easy answers because fallback law operates in the midst of institutional conflict: Upon finding a law unconstitutional, a court must do its best to implement the remaining will of the very legislature that enacted the invalid law; a legislature in crafting fallback law must do its best to anticipate how the courts will respond; yet in the American system of separation of powers, each institution has at best a limited ability to predict or control how the other will respond to its work product.

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INTRODUCTION

To address the risk that a court will declare all or part of a law unconstitutional, legislatures sometimes include "fallback" provisions that take effect on condition of such total or partial invalidation. The attraction of fallback law is obvious. A fallback provision enables the legislature to avoid having to go back to the drawing board should a court find the law invalid. The fallback fills the legal vacuum that would otherwise exist during the time between the invalidating decision and the enactment, if any, of new, valid legislation. Fallback measures ensure that the same session of the legislature that produced the original law gets to say, in advance, what the law will be in the event that the original is subsequently invalidated.

However, fallback law also has disadvantages. Fallback provisions will not always cure the original provisions they back up, and even when they

do, other constitutional and practical difficulties can arise. This Article identifies those difficulties, which chiefly involve interinstitutional conflict. Upon finding a law unconstitutional, a court must do its best to implement the remaining will of the very legislature that enacted the invalid law,[1] and in crafting fallback law, a legislature must do its best to anticipate how the courts will respond. In the American system of separation of powers, each institution has at best a limited ability to predict or control how the other will respond to its work product.

Although no prior academic study addresses fallback law as such, the phenomenon is in fact extremely common. The most widely used kind of fallback provision is a severability clause, which provides that in the event that the original law is held partly invalid, a fallback of the original law minus the invalid provision or application will take effect.[2]

Less commonly, fallback law takes the form of substitute provisions, rather than merely the truncated version of the original law that a severability clause produces. For example, section 274(f) of the Balanced Budget and Emergency Deficit Control Act of 1985 (also known as the Gramm-Rudman-Hollings Act) provided that in the event that certain features of the Act were held invalid, a collection of fallback provisions would go into effect.[3] Having invalidated the triggering provisions, the Supreme Court in *Bowsher v. Synar* declared these fallback provisions effective.[4]

The distinction between severability and "substitutive" fallback law is not always sharp, and in some sense, every severability provision establishes a kind of substitutive fallback provision. The truncated law is not simply smaller; it is also different from the original law.

That point is easy to see in a case like *United States v. Booker*.[5] After a majority of the Supreme Court concluded that the Federal Sentencing Guidelines violated the Sixth Amendment insofar as they enhanced sentences based on facts proved to a judge rather than a jury,[6] a different

1. E.g., People v. Liberta, 474 N.E.2d 567, 578 (N.Y. 1984) (declaring portion of statute unconstitutional and stating that "[t]his court's task is to discern what course the Legislature would have chosen to follow if it had foreseen our conclusions as to" statute's unconstitutionality). *Liberta* is discussed below. See infra note 9 and accompanying text; infra text accompanying note 21.

2. A typical example is section 406 of the Immigration and Nationality Act, which stated: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." Ch. 477, § 406, 66 Stat. 163, 281 (1952) (codified as amended at 8 U.S.C. § 1101 note (2000) (Separability)). This language was held controlling of the severability question in INS v. Chadha, 462 U.S. 919, 932 (1983).

3. Pub. L. No. 99-177, § 274(f), 99 Stat. 1037, 1100.

4. 478 U.S. 714, 734–36 (1986).

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

6. Id. at 244 (Stevens, J., opinion of the Court). The Guidelines were a product of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

majority went on to hold that the portion of the Guidelines mandating the imposition of Guidelines sentences was severable from the rest of the Guidelines.[7] Although nominally using the language of severability, the Court in effect substituted advisory for mandatory Guidelines.[8] After all, a regime of advisory guidelines operates very differently from a regime of mandatory ones. The new regime is not simply the old one minus some now-eliminated part; it has its own distinctive characteristics.

The not-just-less-but-different feature of the severability determination in *Booker* is not unique. In one New York case, for example, the state's highest court severed an unconstitutional *exemption* contained in a criminal law, leaving behind an expanded prohibition.[9] In an important sense, *whenever* a court severs a law's invalid provisions or applications, the resulting law is not just less, but different.[10]

Although severability is thus a special kind of substitutive fallback law, focusing on *expressly* substitutive fallback law brings into sharp focus various constitutional and practical issues that are easy to overlook when one considers severability as such. Accordingly, this Article principally considers examples of the relatively rarely used category of expressly substitutive fallback provisions (which, to avoid awkwardness, I shall simply call *substitutive* fallback provisions). But nearly all of what it says about fallback law has relevance to the much more common phenomenon of severability.

What, then, are the principal constitutional and practical problems that fallback law creates? First, and perhaps most obviously, a fallback provision would fail in its very purpose if it did not cure the defect of the original provision. The *Bowsher* Court endorsed the proposition that "fallback provisions are '"fully operative as a law,"'"[11] but that statement must be qualified. If a fallback provision itself has constitutional defects, then those defects render the fallback invalid. Obviously, this would be true whether or not the defects in the fallback were the same as those in the original provision. For example, a fallback that violated the First

7. 543 U.S. at 258–65 (Breyer, J., opinion of the Court) (invalidating 18 U.S.C. § 3553(b)(1) (Supp. IV 2004) and id. § 3742(e) (2000 & Supp. IV 2004)).

8. Id. at 245 (noting that Court's holding rendered Federal Sentencing Guidelines "effectively advisory").

9. See People v. Liberta, 474 N.E.2d 567, 578–79 (N.Y. 1984) (severing marital exemption from rape statute).

10. For an excellent elaboration of this point, see Emily Sherwin, Rules and Judicial Review, 6 Legal Theory 299, 302 (2000) ("When a court finds an unconstitutional application to be severable from other valid applications, what remains after severance is a new, narrower law.").

11. Bowsher v. Synar, 478 U.S. 714, 735 (1986) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (quoting Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 234 (1932))). Both *Buckley* and *Champlin Refining* involved severability rather than substitutive fallback provisions.

Amendment could not constitutionally replace an original provision that violated the doctrine of separation of powers.[12]

If the requirement that a fallback itself must be constitutional seems obvious, implementing this requirement may be complicated by the fact that it will not always be evident whether the constitutional defect of the original provision taints the fallback. In *Bowsher*, the fallback was clearly untainted. The original scheme empowered the Comptroller General to make budget cuts to reduce federal spending to predetermined deficit reduction targets.[13] The Court invalidated the pertinent statutory provisions on separation of powers grounds: Although the Comptroller General was empowered to execute the law,[14] he was removable, and thus subject to control, by Congress.[15] Anticipating the possibility of such a ruling, Congress included in the legislation a fallback that substituted a procedure requiring both houses of Congress to approve a bill then submitted to the President in order for budget cuts to take effect.[16] That fallback procedure was materially equivalent to the Article I, Section 7 mechanism for the enactment of new legislation, and because it made no use whatsoever of the Comptroller General, there was no plausible argument that it shared the constitutional defect of the invalidated procedure.

But what if the fallback provision purports to preserve the outputs of an otherwise invalid body by delegating to the President the authority to adopt those outputs as his own? If the power to decide the matter in question could have been delegated to the President in the first place, does his use of the fallback procedure to ratify the invalid body's outputs purge the taint? This far-from-hypothetical question is raised by a provision of the North American Free Trade Implementation Act (NAFTA Implementation Act).[17] That fallback provision authorizes the President to give effect to decisions by international bodies in the event that the original provision—which gives those bodies' decisions direct effect under U.S. law—is held invalid. The answer, in the NAFTA case and in general, would seem to depend on whether we deem the President's action as his alone or as partly that of the invalid body.

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12. Consider section 201(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), which defines "electioneering communication" for purposes of various reporting and spending requirements, and contains a fallback definition which would go into effect if the principal definition were found to "be constitutionally insufficient by final judicial decision." 2 U.S.C. § 434(f)(3)(A)(ii) (Supp. IV 2004). In *McConnell v. FEC*, the Supreme Court upheld the primary definition and thus had no occasion to address the validity of the fallback. 540 U.S. 93, 189–94 (2003). However, four Justices would have ruled that the definition and the fallback were both invalid. See id. at 277–78 (Thomas, J., concurring in part and dissenting in part); id. at 337–38 (Kennedy, J., joined by Rehnquist, C.J., and, in relevant part, Scalia, J., concurring in part and dissenting in part).

13. *Bowsher*, 478 U.S. at 717–18.

14. Id. at 732–34.

15. Id. at 727–32.

16. Id. at 718–19.

17. 19 U.S.C. § 1516a(g)(7)(B) (2000).

A fallback that fails to cure the constitutional defect of the original provision is not, strictly speaking, invalid in virtue of its "fallback-ness." The problem is simply that the fallback shares (at least some of) the constitutional flaws of the original.

Can legislation ever be invalid in virtue of its fallback-ness? In other words, can we envision a statutory provision that would be valid if enacted as a freestanding law, but which becomes invalid because it appears as a fallback to another, invalid provision? The answer is yes, as an example illustrates.

Suppose Congress enacted a fallback law eliminating funding for parachutes for members of the Air Force in the event that a court struck down the exclusion of homosexual service members from the military.[18] Even though Congress could choose not to fund parachutes, doing so via this hypothetical fallback would be a transparent effort to coerce the judiciary into voting to sustain the homosexual exclusion,[19] and, for that reason, might be deemed unconstitutional. The issue is more puzzling than it may at first appear, however, because Congress probably could cut funding for parachutes in response to an unrelated judicial ruling of which it disapproved, and probably could do so after having announced an intention to do so in the event of an unfavorable judicial ruling. Drawing analogies to other constitutional doctrines, I explain below how retaliatory legislation can be valid when enacted independently, but unconstitutional when enacted *as a fallback*. Here and elsewhere, one's attitude toward fallback legislation will depend on one's attitude toward another deep constitutional puzzle—the extent to which courts should invalidate laws that serve impermissible purposes.

As the foregoing examples illustrate, there may be an important role for courts in policing the bounds of constitutionally permissible fallback law. But even if one concluded, on institutional competence or other grounds, that courts should generally enforce fallback law, the decision whether to employ fallback law, including severability, can raise constitutional questions outside of the courts. Longstanding debates about the degree to which the Constitution forbids, permits, or requires legislators to make their own independent judgments about the constitutional validity of their enactments have consequences for the legitimacy of fallback law. To give one illustration of a point to which I return below, some accounts of judicial review picture the practice as one of "dialogue" between the elected branches and the courts.[20] Yet when Congress or a

18. See 10 U.S.C. § 654 (2000) (providing "[p]olicy concerning homosexuality in the armed forces").

19. For a game-theoretical discussion of the broader concept of legislative threats, see generally Guy Halfteck, Legislative Threats (Feb. 2006) (unpublished manuscript, on file with the *Columbia Law Review*), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887729.

20. See, e.g., Alexander M. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 50 (1961) ("[V]ery often [the Supreme Court] engages

state legislature scripts its response to a prospective decision overruling its output in advance of that ruling, it cannot possibly take account of whatever points the courts will make in the future discussion.

To be sure, even from the responsible legislator's perspective, there will be many circumstances in which fallback law is constitutionally permissible. Perhaps the legislature knows the possible grounds on which a court might invalidate a proposed bill, considers those grounds in its deliberations, but reasonably concludes that the bill is constitutional, and enacts it. Surely the legislature can, with clear conscience, also include a fallback as insurance against the possibility of judicial invalidation.

When a legislature legitimately decides to draft a fallback, what should the provision entail? Here, practical questions arise. Should the fallback be triggered by *any court's* invalidation of the original provision? Only by a Supreme Court ruling? And triggered for whom? The parties? Everyone? No answer to these and related questions is ideal because legislators face tradeoffs in designing a fallback law: Awaiting a final ruling on the validity of the original provision by the U.S. Supreme Court or a state high court means leaving in place a legal void, the very evil that fallbacks aim to prevent; yet, making lower courts' decisions trigger the fallback's applicability either creates legal inconsistency or gives those courts inordinate lawmaking power.

What about severability? Nearly all of the constitutional and practical difficulties addressed in this Article concern severability as well as substitutive fallback law. Indeed, in some instances, even nonseverability can give rise to problems. Suppose, for example, that a retrograde state legislature were to specify that its marital rape exemption could not be severed from the law as a whole—deliberately putting a court in the awkward position of eliminating the legal prohibition of rape in the event that it finds that the marital exemption violates equal protection.[21] The court's problem would be structurally identical to the problem faced by a

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in a Socratic dialogue with the other institutions and with society as a whole concerning the necessity for this or that measure, for this or that compromise."); Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*, 110 Yale L.J. 441, 517–21 (2000) (analyzing interaction between Congress and Supreme Court in modern civil rights era and concluding first that "the Court will sometimes *require* the assistance of Congress to succeed in the . . . task of constitutional interpretation," and second that "because Congress, as a popular legislative body, is well situated to perceive and express evolving cultural norms, Congress's understanding of equality is a vital *resource* for the Court to consider as it interprets the Equal Protection Clause"); cf. Jürgen Habermas, Moral Consciousness and Communicative Action 198 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) (1983) (offering "practical discourse" among "all concerned" as the "warrant of the rightness (or fairness) of any conceivable normative agreement" that argumentative decisionmaking reaches). For a critique of dialogue, see Richard A. Posner, The Supreme Court, 2004 Term—Foreword: A Political Court, 119 Harv. L. Rev. 31, 82 (2005) ("It is apparent in [Bickel's] account who is Socrates and who are Socrates's stooges . . . ."). For further discussion of the dialectic view, see infra Part IV.B.

21. See supra note 9 and accompanying text.

court asked to adjudicate the validity of a law backed by a coercive substitutive fallback provision.

This Article does not argue that every possible judicial response to an unconstitutional provision of law—invalidating the whole law, severing the invalid provision, or implementing a substitutive fallback—will necessarily give rise to constitutional or practical difficulties. At the very least, some principle of severability is a deep necessity in a legal system with judicial review because there is no natural boundary to a law. Does an invalid provision taint every other provision that passed Congress in the same Article I, Section 7 Act? Does it taint every other provision in the same title of the U.S. Code? A *real* rule of nonseverability would treat any invalid provision of law as invalidating the entire legal code. Thus, real nonseverability is never an option for a court, and so, for courts as well as legislatures, the question is never whether to sever, but how much to sever or what kind of fallback to utilize.

This Article proceeds in six parts. Part I explores the conditions under which a fallback provision bears the taint of its association with an invalid original provision. Part II briefly considers and rejects the possibility that substitutive fallback law ought to be rejected categorically on nondelegation grounds, while noting that the related phenomenon of application severability in fact poses more serious issues. Part III proposes a doctrinal test for distinguishing between valid fallbacks and fallbacks that impermissibly attempt to coerce the courts. Part IV examines the constitutionality of fallback law under three leading approaches to the legislator's duty, if any, of independent constitutional judgment. Part V considers the practical difficulties faced by a legislator trying to decide which judicial decisions should trigger a fallback. Part VI explains why severability, and thus fallback law and the problems associated with it, are inevitable features of our system of judicial review.

I. CAN A FALLBACK STAND ALONE? THE TAINT PROBLEM

A. *The Next Best Thing*

Suppose you are a legislator interested in enacting statutory provision X, which you believe to be both constitutional and warranted on policy grounds but which, you worry, may be invalidated by a court that interprets the Constitution differently. Assuming you do not believe yourself duty bound to vote against the measure simply because it may be struck down by a court,[22] how can you insure against the risk of judicial invalidation? In theory, you would include instructions in the statute that say something like the following: "In the event that a court holds X invalid, the law shall be as close to X as possible without sharing its constitutional defect."

22. I explore the bounds of this assumption below. See infra Part IV.

In reality, however, you cannot say *that*, because the instruction is hopelessly indeterminate. "Close" along what dimension? As measured by what metric? Even if you thought it possible for a court to determine "the next best thing," why would you trust a court that does not share your constitutional judgment to act as your faithful agent in guessing at your policy preferences in the same general area of law?[23]

Moreover, in some contexts, the very vagueness of an unspecified "next-best-thing" fallback would itself be constitutionally problematic. For example, suppose that the Board of Airport Commissioners of Los Angeles had included in its original resolution—which, incredibly, banned all "First Amendment Activities" in the "Central Terminal Area" of the Los Angeles International Airport[24]—the following fallback: "In the event that this resolution is found invalid, all expressive activities which, consistent with the First Amendment, can be banned in an airport, are hereby banned." There is little doubt that the fallback would have met the same fate as the original. Whereas the Supreme Court held the original provision unconstitutionally overbroad, the hypothetical fallback would have been unconstitutionally vague: First Amendment doctrine in its entirety does not give potential speakers sufficient notice of what is and is not permissible speech.[25]

To be sure, vagueness presents a greater problem where laws imposing criminal penalties or limiting expressive rights are concerned,[26] but even outside these areas, legislators will usually find themselves unable to enact a general purpose do-the-next-best-thing fallback. Courts would balk at constructing, out of whole cloth, the nearest constitutional thing to a provision they have just invalidated, for that seems a quintessentially legislative task. As the Supreme Court warned most recently in the con-

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23. A legislature concerned about this problem might well prefer delegation of responsibility for a fallback solution to a sympathetic administrative agency than to the court that, by hypothesis, is going to find the original provision invalid. Congress did just this with regard to judicial review of regulations governing certain discrimination claims brought by federal employees in 2 U.S.C. § 1409 (2000) and 28 U.S.C. § 3902 (2000), each of which provides: "If the court determines that the regulation is invalid, the court shall apply, to the extent necessary and appropriate, the most relevant substantive executive agency regulation promulgated to implement the statutory provisions with respect to which the invalid regulation was issued."

24. Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 570–71 (1987).

25. Cf. id. at 576 (rejecting proposed saving construction that would have limited ban to "expressive activity unrelated to airport-related purposes" because "the vagueness of this suggested construction itself presents serious constitutional difficulty"). For a discussion of how a narrowing cure for overbreadth can create the new disease of vagueness, see Laurence H. Tribe, American Constitutional Law § 12-32, at 1036–37 (2d ed. 1988).

26. See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982) (noting that Court's vagueness jurisprudence has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe"); Smith v. Goguen, 415 U.S. 566, 573 & n.10 (1974) (explaining that "[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts," such as "purely economic regulation").

text of application severability with respect to a state law, limited "institutional competence" leads the Justices to "restrain" themselves "from 'rewrit[ing] state law to conform it to constitutional requirements' even as [they] strive to salvage it."[27] European constitutional courts sometimes avoid this difficulty by ordering the legislature itself to craft new, valid legislation,[28] but that practice has been used only sparingly in the United States,[29] and with mixed results.[30]

Accordingly, the state and federal statute books contain very few do-the-next-best-thing fallbacks.[31] Unless, that is, we count severability as the

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27. Ayotte v. Planned Parenthood of N. New Eng., 126 S. Ct. 961, 968 (2006) (first alteration in original) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

28. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (46–47) (F.R.G.) (requiring legislature to employ criminal sanctions for early abortions, subject to exceptions). For an English-language summary emphasizing the interplay between the West German Constitutional Court and the legislature, see Gerald L. Neuman, *Casey* in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany, 43 Am. J. Comp. L. 273, 274–78 (1995).

29. One recent example is the decision by the New Jersey Supreme Court allowing the state legislature 180 days to amend state laws to open the institution of marriage to same-sex couples or to provide same-sex couples with the option of civil unions with all of the same benefits as marriage. See Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006).

30. When a court orders the legislature to act to satisfy a constitutional duty, it must allow some time for compliance. This lag can lead to practical difficulties, as two episodes illustrate. Following its holding that de jure racially segregated schools violate the Equal Protection Clause in Brown v. Board of Education, 347 U.S. 483, 493 (1954), the Supreme Court did not insist on immediate compliance with its holding, instead demanding that state and local officials act "with all deliberate speed." Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). That formula was taken by many to permit foot dragging, Richard Klugar, Simple Justice 752–53 (1976), leading the Court, thirteen years later, to demand a desegregation plan "that promises realistically to work, and promises realistically to work *now*." Green v. County Sch. Bd., 391 U.S. 430, 439 (1968). Likewise, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), a plurality of the Court invalidated the provision of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. II, sec. 241(a), § 1471, 92 Stat. 2549, 2668–69, that assigned to bankruptcy court judges business that, the Court held, could only be given to Article III judges. However, the Court stayed entry of judgment for six months to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 458 U.S. at 88 (plurality opinion). Congress did not act with sufficient alacrity, and so the district courts stepped in by adopting rules that restored bankruptcy court jurisdiction over those cases that fell outside the Article III core, reserving for themselves the power to issue binding orders in cases demanding an Article III judge (absent consent of the parties). See White Motor Corp. v. Citibank, N.A., 704 F.2d 254, 261 (6th Cir. 1983) (sustaining district court's interim rule). For a proposal for expanded use of the judicial remand to the legislature, albeit only as a cure for constitutional desuetude, see Guido Calabresi, A Common Law for the Age of Statutes 16–21 (1982).

31. Consider two arguable examples. First, some states permit personal jurisdiction in their courts on the basis of statutorily enumerated criteria, with the caveat that, in addition to the enumerated criteria, jurisdiction may be based on any ground consistent with the Constitution. See, e.g., 735 Ill. Comp. Stat. Ann. 5/2-209(c) (West 2003) ("A court may

next best thing, for in addition to including specific severability clauses in individual statutes, all the states and the federal government have a general default principle authorizing courts to sever invalid provisions and applications from valid ones.[32]

But severability will almost never be truly the next best thing from the legislator's standpoint. To put the point abstractly, suppose that law L consists of propositions L_1 and L_2. Now suppose that a court invalidates L_2, but finds L_1 to be valid and severable. It's true that the resulting law, L_1, resembles the original L in that it retains one of the original two provisions. But the resulting law sacrifices *everything* that L_2 accomplished. If there were some constitutionally valid way to achieve much of what L_2 achieved—say through a provision L_3—then substituting L_3 for L_2 would be preferable from a policy standpoint to L_1 standing alone. In this example, L_3 would be a substitutive fallback for L_2.

B. *The NAFTA Fallback and Procedural Dependence*

Yet as the fallback gets closer and closer in what it accomplishes to the original provision, it becomes more and more likely that the fallback itself will be held invalid. The NAFTA fallback nicely illustrates this difficulty. In the NAFTA Implementation Act, Congress included a fallback provision to take effect in the event that NAFTA's mechanism for resolving disputes under U.S. antidumping and countervailing duty law should be held unconstitutional. Under Chapter 19 of NAFTA, each signatory nation retains the right to apply its domestic antidumping and counter-

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also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."); La. Rev. Stat. Ann. § 13:3201(B) (2006) ("In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States."). Second, Alabama law authorizes two methods of execution, but further specifies that in the event that they are found to violate the Eighth Amendment, any constitutionally valid method may be used. Ala. Code § 15-18-82.1(c) (LexisNexis Supp. 2005) (authorizing death by "any constitutional method of execution" in event that electrocution or lethal injection is held invalid on state or federal constitutional grounds).

32. I documented this point over a decade ago. See Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 app. (1994) [hereinafter Dorf, Challenges]. Having not come across any indication of substantial change at the federal level or in any state, I do not repeat the exercise here. I do note, however, that although the formal tests treat applications as no less severable than provisions, judges and Justices find application severability more troubling in practice because it can require them to craft substantive provisions where the legislature has crafted none. See Transcript of Oral Argument at 27–29, *Ayotte*, 126 S. Ct. 961 (No. 04-1144), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1144.pdf (on file with the *Columbia Law Review*) (quoting Justice Ginsburg as saying that "'there is usually great caution on the part of the Court from tampering with the statute. . . . [Courts] feel much more comfortable cutting something out than putting something in.'"); see also supra text accompanying note 27. Perhaps in practice the presumption of severability is stronger for invalid provisions than for invalid applications.

vailing duty law,[33] subject to review by "binational panels" (or BNPs) consisting of trade lawyers from the United States and either Canada or Mexico.[34] There are, however, doubts about the constitutionality of these panels, which are instructed to apply the same standards as an Article III court would apply in cases involving goods from outside North America,[35] which directly bind federal agencies,[36] and which are not subject to review by any Article III court.[37] The NAFTA Implementation Act's fallback provision addresses the risk that the binational panel system will thus be found unconstitutional by granting the President, in the event of such invalidation, the power "to accept, as a whole, the decision of a binational panel."[38] This mechanism, however, achieves all of the same outcomes as the actual binational panel process of the original provision, and for that very reason, its constitutionality is dubious.

The argument *for* the NAFTA fallback's validity is straightforward: A law that simply delegated to the President the power to impose (or not impose) tariffs on Canadian or Mexican goods would be constitutional,[39] and the NAFTA fallback appears to do no more nor less.

This argument would be persuasive if the NAFTA fallback really were equivalent to a simple delegation of tariff-setting authority to the President, but the equivalence is not clear. The NAFTA fallback does not, after all, authorize the President to take *whatever* action he deems appropriate with respect to Canadian or Mexican goods. Nor does it constrain his discretion through processes that are themselves clearly constitutional—such as notice-and-comment rulemaking in an administrative agency.[40] Instead, he has two choices: He can do nothing, a power he undoubtedly had already; or he can implement exactly what the binational panel ordered.[41]

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33. North American Free Trade Agreement Implementation Act, 19 U.S.C. § 2411 (2000) (authorizing U.S. Trade Representative to penalize unfair trade practices); id. § 3312(a)(2)(B) (preserving authority granted by § 2411); North American Free Trade Agreement, U.S.-Can.-Mex., art. 1902(1), Dec. 17, 1992, 32 I.L.M. 605, 682 [hereinafter NAFTA].

34. 19 U.S.C. § 1516a(g); NAFTA, supra note 33, art. 1904.

35. NAFTA, supra note 33, art. 1904(2), (3).

36. 19 U.S.C. § 1516a(g)(7)(A).

37. Id.; NAFTA, supra note 33, art. 1904(11).

38. 19 U.S.C. § 1516a(g)(7)(B). Binational panel decisions can be reviewed by (binational) "extraordinary challenge committees," whose decisions are also not subject to Article III review, see NAFTA, supra note 33, annex 1904.13 ("Extraordinary Challenge Procedure"), and may be accepted as a whole by the President under the fallback provision. For my purposes, no loss of generality results from omitting discussion of extraordinary challenge committees.

39. See, e.g., Field v. Clark, 143 U.S. 649, 680–94 (1892) (upholding President's congressionally delegated power to suspend operation of free trade laws, resulting in tariffs upon certain imported goods).

40. See 5 U.S.C. § 553 (2000) (providing procedures for agency rulemaking).

41. 19 U.S.C. § 1516a(g)(7)(B) (providing that if BNP system is held unconstitutional, "the President is authorized on behalf of the United States to accept, *as a*

The problem with the NAFTA fallback is not that there is some independent constitutional requirement that the President be granted complete discretion over tariff determinations, for surely there is no such requirement.[42] Rather, the problem is that under the NAFTA fallback, the President's choices are constrained by decisions taken under a regime—NAFTA Chapter 19—that is (by hypothesis) unconstitutional.

To be sure, one might think that a body that lacks the constitutional authority to issue binding law nonetheless has the constitutional authority to have its outputs treated as merely advisory.[43] But even if so, a body whose rulings must either be implemented "as a whole" or rejected entirely is not simply giving advice in the ordinary sense, because those determinations form the necessary predicate for the President's implementation of them. It makes no more sense to call the BNP-plus-fallback regime advisory than it would to say that Congress plays only an advisory role in federal lawmaking because the President can either sign its bills as a whole or veto them.[44]

Or consider a starker example. Imagine that an original statute provides that an administrative agency annually shall award ten licenses to engage in some otherwise prohibited activity to the "most qualified white applicants." Suppose further that under the statute the agency first identifies a list of fifty white finalists, and then narrows its selection to ten licensees from that list. Finally, suppose that the law's fallback provision substitutes the President for the agency as the party who selects the ten winners from the list of fifty finalists. Surely, this fallback leaves the President's selection tainted by unconstitutional race discrimination, notwithstanding the fact that the President himself does not utilize a racial crite-

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whole, the decision of a binational panel or extraordinary challenge committee" (emphasis added)).

42. The discretion conferred on the President by the Civil Aeronautics Act of 1938, ch. 601, tit. VIII, § 801, 52 Stat. 973, 1014, would be a sufficient ground for distinguishing Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948), but not for distinguishing Dalton v. Specter, 511 U.S. 462 (1994), in which the President could only approve or disapprove in their entirety the recommendations of the Defense Base Closure and Realignment Commission. Id. at 470 (holding that such constraint on President's discretion is "immaterial"). Yet there is a more important similarity between these two cases that distinguishes them both from the NAFTA case. In *Chicago & Southern* and *Dalton*, the issue was whether judicial review of agency action for conformity with federal procedural statutes was available where presidential approval was required for the agency's recommendations to go into effect. Neither case involved a claim of unconstitutional conduct by the agency, and the *Dalton* Court specifically allowed that this distinction could be critical. Id. at 471–72.

43. See United States v. Booker, 543 U.S. 220, 258–65 (2005) (Breyer, J., opinion of the Court); supra notes 5–8 and accompanying text (discussing *Booker*).

44. See Clinton v. City of New York, 524 U.S. 417, 439–40, 447 (1998) (invalidating Line Item Veto Act, 2 U.S.C. §§ 691–692 (2000), because "[t]here are important differences between the President's 'return' of a bill pursuant to Article I, § 7," which requires him to "approve all the parts of a Bill, or reject it in toto," and the line item veto, which "gives the President the unilateral power to change the text of duly enacted statutes" (internal quotation marks omitted)).

rion. His list of options came from an invalid process, thereby tainting any choice he makes from it.

Likewise, presidential adoption of binational panel determinations pursuant to the NAFTA fallback does not purge panel decisions of whatever constitutional infirmities infect them. The NAFTA fallback's defect can be seen most clearly by contrasting it with a truly taint-purging fallback, such as the one in the Gramm-Rudman-Hollings Act. As noted briefly in the Introduction to this Article, the original Act contained a provision that gave the Comptroller General power to impose mandatory budget cuts in the event that Congress did not meet certain deficit reduction targets. The difficulty that Congress anticipated—and that came to pass in the *Bowsher* decision—was that the doctrine of separation of powers does not permit Congress to grant executive power to an official who answers to Congress itself.[45] Accordingly, Congress included a fallback provision in the event that the delegation of power to the Comptroller General was struck down. In that event, the fallback stated, Congress itself could pass a new law imposing mandatory budget cuts.[46] But, of course, Congress could have done *that* even without a special fallback provision as authorization; indeed, nothing the Congress that enacted the original Gramm-Rudman-Hollings Act could have done would have limited the ability of Congress at a later time to change how budgetary issues were handled.[47] In an effort to ensure that the fallback's validity was beyond doubt, Congress sacrificed essentially *everything* the original Gramm-Rudman-Hollings Act accomplished. After all, the whole point of the Act was to place spending authority outside the ordinary lawmaking process, which had proven incapable of producing balanced budgets.[48]

This juxtaposition of the NAFTA fallback and the Gramm-Rudman-Hollings fallback suggests a rough and ready generalization: If the origi-

45. Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. . . . [T]he Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.").

46. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 274(f)(2), 99 Stat. 1037, 1100.

47. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (affirming principle that "one legislature cannot abridge the powers of a succeeding legislature"); see also Lockhart v. United States, 126 S. Ct. 699, 703–04 (2005) (Scalia, J., concurring) (arguing that, under principle announced in *Fletcher*, so-called legislative "express-reference" or "express-statement" requirements should not be given effect); United States v. Winstar Corp., 518 U.S. 839, 871–80 (1996) (plurality opinion) (discussing unmistakability doctrine and its origins in English law principle that "one legislature may not bind the legislative authority of its successors").

48. E.g., Reply Brief of the Speaker and Bipartisan Leadership Group of the House of Representatives, Intervenors-Appellants at *1, *Bowsher*, 478 U.S. 714 (Nos. 85-1377 to 85-1379), 1986 WL 728086 (stating that "the provision which vested the statutorily-prescribed mathematical calculations of the cuts in the independent Comptroller General" was enacted "in order to 'wall' off that accounting function from political manipulation").

nal provision is unconstitutional because it contains a *procedural* defect, then, with two important caveats to which I return below, the fallback must be *procedurally independent* of the original. The defect in the Gramm-Rudman-Hollings Act was procedural: Congress had delegated lawmaking power to the Comptroller General, a person over whom, the Court said, Congress retained authority. The Gramm-Rudman-Hollings fallback escaped the taint of the original provision because the former was procedurally independent. Nothing that Congress did under the fallback depended on any actions of the Comptroller General.

The alleged constitutional defects in NAFTA are also largely procedural. These include, inter alia, that the selection of BNP panelists violates the Appointments Clause[49] and that the complete preclusion of judicial review of BNP decisions violates Article III.[50] But, as explained above, the NAFTA fallback is not procedurally independent. The President cannot adopt a BNP decision "as a whole" until after that decision has been rendered, and, I have argued, his adoption of the decision as a whole does not make the underlying ruling his alone.[51] Thus, the taint is not purged.

Before generalizing further from these two examples, I should note two caveats to which I adverted above. First, I have introduced the notion of procedural dependence simply as a means of identifying ways in which fallback provisions can succumb to various constitutional doctrines on their own terms. I do not contend that courts should construct some new doctrinal test which asks, as a threshold inquiry, whether a fallback is procedurally dependent on the original, and then applies different tests depending on whether the answer is yes or no. The notion of procedural dependence or independence simply assists courts in applying extant constitutional doctrines to fallback provisions.

Second, there is an obvious exception to the principle that procedurally dependent fallbacks will generally share the constitutional defect of the original provision. We can construct a fallback that is procedurally dependent on the original but that is nonetheless untainted if the addi-

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49. U.S. Const. art. II, § 2.

50. See Coal. for Fair Lumber Imps., Executive Comm. v. United States, No. 05-1366, 2006 WL 3590188, at *2 (D.C. Cir. Dec. 12, 2006) (listing constitutional challenges); Brief of Petitioner Coalition for Fair Lumber Imports Executive Committee at 48–52, *Fair Lumber Imps.*, 2006 WL 3590188 (No. 05-1366) (Appointments Clause argument); id. at 36–48 (Article III argument); Reply Brief of Petitioner Coalition for Fair Lumber Imports Executive Committee at 24–28, *Fair Lumber Imps.*, 2006 WL 3590188 (No. 05-1366) (Appointments Clause argument); id. at 17–23 (Article III argument). In my capacity as counsel for the Coalition, I coauthored these briefs.

51. Perhaps we might say that adoption as a whole would be valid if it could be shown that the President would have made exactly the same decision as the binational panel, even if he had been delegated the discretion to make whatever tariff decision he wished. But such a rule would itself invite judicial scrutiny of the President's motives that principles of separation of powers would likely condemn. Cf. Dalton v. Specter, 511 U.S. 462, 474–76 (1994) (rejecting abuse-of-discretion review of President's decisions and citing cases in support).

tional dependent procedure in fact yields a valid procedure. Consider an easy example. Suppose that the only defect in NAFTA Chapter 19 were its complete preclusion of judicial review of BNP decisions. Suppose further that the NAFTA fallback provided that, in the event that the binational panel system were found unconstitutional, BNP decisions could be appealed to the U.S. Court of Appeals for the Federal Circuit, an Article III court. That fallback would be procedurally dependent on the original Chapter 19 because anything reviewed by the Federal Circuit would have originated in the otherwise unconstitutional binational panel system, but the fallback would nonetheless be valid because the resulting system would, by hypothesis, cure the defect of preclusion of judicial review.

Where, however, a procedurally dependent fallback does not supply the constitutionally required missing piece, the fallback will bear the taint of the procedurally invalid mechanisms it supplants. The question then arises: Must Congress (or a state legislature) go so far as it did in the Gramm-Rudman-Hollings Act, and adopt a fallback that sacrifices all of the original law's aims in an effort to achieve procedural independence? The answer is certainly no.

In *Bowsher* itself, the Court did not say that Congress was precluded from assigning to any government official the function of freezing or cutting spending to achieve deficit reduction. Congress was only forbidden from assigning that task to an official that it controlled.[52] Accordingly, as a fallback, Congress almost certainly could have delegated to an executive branch official—the Director of the Office of Management and Budget, say—the same authority that the original provision delegated to the Comptroller General. To be sure, doing so would have sacrificed one ostensible goal of the original legislation, namely, keeping the budget axe inside the legislative branch.[53] But given that *that* goal was exactly what the *Bowsher* Court found unconstitutional, it should hardly be surprising that Congress would have to give it up to achieve its remaining goals in a constitutional manner.[54] The more important point is that had Congress been willing to risk delegating power to the executive, it could have crafted a fallback that did not fall all the way back to Article I, Section 7.

52. *Bowsher*, 478 U.S. at 721–27.

53. Whether maintaining control over the budget cutter was in fact one of the goals of the original legislation was itself contested in *Bowsher*. Compare id. at 725 n.4 (contrasting degree of control Congress exercised over Comptroller General with lesser control it exercised over independent bodies), with id. at 785 (Blackmun, J., dissenting) (arguing that Congress assigned budget-cutting task to Comptroller General because it expected him to act independently).

54. See id. at 776–78, 783–87 (Blackmun, J., dissenting) (arguing that proper remedy for unconstitutional scheme in *Bowsher* was invalidation of statutory provisions that allowed Congress to directly participate in removal of Comptroller General).

C. *Substantively Defective Original Provisions*

If fallbacks must generally be procedurally independent of procedurally unconstitutional laws, no such requirement applies to a fallback that backstops a law that is vulnerable on substantive grounds. A few examples should clarify what I mean by distinguishing between procedural and substantive constitutional requirements in this context. To begin, suppose that when it enacted the Gun-Free School Zones Act of 1990 (GFSZA),[55] Congress had anticipated the possibility that the law would be invalidated as beyond congressional authority under the Commerce Clause, as it later was in *United States v. Lopez*.[56] Congress might have included a fallback banning the possession in school zones of firearms that had moved in interstate commerce because, as the Court confirmed in *Lopez* itself, such a "jurisdictional element" typically obviates the concern that Congress has gone beyond the bounds of the Commerce Clause.[57] Likewise, a clearly invalid municipal ordinance banning the sale of "indecent" material could be validly backstopped by a fallback that banned only the sale of "obscene" material, so long as the definition of obscenity satisfied the requirements set forth in *Miller v. California*.[58]

These examples make clear that wherever the constitutional constraint consists of a limit on the content of government action rather than the procedure by which that government action comes into being, the fallback inquiry is straightforward: Once a court determines that the original provision is invalid, it can be safely ignored, and the court can ask whether the resulting law, with the fallback, is valid.

In theory, that is true even where the underlying constitutional norm is procedural—that is, where, as in the case of NAFTA Chapter 19 and the Gramm-Rudman-Hollings Act, the constitutional norm constrains the procedure by which rulings or laws come into being. To determine the validity of the NAFTA fallback or the Gramm-Rudman-Hollings Act fallback, we can, in a sense, ignore the original law. But only in a sense, for as the NAFTA example illustrates, the fallback itself shares the defects (if they are defects) of the original binational panel system. The case is tricky because the NAFTA fallback *looks* independent at first blush. It

55. Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (codified as amended at 18 U.S.C. § 922(q) (2000)).

56. 514 U.S. 549 (1995).

57. See id. at 562. Indeed, the current version of the GFSZA contains just such a jurisdictional element. The original Act of 1990 read: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." § 1702(b)(1), 104 Stat. at 4844. Amended a year after *Lopez* in 1996, the law now reads: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, sec. 657, § 922(q)(2)(A), 110 Stat. 3009, 3009-369 to -370 (1996) (codified as amended at 18 U.S.C. § 922(q)(2)(A)).

58. 413 U.S. 15, 23–26 (1973).

appears to utilize the valid mechanism of delegation to the President. On close inspection, however, it becomes apparent that the fallback is entangled with the original provision. Thus, I do not propose drawing any clear doctrinal distinction between the test applicable to fallbacks alleged to save procedurally defective laws and those alleged to save substantively defective laws. My claim is simply that the question is more intricate with respect to the former, admittedly not sharply defined category.

D. *Invalid Purpose Tests*

The procedural-independence requirement for fallbacks activated by procedurally defective original provisions becomes especially slippery where the underlying defect consists of an invalid legislative purpose. We need to know whether the invalid purpose of the original provision infects the fallback. But that inquiry proves difficult both because invalid purpose tests are neither entirely procedural nor entirely substantive and because of ambiguities in purpose scrutiny itself. To illustrate, I shall use an Establishment Clause[59] example, but the point holds as well in other contexts, such as equal protection doctrine,[60] where the Constitution limits government purposes.

Suppose that a state adopts a law requiring that the Pledge of Allegiance be recited in public schools at the start of each day. Consistent with *West Virginia State Board of Education v. Barnette*,[61] the law permits students who do not wish to recite the Pledge to opt out.[62] But in anticipation of a possible ruling that the Pledge violates the Establishment Clause because it includes the phrase "under God,"[63] the state legislature also includes the following fallback: "If the recitation of the Pledge of Allegiance including the phrase 'under God' shall be found by a court to be unconstitutional, this law shall remain in effect except that students and teachers who wish to recite the Pledge may substitute the phrase 'under Law' for 'under God.'"

Now suppose that a court determines that the original law is invalid because it was adopted for the impermissible purpose of advancing religion. Exactly what body would have had that impermissible purpose is a

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59. U.S. Const. amend. I.

60. Id. amend. V; id. amend. XIV, § 1; see, e.g., Johnson v. California, 545 U.S. 162, 168–73 (2005) (explaining how discriminatory purpose in use of peremptory juror strikes can violate Constitution).

61. 319 U.S. 624 (1943) (invalidating compulsory recitation of Pledge of Allegiance in public schools).

62. See Elk Grove Unified Sch. Dist. v. Newdow (Newdow II), 542 U.S. 1, 8 (2004) (reviewing challenge to school district's policy of daily Pledge of Allegiance recitation and noting that "[c]onsistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation" (citing *Barnette*, 319 U.S. 624)).

63. See Newdow v. U.S. Cong. (Newdow I), 328 F.3d 466, 490 (9th Cir. 2003) ("[T]he school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause."), rev'd on standing grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1.

question upon which the most directly relevant cases shed inadequate light,[64] but in our hypothetical example we can bracket that question by assuming that the court finds both that the Congress that inserted the phrase "under God" into the Pledge in 1954 and the state legislature that required the Pledge to be recited in 2007 did so for the impermissible purpose of advancing religion. Suppose as well that it would be constitutionally permissible for a state legislature to require the recitation of the under-God Pledge, so long as: (a) it contains the opt-out provision mandated by *Barnette*; (b) it gives students and teachers who do not wish to opt out entirely the option of substituting "under Law" for "under God";[65] and (c) the legislature did not adopt the under-God Pledge law for the purpose of advancing religion. Finally, suppose that in our particular example the purpose of the state legislature in requiring the Pledge with "under God" was indeed to advance religion, but that the legislature's purpose in including the fallback was simply to accomplish as much of the original law's purpose as possible in the event that a court invalidated the original law. Is the fallback valid?

This question is difficult in part for reasons that go beyond the special puzzles that substitutive fallback law poses. We do not have a good account of whether and when courts can sever the parts of laws that serve impermissible purposes from the parts that serve permissible ones. On the one hand, if an otherwise innocuous omnibus law includes one provision that has the impermissible purpose of advancing religion, one would think that the ordinary presumption of severability ought to apply. Why invalidate the numerous valid provisions? On the other hand, the legislative process is usually a matter of logrolling and compromise. The general rule is that a law that would not have been enacted but for an impermissible purpose is invalid,[66] and if that is true for the problematic piece it might be thought to be true for the whole as well.

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64. In the Supreme Court, only three Justices would have reached the merits, and only one of them, Justice O'Connor, squarely considered the objection that the Pledge serves an impermissible purpose of advancing religion. In her view, this argument failed because the original congressional purpose was secular and "the *subsequent* social and cultural history of the Pledge shows that its original secular character was not transformed by its amendment." *Newdow II*, 542 U.S. at 41 (O'Connor, J., concurring in the judgment). Justice O'Connor did not address the purpose of the California legislature or the Elk Grove Unified School District in adopting, respectively, the state law and the district policy that required the recitation of the Pledge. Neither did the Ninth Circuit, which found that the school district's policy impermissibly "coerce[d] a religious act," *Newdow I*, 328 F.3d at 487, although it did note some questionable language in the House Judiciary Committee's report that accompanied the 1954 amendment. Id. at 488 n.7 (quoting H.R. Rep. No. 83-1693, at 3 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2341).

65. See Christopher Eisgruber & Lawrence Sager, Religious Freedom and the Constitution 152 (2007) (proposing "under Law" alternative as constitutionally permissible option).

66. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) ("Proof that the decision . . . was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such

To reconcile these principles would appear to require that courts engage in the following counterfactual inquiry whenever a provision of law enacted for an invalid purpose appears within a law that includes other provisions that were adopted for constitutionally unobjectionable purposes: Would the legislature have enacted the valid provisions were they not joined to the invalid one? If so, then severability is permissible, so long as the other conditions usually required for severability are satisfied. And indeed, to the very limited extent that the Supreme Court has addressed this question, that appears to be its approach.[67]

Turning more directly to the fallback that backstops an original provision that serves a constitutionally invalid purpose, the right question to ask is whether the impermissible purpose of the original provision infects the fallback. Clearly it would if we knew that the legislature actually had the impermissible purpose with respect to the fallback itself, but in the version of the Pledge of Allegiance example I am considering, we lack such knowledge. The evidence simply shows that the legislature's main purpose was to get God into the Pledge, and that if this could not be accomplished as the exclusive language of the Pledge, it would be accomplished as one of a menu of two options.[68]

Is *that* a permissible purpose? Certainly there are contexts in which government support of only religious options is invalid while support for a menu of items that includes both religious and secular choices is valid.[69] Here, to be sure, we know that the legislature actually favors the religious option. Still, it is not clear that this makes the fallback unconstitutional.

Perhaps the best way to make progress on this question is to distinguish between subjective and objective purpose. There are nontrivial reasons why one might think that an inquiry into the legislature's subjective

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proof would . . . [shift] the burden [to the government] of establishing that the same decision would have resulted even had the impermissible purpose not been considered.").

67. See Exxon Corp. v. Hunt, 475 U.S. 355, 376 (1986) (remanding to state court for determination of whether provisions of state law that served purposes that were preempted by Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.), were severable from other provisions of same law that served valid purposes).

68. It is not unrealistic to suppose that federal, state, and local bodies would use fallback provisions to push the edge of the envelope of what the courts permit in the area of the Establishment Clause. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 297, 301 (2000) (invalidating on Establishment Clause grounds official prayer at public school football games and noting that school district in question had made adoption of one version of prayer policy contingent on court enjoining even more problematic version of policy).

69. See, e.g., Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion) ("If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.").

purpose is almost always misguided,[70] but if the courts really did apply a purely subjective purpose test, legislatures would not likely risk writing a fallback. After all, a fallback could advertise to the courts and potential plaintiffs that the original provision was adopted for an impermissible purpose. The legislature would more likely disguise its purpose or, if there were legal uncertainty as to whether some purpose was in fact forbidden, await the courts' answer, and if the original law were held invalid, then reenact it without any reference to the forbidden purpose. Either of these approaches would enable the legislature to accomplish everything the original law accomplished (except perhaps some expressive goals). Accordingly, a legislature that fears alerting courts to an invalid *subjective* purpose will not likely enact a fallback provision. However, where the relevant constitutional doctrine turns on *objective* purpose, a legislature can write a fallback provision without worrying that it thereby reveals a forbidden subjective purpose.

Assuming that the Pledge with just "under God" would fail an objective purpose test, would the Pledge with the under-God-or-under-Law fallback also fail such a test? There are two ways that it might.

First, one might think that the only reason for giving the two options is to encourage the recitation of "under God." Although the Court's invalidation of a state-mandated moment of silence for "meditation or prayer" in *Wallace v. Jaffree* was based on the law's subjective purpose,[71] the case might alternatively (and more persuasively) have been decided on the ground that, as an objective matter, the inclusion of prayer as one of only two state-sanctioned activities served no possible secular purpose.[72] Likewise, the inclusion of "under God" as one of only two possible variants could be thought objectively to serve no secular purpose. That would render the fallback invalid, but not because of its fallbackness. It would be invalid because, contrary to my assumption above, the under-God-or-under-Law version of the Pledge would have been invalid even if adopted as the original law itself.

Second, and more relevant to our current inquiry, even if one concluded that a freestanding under-God-or-under-Law Pledge were valid, one still might think that an under-God-or-under-Law fallback to an

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70. See Edwards v. Aguillard, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute . . . or even the formal motivation for a statute where that is explicitly set forth . . . , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."); United States v. O'Brien, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."). See generally Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 Sup. Ct. Rev. 1 (exploring puzzles created by motive tests in legislation and constitutional doctrine).

71. 472 U.S. 38, 56–57 & nn.43–44, 59–60 (1985) (noting court filing by Governor and testimony by legislation's prime sponsor).

72. See id. at 66 (Powell, J., concurring) (remarking upon state's failure "to identify any nonreligious reason for the statute's enactment").

under-God Pledge would be invalid. In light of the legislature's evident objective purpose in enacting the original under-God Pledge, the argument would go, its only plausible purpose in including the under-God-or-under-Law fallback was to circumvent a judicial ruling invalidating the original law. However, this view about the legislature's objective purpose would be vulnerable to a standard objection to *subjective* purpose scrutiny: If the under-God-or-under-Law fallback were invalidated, the legislature could then go back and enact a freestanding under-God-or-under-Law Pledge, the objective purpose of which would, by hypothesis, be permissible. So, a court that thinks that the freestanding under-God-or-under-Law Pledge satisfies an objective purpose test would accomplish little of practical consequence by invalidating an under-God-or-under-Law Pledge that takes the form of a fallback.

Perhaps invalidation of the fallback would nonetheless be warranted because of the symbolic impact of the ruling or because there actually would be some practical effect—namely, that the legislature would once again have to muster the political will necessary to overcome legislative inertia. Or perhaps one might think that the legislature does not have a free hand to reenact the law as a freestanding provision once it has revealed, by its prior action, that its goals are impermissible.[73] No solution to these puzzles seems obviously correct, but that has more to do with the general mystery of purpose scrutiny than its specific application to fallback law.

E. *When Does Severance Cure Taint?*

Thus far we have considered the taint question with respect to substitutive fallback provisions, but legislatures more frequently require severance as the remedy for partial invalidation of the statutes they write. Indeed, as we saw in the Introduction and as I explain at greater length in Part VI, in a real sense, every law, including those that also include substitutive fallback provisions, also requires some measure of severability, at least implicitly. To what extent do the foregoing observations bear on the ubiquitous problem of determining when, and how much, severance cures the taint of an invalid legal provision?[74]

The answer is: quite a bit. Consider a variation on our Pledge example. Suppose a state law requires that public schools begin each day with

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73. See McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2736–37 (2005) (finding impermissible purpose of advancing religion in Ten Commandments display based on evolution of that display over time, even if last act by county viewed in isolation could be characterized as secular in nature).

74. For freestanding discussions of the ability of severability to purge the taint of an invalid provision, see Michael C. Dorf, The Heterogeneity of Rights, 6 Legal Theory 269, 279–91 (2000) (arguing that questions about facial challenges can typically be reduced to questions about severability); Mark L. Movsesian, Severability in Statutes and Contracts, 30 Ga. L. Rev. 41, 73–82 (1995) (proposing "textual" approach to replace current "contractual" approach).

a recitation by nonobjecting students of the Pledge of Allegiance with the phrase "under God" included. Suppose further that a court finds that this version of the Pledge violates the Establishment Clause because it was adopted for the impermissible purpose of advancing religion. What remedy should the court order? Assuming that the state either generally presumes severability[75] or that the Pledge statute contains a severability clause, we might think that the court should enjoin enforcement of the "under God" Pledge but sever that phrase from the official Pledge, leaving in place the balance of the Pledge.

Yet we can also imagine that the court would treat the invalid purpose of advancing religion as pervading the entire Pledge. While that view might be implausible in the real world, where the words "under God" were added in 1954 to a preexisting "Godless" Pledge,[76] in our hypothetical example we might suppose that the state legislature adopted the "under God" Pledge simply as a means of sneaking religion into public schools. Although it still might seem odd to invalidate even the dedeified Pledge on Establishment Clause grounds, we can imagine a view of purpose scrutiny that would require such a result, imposing a rule of nonseverability. As with our discussion of substitutive fallback provisions, so too here, the question reduces to what form purpose scrutiny ought to take.

Invalid purpose tests are not unique. Other constitutional tests—such as the First Amendment overbreadth doctrine—also place constitutional limits on severability.[77] The precise details of such tests need not concern us here. For present purposes, it suffices to observe that the question of a severed statute's validity takes the identical form as the question of a substitutive fallback provision's validity: whether replacing the original provision with the truncated or substituted provision cures the original constitutional violation.

* * *

What can be said definitively about the taint problem? At a minimum, if a law contains an invalid original provision and a substitutive fallback provision or a severability clause (or even if the law operates against a background presumption of severability), the substitution of the fallback or the severed law for the original must result in a valid law. But this tautology masks complications. Especially where the original provi-

75. E.g., 1 Pa. Cons. Stat. Ann. § 1925 (West 1995) ("The provisions of every statute shall be severable.").

76. Act of June 14, 1954, ch. 297, 68 Stat. 249 (codified as amended at 4 U.S.C. § 4 (2000 & Supp. IV 2004)).

77. See Richard H. Fallon, Jr., Commentary, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1351–52 (2000) [hereinafter Fallon, As-Applied] (arguing that constitutional limits on severability arise out of doctrine-specific requirements that some rules be fully specified when enacted).

sion violates "procedural" constitutional norms, one must look carefully to ensure that those violations do not infect the fallback or truncated law.

II. An Aside About Delegation

Suppose that a fallback provision wholly cures the underlying constitutional defect of the original provision. Might the fallback provision nonetheless be held invalid as an impermissible delegation of lawmaking authority to courts? If so, then substitutive fallback law would be *categorically* impermissible.

In fact, one state, Oregon, entirely bars substitutive fallbacks on just this ground.[78] However, that approach is rooted in language in the Oregon constitution that has no precise parallel in the Federal Constitution.[79] By contrast, federal nondelegation doctrine is notoriously toothless.[80] If Congress can delegate to administrative agencies the authority to craft rules of their own devising so long as it provides only the vaguest guidance—and it can[81]—then surely Congress can make the exercise of the courts' own independent judgment about the constitutionality of laws the trigger for legal provisions that Congress itself has written. Accordingly, there is no plausible argument that Congress violates federal nondelegation principles whenever it enacts a substitutive fallback provision.

The picture is somewhat more complex with respect to severability, however. Although courts routinely sever invalid *provisions* from valid ones,[82] they sometimes hesitate to sever invalid *applications*.[83] Judges worry that severing an application will require them to engage in lawmaking.

For example, in *Ayotte v. Planned Parenthood of Northern New England*, the Supreme Court invalidated a New Hampshire law requiring minors seeking abortions to notify their parents on the ground that the law lacked a constitutionally required health emergency exception.[84] The

78. See Eckles v. State, 760 P.2d 846, 849 n.3 (Or. 1988) ("[A] provision of law that takes effect only upon a judicial declaration of the invalidity of another provision of law violates . . . the Oregon Constitution . . . .").

79. See Or. Const. art. I, § 21 (forbidding enactment of any law "the taking effect of which shall be made to depend upon any authority, except as provided in [the Oregon] Constitution").

80. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . . .").

81. See id. (citing examples).

82. See, e.g., INS v. Chadha, 462 U.S. 919, 931–32 (1983) (severing invalid provision of challenged statute and declaring that "invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'" (alteration in original) (some internal quotation marks omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam))).

83. See infra notes 84–86 and accompanying text.

84. 126 S. Ct. 961, 967 (2006).

Justices then remanded the case to the Court of Appeals so that the latter could decide whether and how to cure the law's defect.[85] The answer was not obvious because there was no statutory language as such to sever.[86] The law was defective as applied to health emergencies precisely because of missing language. To "sever" the law's invalid applications in health emergencies would have thus required the courts to formulate a health emergency exception.

The Supreme Court in *Ayotte* did not formally express its worry as a concern about delegation, but that was the substance of the worry. A severability clause that authorizes courts to sever invalid applications risks delegating to courts lawmaking power.

Seen in this light, we can understand substitutive fallback law as a legislative effort to *avoid* the delegation issues that arise from a general background presumption of severability. To be sure, as I explain below,[87] the possibility of as-applied invalidation of a statute can create difficulties for substitutive fallback provisions as well: In particular, courts may not be certain just *how unconstitutional* an original provision's applications must be in order to trigger a fallback, and even when they have confidence that a law's invalid applications trigger a fallback, they may have doubts about who should be subject to the fallback and who should be subject to the original law. But at least courts know the *content* of the fallback provision in these circumstances. By contrast, a court that must sever invalid applications will sometimes find itself charged with creating a whole new provision. And that is, or at least can be, a real delegation problem.

III. Coercive Fallbacks

A legislature would most likely use a fallback as a means of substituting a less desirable (but still desirable) provision for a more desirable provision that the legislature worries may be invalidated by a court. However, a legislature might also use a fallback as a means of coercing courts into resolving close constitutional questions in favor of the challenged legislation. By including a highly *undesirable* fallback provision in legislation, the legislature can raise the cost of invalidation to the court.[88]

85. Id. at 969.

86. See supra note 32.

87. See infra Part V.F.

88. In response to a draft of this Article, my colleague Scott Hemphill suggested that a coercive fallback is not really a fallback at all, in the sense of a provision or provisions designed to substitute for the original legislation. I agree with that characterization, but think that the judgment that a fallback is intended to be coercive rather than substitutive must be the conclusion, rather than the starting point, of the analysis of a *seemingly* coercive fallback. The principal task of this Part of the Article is to formulate a test for distinguishing genuine substitutive fallbacks from coercive measures that take the nominal form of fallbacks.

Would a legislature actually do that? As far as I have been able to ascertain, no member of Congress has yet proposed a coercive fallback as a means of keeping the courts in line, but it is unclear why not. Certainly there has been no shortage of other congressional efforts to influence the decisions of the federal courts. Most dramatically, the newly Jeffersonian Congress canceled the Supreme Court's Summer 1802 Term to delay the Court's ability to rule on the constitutionality of the Repeal Act of 1802[89]—which abolished the federal judgeships created by the lame duck Federalist Congress and filled by Federalists, and required the Justices themselves to resume unpleasant circuit-riding duty.[90] The Reconstruction Congress denied Andrew Johnson the opportunity to name new Justices to the Court by shrinking the Court's size,[91] and President Franklin D. Roosevelt invoked prior changes in the Court's size as historical precedents for his Court-packing scheme.[92] Even today, one commonly hears critics of the federal courts propose impeachment, jurisdiction stripping, and other measures as means of disciplining judges and Justices who stray too far from the critics' preferred constitutional interpretation.[93] And in 1999, the California legislature enacted a law that may well have been intended as a coercive fallback.[94]

This Part first describes the California legislation and then builds a series of hypothetical—but not too implausible—examples based on it. To focus attention on coercive fallbacks as such, I assume that the courts would lack the authority to invalidate an otherwise valid legislative act on the ground that it was adopted for the purpose of retaliating against an unpopular judicial ruling. I nonetheless conclude that courts *could* invalidate those otherwise valid measures if included in the original legislation as coercive fallbacks, for preemptive legislative retaliation of this sort

89. Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

90. See Michael W. McConnell, The Story of *Marbury v. Madison*: Making Defeat Look Like Victory, *in* Constitutional Law Stories 13, 21–22 (Michael C. Dorf ed., 2004).

91. The Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209, 209, limited the number of Supreme Court Justices to seven, while the Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44, 44, restored it to nine.

92. See Franklin D. Roosevelt, Fireside Chat on the "Court Packing" Bill (Mar. 9, 1937), *in* Selected Speeches, Messages, Press Conferences, and Letters 171, 178–79 (Basil Rauch ed., 1957).

93. See, e.g., Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108th Cong. § 2 (2004) (proposing, in bill introduced by U.S. Representative Ron Lewis (R-KY), that "Congress may, if two thirds of each House agree, reverse a judgment of the United States Supreme Court—(1) if that judgment is handed down after the date of the enactment of this Act; and (2) to the extent that judgment concerns the constitutionality of an Act of Congress"); see also Katharine Q. Seelye, House G.O.P. Begins Listing a Few Judges to Impeach, N.Y. Times, Mar. 14, 1997, at A24 (reporting that Representative Tom DeLay listed, among others, Judge Harold Baer, Jr. as possible candidate for impeachment for his ruling on suppression of evidence in Washington Heights drugs case). These are legislative examples of what Mark Tushnet aptly calls "constitutional hardball." Mark Tushnet, Constitutional Hardball, 37 J. Marshall L. Rev. 523, 523 (2004).

94. See Cal. Health & Safety Code § 44091.2 (West 2006).

undermines government accountability in the way that after the fact retaliation does not. Finally, this Part briefly considers the use of severability for coercive purposes. I find that the same considerations apply, although legislatures would generally find it easier to use *nonseverability* coercively than to use severability that way.

A. *California's Coercive Quasi-Fallback*

Consider the California law imposing a $300 "impact fee" on vehicles previously registered out of state when their non-Californian owners attempted to register them in California; because the state charged the fee even when the cars met California smog standards, it pretty clearly violated the dormant Commerce Clause's virtually per se rule against discriminatory taxation, and a state trial court so ruled.[95] However, further California legislation provided that in the event that a state appellate court or the California Supreme Court invalidated the impact fee, funding for a separate program subsidizing vehicle repairs for low-income Californians, which had previously been supplied by the discriminatory tax, would not be provided by general revenues.[96] The further legislation could have been intended to keep state spending in check, but while invalidation of the discriminatory fee would have undoubtedly affected overall state revenues, there was no reason why the low-income inspection program had to be supported by the discriminatory tax. Indeed, another fallback provision already stated that in the event that the discriminatory tax was found to be unconstitutional, another source would substitute funding for the low-income inspection program, although it was not clear that this alternative source would have been sufficient.[97] Thus, the legislature's aim in announcing its intent not to provide general funds for the low-income program may well have been to threaten the courts, rather than simply to save money. The legislature may have been sending a not-so-subtle message to the courts: If you do your duty under the Supremacy Clause[98] and invalidate this discriminatory tax, poor people in California will get hurt. If so, and for purposes of my discussion here I shall assume

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95. See Jordan v. Dep't of Motor Vehicles, 89 Cal. Rptr. 2d 333, 336–40 (Ct. App. 1999) (summarizing proceedings in trial court).

96. The California Code provided that:

> It is the intent of the Legislature that if the impact fee . . . is ruled unconstitutional by an appellate court or the California Supreme Court, or if the state is in any manner prevented by either of those courts from imposing or collecting the fee, the [low-income] repair assistance program . . . and any voluntary vehicle retirement program implemented by the department not be supported by money appropriated from the General Fund.

Cal. Health & Safety Code § 44091.2.

97. The Act provided that, as of July 1998, $2 of the then-$6 fee paid by owners of new vehicles exempt from inspection requirements would be used to fund the low-income repair assistance program in the event that the discriminatory tax was found invalid. Act of Oct. 8, 1997, ch. 802, § 9, 1997 Cal. Legis. Serv. 4332, 4339 (West).

98. U.S. Const. art. VI.

that this was indeed what the legislature meant to communicate, this would have been a coercive fallback.

Two further peculiarities of the actual California case complicate the analysis of the use of coercive fallbacks. First, the law applied to a *pending* case, although it did not mention the particular case by name.[99] In the federal system, legislative efforts to direct the results of particular cases raise special separation of powers concerns,[100] and similar issues can arise under state constitutional law as well.[101] To my mind, however, the California legislation threatening to cut (or not substitute adequate) funding for the low-income repair program would have been highly problematic, even if it had been enacted simultaneously with the discriminatory impact fee, and thus in advance of any judicial rulings on the latter's validity. Accordingly, for present purposes, I will subtract the retroactive element out of the analysis.

Second, the actual wording of the California law indicated that cuts to the low-income repair program would not follow automatically upon the invalidation of the impact fee; it stated that it was the legislature's "intent" that the program not be funded in the event that the impact fee was invalidated.[102]

To the extent that the California law merely expressed the legislature's intent to enact future legislation, it was not a fallback but a threat. To be sure, a threat that takes the form of an act of the California legislature is more credible than one contained in, say, a speech by a single legislator to a partisan audience, but we can imagine circumstances in which an "unofficial" threat would as likely be carried out as an official one. The political party controlling both houses of Congress and the presidency might, for example, declare its intention to punish the judiciary or innocent third parties in the event of a judicial ruling not to the political party's liking. Such a threat would be quite similar to the threat contained in the California legislation.[103]

Undoubtedly there is something unseemly or worse about legislators threatening to harm judges—say, by making them travel long distances

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99. That case was *Jordan*, 89 Cal. Rptr. 2d 333. See also supra text accompanying note 95.

100. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (forbidding Congress from requiring federal courts to reopen final judgments).

101. See, e.g., People v. Bunn, 37 P.3d 380, 382, 394 (Cal. 2002) (holding that *Plaut*, 514 U.S. 211, is "persuasive for purposes of interpreting California's separation of powers clause," Cal. Const. art. III, § 3).

102. See supra note 96. As it turned out, the legislature never did follow through on the threat. After the appellate court's ruling affirming the trial court's invalidation of the impact fee, *Jordan*, 89 Cal. Rptr. 2d 333, the Governor decided not to appeal, and fees were refunded. See Cal. Rev. & Tax. Code § 6262 note (West 2006).

103. The principal difference is that the California legislation threatened *not* to take certain action—namely, appropriating general funds—and in that sense was more like a traditional fallback, whereas other threats would require further affirmative acts of the legislature in order to be carried out.

and sleep in cramped quarters, as per the Repeal Act of 1802[104]—or threatening to harm innocent third parties—as in the California legislation as I have imagined it—for rulings that legislators disapprove. Such measures undermine the independence of the judiciary. Accordingly, one might think that one or more of these and other retaliatory measures are unconstitutional. Most obviously, it is well accepted that mere disagreement with a judge's rulings does not supply a ground for impeachment, although a judge's claim that he has been impeached on illicit grounds may well be nonjusticiable.[105] More controversially, scholars have suggested that some forms of targeted jurisdiction stripping would be invalid.[106]

Could a court invalidate otherwise valid legislation on the ground that it was enacted in retaliation for a court's independent judgment? In some circumstances, perhaps yes. For example, Congress probably has the power to cut the federal courts' budget for paying law clerks and secretaries, but a serious constitutional question (whether or not justiciable) would be raised were Congress to cut such funding in retaliation for an unpopular judicial decision. We could even imagine a court holding that the retaliatory budget cut was such a threat to Article III independence as to hold it invalid, and to order that the funding be restored.[107]

Nonetheless, the courts might just have to accept a retaliatory slashing of their budgets. A contrary approach would raise practical questions: How would the court know that the budget cut was for the purpose of retaliation? If a court invalidated a budget cut because it was moti-

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104. See supra notes 89–90 and accompanying text.

105. See Nixon v. United States, 506 U.S. 224, 226 (1993) (finding nonjusticiable former federal judge's claim that Senate's reliance on committee procedures for trying and convicting him after impeachment was unconstitutional).

106. See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364–65 (1953) (fearing "destr[uction of] the essential role of the Supreme Court in the constitutional plan"); Laurence H. Tribe, Commentary, Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts, 16 Harv. C.R.-C.L. L. Rev. 129 *passim* (1981) (asserting that there are internal and external limits on Congress's ability to reduce federal jurisdiction).

107. Although characterizing such action as a last resort, federal courts have not hesitated to order state legislative bodies to appropriate funds where failure to do so amounts to a constitutional violation. See, e.g., Missouri v. Jenkins, 495 U.S. 33, 57 (1990) ("It is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation."). An order to Congress to appropriate funds, however, would raise separation of powers concerns. See Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 185 (D.C. Cir. 1992) (per curiam) (reversing order to federal government to allocate funds on ground that "[t]he Appropriations Clause of the Constitution vests Congress with exclusive power over the federal purse" (citing U.S. Const. art. I, § 9, cl. 7; Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937))). Perhaps those separation of powers concerns could be overcome to remedy a violation of the independence of the Article III judiciary, which itself is a matter of separation of powers.

vated by an illicit retaliatory purpose, when, if ever, could Congress reenact the measure purged of its former purpose? Such questions call to mind the general problems with purpose scrutiny we encountered above.[108]

There are also reasons of principle to think that perhaps Congress is entitled to retaliate against the courts for unpopular decisions. Although the Court's modern jurisprudence tends to be self-protective, *Stuart v. Laird*[109] and *Ex parte McCardle*[110] have not been formally overruled,[111] and in the clamor for popular constitutionalism, no less a mainstream figure than the Dean of Stanford Law School wistfully looks back upon a time when mob action was deemed an appropriate means of advancing a constitutional vision, even if he stops just short of advocating violence in response to contemporary unpopular judicial decisions.[112]

Accordingly, there are plausible arguments both for and against judicial invalidation of an act of Congress that directly and unequivocally retaliates against the courts for an unpopular ruling. What about retaliation against third parties for the courts' failure to heed a warning, as in the 1999 California law? For concreteness, suppose that a majority of members of both the House and the Senate publicly pledge that in the event that any state or federal court invalidates any provision or application of the Defense of Marriage Act (DOMA),[113] they will eliminate one year's worth of funding for school lunches for poor children.[114] A federal district judge, fully aware of the threat, nonetheless invalidates DOMA's definition of marriage on equal protection grounds, and Congress carries out its threat, slashing funding for school lunches. If a school district and parents of children previously entitled to subsidized lunches sue the Secretary of Agriculture demanding that the funding be restored, could a court grant relief on the ground that the federal law cutting funding was invalid insofar as it was adopted for an impermissible purpose—namely, to punish the federal judiciary for carrying out its obligation under Article III to exercise its independent constitutional judgment?

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108. See discussion supra Part I.D.

109. 5 U.S. (1 Cranch) 299, 309 (1803) (upholding Repeal Act, discussed supra text accompanying notes 89–90).

110. 74 U.S. (7 Wall.) 506, 513–14 (1868) (dismissing habeas petition after Congress repealed jurisdiction over it; stating that in cases challenging jurisdiction stripping, "[w]e are not at liberty to inquire into the motives of the legislature").

111. In *Hamdan v. Rumsfeld*, the Court found it unnecessary to decide whether the Constitution forbids Congress to withdraw appellate jurisdiction over a pending habeas petition. 126 S. Ct. 2749, 2764 (2006) (holding that "[o]rdinary principles of statutory construction suffice to" resolve jurisdictional question).

112. See Larry D. Kramer, The People Themselves 27 (2004).

113. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)).

114. See Richard B. Russell National School Lunch Act, 42 U.S.C. §§ 1751–1769i (2000 & Supp. III 2003).

Here too, we can imagine an argument for invalidating the school lunch cut: Even under nominally rational basis scrutiny, a law that serves an impermissible purpose is invalid,[115] and making good on a threat against judicial independence ought to qualify as an impermissible purpose. Nonetheless, the arguments against invalidation seem even stronger here than in the case of the carrying out of a threat directly against the judiciary, for here there is an obvious rational basis for the enacted law—namely to protect the federal fisc. Perhaps if Congress declared in the lunch-cutting legislation itself that it was cutting spending in retaliation for the judicial invalidation of DOMA, a court would be able to point to that language as proof of illicit motive[116] and order funding restored. That result seems problematic, however, in light of the possibility of easy evasion: Congress could simply reenact the same legislation minus the offending language, making its retaliatory intent evident, if at all, only through unofficial statements.

In any event, I am not directly concerned here with the validity of measures that a legislature might take or threaten in the event of a judicial ruling of which the legislators disapprove. To focus on genuine fallback provisions, I want to explore the possibility that there exists some class of measures which a legislature could validly threaten and impose in the event that the courts rule against the validity of some original law, but which would be invalid if contained in a fallback to that same original law.

B. *A Hypothetical DOMA Fallback*

Suppose that Congress were to enact the following "DOMA Fallback": "In the event that any provision or application of the Defense of Marriage Act shall be found unconstitutional by any state or federal court, no federal funds for school lunches may be spent for one year

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115. See Romer v. Evans, 517 U.S. 620, 634–35 (1996) ("'[I]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" (alterations in original) (some internal quotation marks omitted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985); Olech v. Vill. of Willowbrook, 160 F.3d 386, 387–88 (7th Cir. 1998) (holding that plaintiff had legally sufficient cause of action where she claimed that municipality temporarily denied her equal access to water in retaliation for plaintiff's prior successful lawsuit against municipality), aff'd on other grounds, 528 U.S. 562 (2000) (per curiam). For an excellent discussion of purpose scrutiny, see generally Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297 (1997).

116. Compare Nordlinger v. Hahn, 505 U.S. 1, 17–18 (1992) (upholding, under rational basis scrutiny, acquisition-value real property valuation scheme), with Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344–46 (1989) (striking down on equal protection grounds acquisition-value based practices of tax assessor, where state law mandated that type of property at issue be taxed uniformly throughout state according to estimated market value).

following the ruling."[117] Consider the hypothesis that a court could *not* invalidate separately enacted school-lunch-cutting legislation adopted in retaliation against an unpopular judicial ruling, but that a court *could and should* invalidate the very same provision if it appeared in the DOMA Fallback.

Why might that hypothesis hold? Several constitutional doctrines could be invoked to support invalidating an otherwise valid enactment when it appears as a fallback designed to coerce a judicial decision. We can begin with the rational basis test, whether understood as an interpretation of due process[118] or equal protection.[119]

Let us assume that Congress would have a rational basis for a separately enacted school-lunch-cutting law passed in retaliation for a judicial ruling invalidating DOMA. That rational basis, the courts might say, is saving money.[120]

But if the freestanding provision could rationally be thought to save money, that does not appear to be a rational basis for the budget cut *as a fallback.* In the case of the freestanding provision, a judge might worry that she cannot confidently say that the cancellation of school lunch funding is *not* for fiscal reasons, and all that rational basis scrutiny typically requires is a plausible reason.[121] However, saving money is not a rational reason for making funding of school lunches contingent on the validity of DOMA. One has nothing to do with the other.

We might conceptualize the application of rational basis scrutiny (with some teeth) here as similar to the requirement that conditions Congress attaches to funds it appropriates to states be germane to the funded

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117. As worded, the DOMA Fallback has the draconian consequence of cutting school lunch funding even if a district court ruling invalidating a provision or application is subsequently reversed on appeal. I address the complexities introduced by the decentralized nature of American judicial review in Part V.D, infra, and thus have not cluttered the discussion here with caveats about which court's rulings would trigger the fallback.

118. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (rejecting due process challenge, in part, because state's law was "rationally related to legitimate government interests").

119. See, e.g., FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

120. See, e.g., Bowen v. Gilliard, 483 U.S. 587, 598–99 (1987) (upholding congressional legislation against constitutional challenge because, in part, it "unquestionably serves Congress' goal of decreasing federal expenditures").

121. See *Beach Commc'ns*, 508 U.S. at 314–15 ("On rational-basis review, . . . those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. . . . [I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." (citations and internal quotation marks omitted)).

programs.[122] As a formal matter, the requirement that conditions be germane is independent of and in addition to the requirement that conditions not be coercive.[123] In fact, however, germaneness may best be understood as a means of distinguishing between coercive and noncoercive conditions. Why would Congress attach a condition that is not germane to the funded program if not simply to raise the cost of noncompliance to the states? Here, as elsewhere in constitutional doctrine, examining the relation between asserted legislative ends and actual means can "smoke out" illegitimate motives.[124]

Sticklers will note that I am running together a number of doctrines that are triggered by different conditions and have quite different formal requirements: rational basis scrutiny; forbidden purpose analysis; conditional spending doctrine; and even strict scrutiny for racial classifications. I do not mean to suggest that the differences among these doctrines are unimportant or that any of them already applies of its own force to a seemingly coercive fallback.

But neither is it true that any of these doctrines is strictly entailed by the constitutional text. Each is a judicial gloss, fashioned by the Court to protect constitutional values.[125] With respect to a coercive fallback, we can identify at least two constitutional values that a germaneness requirement would serve: the independence of the Article III judiciary and government accountability.

A coercive fallback threatens these constitutional principles to a degree that a stand-alone retaliatory legislative measure does not. For one thing, where the legislature has not embodied its threat in a fallback provision, the court can treat the threat as hollow—a kind of interbranch game of chicken. "Cut school lunches in response to our invalidation of DOMA?," we can hear the court thinking, "You wouldn't dare." By contrast, where the school lunch cut appears in the DOMA Fallback, it goes into effect automatically upon DOMA's invalidation. There is no way for the court to dodge the adverse consequences for needy schoolchildren of invalidating DOMA, unless the court also invalidates the fallback.

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122. See South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) ("[O]ur cases have suggested . . . that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion))).

123. See id. at 211 (considering whether Congress's spending program was unconstitutionally "coercive").

124. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

125. See Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 57 (1997) ("Identifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely.").

The automatic nature of the cuts under the DOMA Fallback (but not under the stand-alone retaliatory measure) also undermines legislative accountability. Members of Congress can say to their constituents that the courts, not Congress, mandated the school lunch cuts by their insistent activism even in the face of the consequences.

To be sure, any minimally sophisticated observer will be able to see that Congress should bear much if not all of the responsibility for the cuts for having enacted the DOMA Fallback in the first place. But in fashioning doctrine to foster accountability, the Court has not assumed very much sophistication on the part of citizens trying to trace the consequences of decisions by various governmental bodies to their ultimate source.[126]

Moreover, accountability in the context of a coercive fallback is not merely about ensuring that the voters know whom to blame for decisions such as the cancellation of a popular program like school lunches. It is also about ensuring that legislation in fact reflects the will of the legislature. A coercive fallback is like the sword of Damocles; its point is to hang, not to drop. Once a court has actually gone ahead and invalidated DOMA—or more generally, taken whatever action the legislature tried to prevent—the fallback no longer serves as a deterrent; it serves simply as a punishment.

We have been assuming that the courts may be without power to stop Congress or a state legislature from punishing them or third parties for unpopular decisions. A rule permitting courts to invalidate coercive fallbacks would not change that assumption. It would merely insist that if the legislature really wants to punish the courts or third parties for unpopular decisions, the legislature must take direct responsibility for doing so.

C. *Is the Germaneness Test Too Permissive?*

Indeed, the principal problem with the doctrine I am suggesting here—judicial invalidation of a coercive fallback identified by its lack of

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126. In the federalism context, the Supreme Court has stated:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Printz v. United States, 521 U.S. 898, 930 (1997); see also New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). For critiques of the accountability argument in these cases, see Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L. Rev. 1001, 1061–74 (1995); Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 824–30 (1998).

germaneness to the original provision—is not that it is insufficiently deferential to the legislature. The problem is more nearly the opposite: It may be all too easy for a legislature to fashion a fallback that is intended to be coercive but nonetheless satisfies a germaneness test.

The Court's conditional spending doctrine is instructive. In the leading modern case, *South Dakota v. Dole*, Congress conditioned five percent of federal highway funds on state recipients adopting a minimum drinking age of twenty-one.[127] The Court acknowledged that prior cases had not provided "significant elaboration" as to the origin or content of the germaneness requirement, but went on to conclude—without any significant elaboration of its own—that "the condition imposed by Congress [was] directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[128] Funds to build and maintain highways that are safe for vehicle traffic prevent highway injuries and fatalities, as do laws that reduce the incidence of drunk driving. This shared general purpose was enough for the Court to conclude that the germaneness requirement, whatever its precise content, was satisfied.

As Justice O'Connor argued in dissent in *Dole*, however, that a condition and a grant can both be said to further the same highly abstract interest—such as highway safety—in no way ensures that Congress has in fact acted pursuant to the Spending Clause.[129] In *Dole* itself, Justice O'Connor thought it clear that the effort to induce the states to raise the drinking age was regulatory in nature, and not in any way a limit on how states were permitted to spend their highway funds.[130] Accordingly, taking inspiration from Justice O'Connor's *Dole* dissent, Lynn Baker has argued forcefully for replacing the *Dole* test with a rule under which conditions on federal grants are valid only insofar as they limit how the states spend the grant money, permitting "reimbursement spending" but not "regulatory spending."[131]

That distinction is not wholly persuasive, however, unless its proponents can satisfactorily address the problems of fungibility and taint. Insofar as money is fungible, Congress might legitimately worry that funds expended for one purpose could free the state to use other funds for a purpose that Congress, but not the state, regards as improper. And insofar as Congress implicates itself in all the behavior of the states whose activities it funds, it may have legitimate reasons to worry about the merely tangentially related activities of the states it funds. If it seems far-

127. 483 U.S. at 211.

128. Id. at 207–08.

129. Id. at 213–15 (O'Connor, J., dissenting) ("[Congress] is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety.").

130. Id. at 215–18 (arguing that conditions tied to federal expenditures, if justified solely by spending power, must "relat[e] to how federal moneys [are] to be expended").

131. Lynn A. Baker, Conditional Federal Spending After *Lopez*, 95 Colum. L. Rev. 1911, 1962–63 (1995).

fetched for Congress to worry about responsibility for drunk driving by eighteen- to twenty-one-year-olds on the five percent of highways it has funded, it may seem less farfetched for Congress to worry about race discrimination in broadly defined federal programs, even where the discrimination itself is not directly funded by federal dollars.[132] Yet the proposed no-regulatory-spending rule would prohibit Congress from enacting the latter along with the former.

Whatever the right approach to questions of federal spending, we can model a robust germaneness requirement for fallbacks on Professor Baker's proposal. The inquiry would be formulated thusly: Could Congress plausibly be understood to have intended the fallback provision either to substitute for the original provision, or otherwise to take account of a contingency created by the original provision's invalidation? If the answer is yes, then the fallback should be deemed germane. If the answer is no, a court should deem the fallback nongermane, and thus invalid.

How would such a test operate in practice? The DOMA Fallback clearly fails. The school lunch cuts have nothing to do with DOMA. But might Congress draft around the proposed test? Suppose that Congress enacted a DOMA Fallback that eliminated a variety of legal benefits for married couples—including the benefits paid to surviving spouses under Social Security[133]—in the event that DOMA were invalidated. Such a fallback could plausibly be understood as not simply coercive, but as responsive to a taint problem created by DOMA's invalidation: Were DOMA held invalid and the federal government required to pay Social Security benefits to surviving spouses of same-sex marriages, members of Congress who oppose same-sex marriage on moral grounds might worry that they would thereby be implicated in the institution. Although a court that found DOMA itself unconstitutional would hardly sympathize with that view, leveling down, even for odious motives, is constitutionally permissible.[134] In addition, the modified DOMA Fallback could be seen as serving a fiscal rather than coercive function: Congress might conclude that the additional demands on the Social Security system from surviving spouses of same-sex marriages would make the system as a whole unaffordable.

Notwithstanding such possible congressional motives, a court that would be inclined to invalidate the school-lunch-cutting DOMA Fallback should probably also be willing to invalidate the Social Security-cutting DOMA Fallback as coercive. To mix our doctrinal metaphors again, we

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132. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

133. See 42 U.S.C. § 402(e) (defining eligibility for widows' insurance benefits); id. § 402(f) (defining eligibility for widowers' insurance benefits).

134. See Palmer v. Thompson, 403 U.S. 217, 219 (1971) (upholding closing of public swimming pool in response to desegregation order).

might say that the elimination (rather than modest reduction) of Social Security benefits to surviving spouses is so disproportionate to the financial impact of recognizing same-sex marriage as to belie any real cost-saving motive.[135] To be sure, the same cannot quite be said about the taint issue: It is possible that Congress, in an anticipatory fit of spite,[136] really would want to chop off its nose to spite its face. But if so, Congress can accomplish that goal as effectively by enacting a stand-alone provision repealing Social Security surviving spouse benefits *after* the decision invalidating DOMA and its fallback, and per my assumption in this discussion, the courts would then have to accept that stand-alone repeal as valid, even though adopted to make good on a threat against judicial independence. The less likely it is that Congress would in fact carry out such a threat, the more confidence a court can have that the fallback itself was intended to be coercive and can thus be invalidated on that ground.

D. *Coercive Severability and Nonseverability*

If a court finds the foregoing argument persuasive, it will invalidate coercive fallback provisions so long as it can identify them with some measure of confidence. What about severability? Can legislatures write coercive severability clauses? The answer is yes, although it may be even easier to write a coercive *nonseverability* clause.

Consider an example. Under a former provision of the Social Security Act, wives and widows were presumed dependent for financial support on their husbands or late husbands, but husbands and widowers were entitled to benefits only if they could prove dependency.[137] After the Supreme Court held that this scheme violated equal protection,[138] Congress eliminated the principal disparity on a prospective basis in 1977, but to protect the reliance interest of wives and widows, maintained the sex distinction for past cases.[139] That distinction was challenged, but as a threshold matter, the Supreme Court had to consider whether a male plaintiff had standing to sue. A nonseverability clause that Congress en-

135. See Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down state constitutional amendment because, in part, "[the] sheer breadth [of the amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

136. Cf. id. at 636 (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite.").

137. See Heckler v. Mathews, 465 U.S. 728, 731 (1984) (describing 42 U.S.C. § 402 as it existed before the Social Security Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (codified as amended in scattered sections of 2, 26, and 42 U.S.C.)).

138. See Califano v. Goldfarb, 430 U.S. 199 (1977) (holding sex-based classification scheme for widowers unconstitutional under equal protection component of Due Process Clause of Fifth Amendment); Jablon v. Sec'y of Health, Educ. & Welfare, 399 F. Supp. 118 (D. Md. 1975) (holding sex-based classification scheme for husbands unconstitutional under equal protection component of Due Process Clause of Fifth Amendment), aff'd, 430 U.S. 924 (1977); Silbowitz v. Sec'y of Health, Educ. & Welfare, 397 F. Supp. 862 (S.D. Fla. 1975) (same), aff'd, 430 U.S. 924 (1977).

139. See *Mathews*, 465 U.S. at 733.

acted along with the 1977 substantive amendments specified that in the event that the provision of retrospective benefits to women but not men were deemed a violation of equal protection, the benefits would be eliminated for everyone.[140] Given that "leveling down" in this way is a permissible response to an equal protection violation, the Justices might have concluded that the nonseverability clause meant that the male plaintiff's injury could not be redressed by a favorable ruling. Even if he won, he would receive no financial benefit.[141] Nonetheless, the Supreme Court found standing, and upheld the statute in *Heckler v. Mathews*.[142]

The Court's holding with respect to standing was sensible enough, but note that the Justices could have gone further still and held—in keeping with the analysis set forth above—that even though leveling down would be a permissible post hoc congressional response to a decision invalidating the male-female distinction, Congress could not choose that response in advance as a means of discouraging male plaintiffs from suing or the Justices from ruling according to their constitutional druthers.[143] The fact that the Justices did not take this additional step likely reflected their judgment that the nonseverability clause really was aimed at fiscal concerns, rather than an attempt at coercion.[144]

Without too much difficulty, however, we can concoct a law that uses nonseverability for truly coercive reasons.[145] Suppose that a state legislature were to include the following nonseverability clause in a law defining marriage as between one man and one woman: "This definition is indispensable to the institution of marriage. Should a court hold it invalid,

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140. See id. at 734 (referring to provision as "severability clause," which it was for other purposes).

141. Cf. Heimberger v. Sch. Dist. of Saginaw, 881 F.2d 242, 243–44, 246 (6th Cir. 1989) (dismissing plaintiffs' claim for lack of jurisdiction on redressability grounds because school district's backup policy would "exacerbate[ ] rather than relieve[ ] [plaintiffs'] alleged injury").

142. 465 U.S. at 737–40 (determining that plaintiff had standing); id. at 748–51 (upholding statute against equal protection challenge).

143. Indeed, the *Mathews* district court took just this view, holding that the nonseverability clause was unconstitutional because it was "'not an expression of the true Congressional intent, but instead [was] an adroit attempt to discourage the bringing of an action by destroying standing.'" Id. at 737 (quoting unpublished appendix).

144. Id. at 731–33, 742 (stating that Congress's elimination of dependency requirement in response to Califano v. Goldfarb, 430 U.S. 199 (1977), caused it to be concerned that "increasing the number of individuals entitled to spousal benefits . . . could create a serious fiscal problem for the Social Security trust fund").

145. For an arguable real life example, see Stilp v. Commonwealth, 905 A.2d 918, 978–80 (Pa. 2006) (disregarding nonseverability clause that tied judicial compensation to unconstitutional provision increasing reimbursements to legislators for expenses without receipts, on ground that nonseverability clause appeared to be coercive); see also Fred Kameny, Are Inseverability Clauses Constitutional?, 68 Alb. L. Rev. 997, 997–99 (2005) (anticipating result in *Stilp* on ground that nonseverability clause illegitimately threatened judges' own compensation). But see Michael D. Shumsky, Severability, Inseverability, and the Rule of Law, 41 Harv. J. on Legis. 227, 267–69 (2004) (arguing that courts should enforce clear nonseverability provisions).

the remaining provisions of this Code that govern marriage should likewise be held invalid." It would be fair to infer that the threats to abolish marriage are designed to coerce the courts into upholding the original provision.

In this example, a court would be justified in concluding that the legislature does not *really* want the entire institution of marriage held invalid. Accordingly, it could not only confer standing on a plaintiff challenging the law, but also invalidate the offending provisions and sever them from the balance of the law, notwithstanding the nonseverability clause. As in our fallback examples, if the court proves wrong in its assessment of the legislature's true purpose, the cost is relatively modest: The legislature can, in response to the court's ruling, eliminate marriage altogether, but if it does so after the ruling, it, rather than the court, will take the political heat.

These same considerations apply to a coercive severability provision, although there are fewer circumstances in which a legislature can use severability coercively than in which it can use substitutive fallback provisions or nonseverability coercively. Perhaps a law might make compliance with an arguably unconstitutional provision U a condition for avoiding some draconian measure D, and specify further that invalidation of U shall not affect the validity of D, in the hope that courts will uphold U so as to avoid subjecting innocent parties to D. Such a mechanism would be indistinguishable in practical effect from using D as a coercive substitutive fallback to U.

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As the abstract and mostly hypothetical character of the examples in this Part shows, for the most part legislatures have not yet seized on substitutive fallback law, nonseverability, or severability as a mechanism for coercing the courts. One hopes that this restraint reflects respect for judicial independence, but American history suggests that when, as happens from time to time, judicial decisions prove especially unpopular, legislatures, including Congress, use what tools they have in response.[146] Accordingly, one cannot be confident that examples of the sort we have been considering will remain hypothetical forever.

Should legislatures begin to use fallback law, nonseverability, or severability coercively, courts should be prepared to strike back. As we have

146. See supra notes 89–93 and accompanying text. As Barry Friedman has argued at length, whether Congress or other political actors attack the Court in any particular era depends on a range of factors, including the strength of the Court. Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153 (2002) (distinguishing academic debates about legitimacy of judicial review from popular critiques of the practice, which tend to be tied closely to the merits); Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. Rev. 333 (1998) (noting how attacks on legitimacy of judicial review waxed and waned in nineteenth century).

seen, however, the most useful test for distinguishing coercive from non-coercive measures—a germaneness requirement—may sometimes prove unavailing, given the relative ease with which a determined legislature can disguise a coercive measure in a seemingly germane provision.

Yet readers who conclude that courts are therefore powerless to prevent legislatures from abusing the power to write fallback, severability, and nonseverability provisions should not despair. As the next Part explains, under a variety of views about the duty of legislators to interpret the Constitution for themselves, fallback law proves problematic, whether or not adopted as a means of coercing judicial decisions. Similar problems arise for severability as well.

IV. THE LAWMAKER'S DUTY OF INDEPENDENT CONSTITUTIONAL JUDGMENT

Thus far, this Article has considered reasons why courts might find certain kinds of fallback law unconstitutional. But in our constitutional system, elected officials as well as judges take an oath to uphold the Constitution. A large body of academic literature addresses the question of what duty, if any, elected officials have to consider the constitutionality of their actions, and not just the desirability of those actions as a matter of policy. Some scholars take aim at judicial review itself, arguing that legislatures ought to supplant courts as the principal or even exclusive authority on the meaning of constitutional questions.[147] Others argue for a more cooperative arrangement, in which legislatures have a duty to supplement, but not contradict, the courts' constitutional judgment.[148] Still others defend a practice of judicial supremacy in which political actors accept the judgment of the Supreme Court as definitive of constitutional

147. See, e.g., Mark Tushnet, Taking the Constitution Away from the Courts *passim* (2000) [hereinafter Tushnet, Taking]; Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346, 1395–401 (2006) (challenging supposedly simplistic notions about "tyranny of the majority" as basis for judicial review). As I have noted elsewhere, in a legal system such as our own, in which the Constitution contains at least part of the rule of recognition, the ability of courts to interpret the Constitution cannot be entirely eliminated. See Matthew D. Adler & Michael C. Dorf, Constitutional Existence Conditions and Judicial Review, 89 Va. L. Rev. 1105, 1201 (2003) ("[T]he Constitution simply cannot be taken away from the courts.").

148. See, e.g., Lawrence G. Sager, Justice in Plainclothes 31–35 (2004) (arguing as empirical matter that courts behave as legislatures' partners, not agents, when interpreting many legislative schemes); id. at 114–17 (arguing that Supreme Court should allow Congress greater flexibility when exercising Fourteenth Amendment, Section Five enforcement power because Court's institutional limitations lead to underenforcement of Constitution's substantive provisions); Michael C. Dorf & Barry Friedman, Shared Constitutional Interpretation, 2000 Sup. Ct. Rev. 61, 81–83 (arguing that there is "a sensitive and difficult constitutional line between appropriate [congressional] testing of constitutional bounds and defiance," but that "in the end the say is the Court's"); Post & Siegel, supra note 20, at 517–21.

meaning.[149] Although I have a position in this debate,[150] my aim here is simply to trace the implications of the various approaches to the question, rather than to advance arguments for any one approach.

A. *Lincoln's View*

We can begin by setting aside positions that frontally attack judicial review itself. Fallback law only comes into play once a court has found a provision of the original law unconstitutional, so the question whether the use of fallback law is at odds with an independent duty of legislative interpretation of the Constitution does not arise if the Supreme Court has no legitimate power to invalidate the original law in the first place. If judicial review were abolished, there would be no occasion for Congress to employ fallback law.[151]

However, not all critics of judicial supremacy would abolish judicial review. Frequently, critics take the position most famously stated by President Abraham Lincoln in his first inaugural address and later avowed by Attorney General Edwin Meese: Supreme Court rulings on issues of constitutionality bind the parties to the case, and may be regarded by the Supreme Court and lower courts as precedents in future cases, but they do not bind Congress or the President, who remain free to continue to act on their contrary constitutional understanding in the future.[152] In

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149. See, e.g., Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455, 482 (2000) (arguing that rule of law requires "a single and authoritative interpreter" to realize values of "coordination and settlement," and concluding that Supreme Court best serves that role); Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1369–81 (1997) [hereinafter Alexander & Schauer, Extrajudicial] (arguing that authoritative judiciary is best institution to achieve constitutional values of stability and settlement and is best able to remove "transcendent questions from short-term majoritarian control").

150. Broadly speaking, I take the "cooperative" view. See Dorf & Friedman, supra note 148, at 107 (providing example of when it would be appropriate for Court to alter settled jurisprudence and "show respect for the capacity of political actors to improve upon the Court's own judgment about what satisfies the constitutional standards it has announced"); Michael C. Dorf, The Domain of Reflexive Law, 103 Colum. L. Rev. 384, 400 (2003) (book review) (arguing that if courts are to be responsive to popular, evolving understandings of rights, they should give deference to "bipartisan majorities in Congress [that] expand constitutional understandings of" various rights).

151. For simplicity, in the balance of this section, I shall refer to Congress, although much of what I say applies as well to state legislatures.

152. Lincoln stated:

> [I]f the policy of the Government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Abraham Lincoln: His Speeches and Writings 579, 585–86 (Roy P. Basler ed., 1969); accord Edwin Meese III, The Law of the Constitution, 61 Tul. L. Rev. 979, 983 (1987) (asserting that constitutional decisions of Supreme Court do "not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore"). For scholarly approval

this approach, when Congress writes a law that it believes to be constitutional but that violates the Court's view, Congress provides the Court with an opportunity to overrule an erroneous decision, a point Lincoln made with respect to *Dred Scott v. Sandford*.[153]

A legislator who takes Lincoln's position on judicial review should be skeptical of including fallback provisions in legislation that she regards as valid but that, she fears, the courts may invalidate. For her, fallback law should be objectionable in two respects.

First, depending on how it is written, a fallback law could give the courts more power than the Lincolnian believes they deserve. Consider a standard fallback of the form, "If a court invalidates X, the law shall be Y." Under Lincoln's view, the invalidation of X by a court nonetheless leaves the law as X in those contexts in which application of X cannot give rise to a justiciable controversy. But the standard form fallback does not merely say that Y shall replace X wherever justiciable controversies arise; it replaces X with Y *tout court*.

Could the Lincolnian draft around this objection? Perhaps. Consider the following: "In the event that a court invalidates X, the law as seen by the courts shall be Y, but it shall remain X in all nonjudicial contexts." This language solves the problem, but leads to its own practical problems. Principal among these is the difficulty of knowing, ex ante, whether a constitutional controversy will arise in a setting that renders the underlying issue justiciable. A case may be nonjusticiable because no plaintiff has yet suffered a redressable injury, but that could of course change, and once it does, persons who have been treated under X will suddenly be able to claim the protections of Y. Congress might try to avoid that problem by providing that the fallback would not operate in just those circumstances in which the law is *incapable* of giving rise to a justiciable case or controversy, but such an exception would merely displace the problem because the category of circumstances incapable of giving rise to justiciable controversies is no more clearly defined than the category of cases that in fact will not give rise to justiciable controversies.

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of this view, see, for example, Sanford Levinson, Could Meese Be Right This Time?, 61 Tul. L. Rev. 1071, 1077 (1987) (contending that under Meese's theory, Constitution can serve "as a public source of social understanding" by enabling "all citizens to share in the debates about the meaning of our tenuously shared life"); Michael W. McConnell, Comment, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 181–83 (1997) (arguing that Section Five of Fourteenth Amendment "was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution"); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 272–84 (1994) [hereinafter Paulsen, Most Dangerous Branch] (approving Lincoln's reasoning and actions as "perfectly consistent with the Constitution's scheme of independent, co-equal branches").

153. 60 U.S. (19 How.) 393 (1857); see also Abraham Lincoln, The *Dred Scott* Decision: Speech at Springfield, Illinois (June 26, 1857) [hereinafter, Lincoln, The *Dred Scott* Decision], reprinted in Abraham Lincoln: His Speeches and Writings, supra note 152, at 352, 355–57.

The second reason why Lincolnians ought to be resistant to fallbacks is less practical and more a matter of principle: Lincolnians believe that in many contexts the proper response to a constitutional decision by the Supreme Court with which they disagree is to reenact the invalidated law in the hope that the Justices will either see the error of their ways or defer to congressional judgment.[154] Such deference might be granted on the ground that Congress has a greater ability than the Court to speak for the People or on the basis of Congress's greater institutional capacity to find facts. Putting a fallback provision in a law capitulates to the courts' determination of constitutionality in a way that should make Lincolnians uncomfortable.

How many members of Congress are Lincolnians is not known, but Congress has not hesitated to challenge Supreme Court rulings. For instance, the "Findings" section of the federal Partial-Birth Abortion Ban Act of 2003 attempts to change the Justices' minds using the factfinding strategy.[155] It notes that the Court's 2000 decision in *Stenberg v. Carhart*[156] invalidated a Nebraska partial-birth abortion ban based on district court factual findings that, Congress declared in the Act, were erroneous.[157] Accordingly, Congress asserted, its findings take precedence.[158]

It is not clear whether this strategy will work when the Court decides the pending cases challenging the Act.[159] It is true, as Congress itself explained in the Partial-Birth Abortion Ban Act, that the Court continues to invoke and apply the principle that congressional findings of fact are entitled to substantial deference.[160] But even in doing so, the Court has insisted on its own prerogative to make an "'independent judgment of the facts bearing on an issue of constitutional law.'"[161]

Moreover, such insistence appears to be more than empty verbiage: Although it should make no real analytical difference whether a congres-

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154. See infra notes 180–181 and accompanying text; cf. Paulsen, Most Dangerous Branch, supra note 152, at 274–75 ("Congress may 'nonacquiesce' in holdings of unconstitutionality by re-passing legislation, sometimes in slightly altered form, in order to have the issue of its constitutionality relitigated.").

155. Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201–06 (codified at 18 U.S.C. § 1531 note (Supp. IV 2004)).

156. 530 U.S. 914 (2000).

157. § 2(3)–(7), (13), (14), 117 Stat. at 1201–06.

158. Id. § 2(8)–(12), 117 Stat. at 1202–03.

159. See Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), cert. granted, 126 S. Ct. 2901 (2006) (mem.); Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), cert. granted, 126 S. Ct. 1314 (2006) (mem.).

160. See § 2(8)–(12), 117 Stat. at 1202–03 (citing Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 195–96 (1997); Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 665–66 (1994) (plurality opinion); Katzenbach v. Morgan, 384 U.S. 641, 653 (1966); City of Rome v. United States, 472 F. Supp. 221, 238 (D.D.C. 1979), aff'd, 446 U.S. 156 (1980).

161. *Turner I*, 512 U.S. at 666 (plurality opinion) (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989)).

sional factfinding follows a contrary judicial determination of the facts in a different case, when the Justices have perceived outright hostility to their own constitutional precedents, they have been especially unreceptive to the notion that they should reconsider those precedents in light of the fact that Congress has reached a contrary judgment.[162] Indeed, the Court has even suggested that strong political opposition to a Supreme Court interpretation of the Constitution can count as a reason for adhering to that interpretation.[163]

Perhaps a distinction could be drawn between congressional disagreement with the Court rooted in a contrary factual predicate and congressional disagreement with the Court based on different values,[164] but there is reason to think that precisely in those statutes in which Congress invokes its ostensible institutional advantages with respect to facts—such as the partial-birth abortion law—the real disagreement is over values. In any event, even if the Court permitted the distinction—accepting congressional reversals with respect to facts but not with respect to values—that would not satisfy the Lincolnian. Lincoln says the Supreme Court made a factual error in *Dred Scott*,[165] but the heart of his argument is *moral* disagreement with the ruling: To read the Declaration of Independence as the *Scott* Court and its defenders did, Lincoln says, cheapens the document and the ideals he believes the American republic ought to uphold.[166]

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162. For example, after the Court's doctrinally straightforward but politically unpopular decision in Texas v. Johnson, 491 U.S. 397 (1989), which invalidated a Texas law banning flag desecration, Congress quickly enacted a federal ban that the government defended on the grounds that, inter alia, the Court should "reconsider [its] rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or 'fighting words,' does not enjoy the full protection of the First Amendment." United States v. Eichman, 496 U.S. 310, 315 (1990). The Court rejected the proposal out of hand. See id. ("This we decline to do."); see also City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("[Congress's] conclusions are entitled to much deference. . . . [Its] discretion is not unlimited, however . . . .").

163. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

164. Let us put aside the claim of some philosophers that one cannot meaningfully distinguish between fact and value. See, e.g., Hilary Putnam, The Many Faces of Realism 62–71 (1987); Richard Rorty, Consequences of Pragmatism, at xvi (1982); Richard Rorty, Philosophy and the Mirror of Nature 363–65, 387 (1979).

165. Lincoln, The *Dred Scott* Decision, supra note 153, at 357 ("I have said, in substance, that the *Dred Scott* decision was, in part, based on assumed historical facts which were not really true.").

166. Id. at 362 ("My good friends, read that carefully over some leisure hour, and ponder well upon it—see what a mere wreck—mangled ruin—it makes of our once glorious Declaration."). Although progressive in his day, Lincoln's speech is jarring to twenty-first century sensibilities for, among other things, his argument that extension of slavery into the territories should be opposed on the ground that with slavery comes miscegenation. See id. at 364 ("I have said that the separation of the races is the only perfect preventive of amalgamation.").

Hence, the Lincolnian legislator may well find the Supreme Court unreceptive to his pleas for the latter to change its doctrine. But if so, that will not count as a reason for the Lincolnian to acquiesce in the Court's determination that popular moral disagreement with the Justices does not justify doctrinal change. After all, the Lincolnian denies that the Justices get to decide how much weight to give the views of the people and elected officials in ascertaining constitutional meaning.[167] For the Lincolnian legislator, resistance to judicial assertions of judicial supremacy is a matter of constitutional duty, even if unlikely to be effective. And thus, even without a viable means of persuading the Court to change its mind, the Lincolnian legislator may well regard any use of fallback legislation as an impermissible sacrifice of a basic principle.

B. *The Dialectic View*

Those who believe that the Court and the political branches should be engaged in dialogue about constitutional meaning have their own reasons to be skeptical of fallback law. Most such dialectic views accept that the Court has the last word in cases of conflict,[168] but they call for a back and forth before the Court may insist on its own interpretation. Guido Calabresi's concept of the "constitutional remand" is an instructive example.[169] As an academic, Calabresi argued that when a law is challenged on potentially valid grounds, courts ought to be able to remand the issue for reconsideration by the legislature. Then, if the legislature reenacts the challenged provision, the courts can either accept the new law as constitutional or finally bite the bullet and strike it down.

Although Canadian constitutional law under the notwithstanding clause[170] and English law under the Human Rights Act make use of devices similar to the constitutional remand,[171] the mechanism is not widely

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167. In Matthew Adler's terminology, Lincolnians would thus count as *deep* popular constitutionalists. Matthew D. Adler, Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?, 100 Nw. U. L. Rev. 719, 722, 798–99 (2006) ("The [deep] 'popular constitutionalist,' faced with official resistance to the claim that officials should defer to citizen constitutional views, would surely be tempted to appeal to citizen opinion on the very issue of constitutional authority.").

168. See, e.g., Dorf & Friedman, supra note 148, at 83 ("Of course, in the end the say is the Court's.").

169. See Calabresi, supra note 30, at 16–21 (proposing "constitutional remand" and purporting to find authority for practice in Supreme Court precedent).

170. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 33 (U.K.) (permitting national and provincial legislatures to continue a law in effect for five years notwithstanding its judicial invalidation). The Ottawa parliament has never invoked its power under the notwithstanding clause, although legislators have frequently threatened to do so, and provincial legislatures have in fact used the clause. For example, the Quebec Parliament overrode the Canadian Supreme Court's invalidation of provisions of a language law. See Ford v. Quebec, [1988] 2 S.C.R. 712.

171. In the United Kingdom, the Law Lords and other specified courts can review an act of Parliament and issue a "declaration of incompatibility" with the Human Rights Act of

used in U.S. constitutional law. Calabresi's own version is limited to circumstances in which the original law can be invalidated on grounds of desuetude, and even in this limited context his argument is controversial.[172] But the advocates of constitutional dialogue need not stake their argument on any particular implementing mechanism or even on extant practices in American constitutional law. Their larger point is that each branch should take account of the views of the other branches in formulating its own constitutional views.

The use of fallback law will frequently be inconsistent with the legislature's obligations under such a dialectic view. In enacting an original provision and a fallback provision simultaneously, the legislature effectively pre-scripts its response to the courts, no matter what grounds they give for invalidating a piece of legislation. How can the legislature take the views of the courts into account in formulating its own response if it formulates that response before learning those views?

That is not to say that proponents of the dialectic view will never have good reason to enact a fallback provision. Indeed, when Congress legislates in an area in which a substantial body of Supreme Court doctrine already exists, its inclusion of a fallback provision may reflect not disrespect for the Court but deep respect. It may show that Congress took the Court's doctrine very seriously in its deliberations, even if Congress could not ultimately predict with confidence how the Justices would evaluate the new legislation. Perhaps Congress found that the resulting original law satisfied its own best constitutional judgment as well as its assessment of what the Court would likely say, but included a fallback because of lingering doubts about the latter question. The fallback could then count as evidence that Congress took the Court's views seriously.

But why does Congress need a fallback even then? Because in at least some circumstances Congress might legitimately worry that great harm would arise were there to be a temporal gap between a judicial decision invalidating a law and the enactment of new, substitute legislation. Fallback law could be used to fill the gap, granting legislators who take the obligation of dialogue very seriously time to deliberate on the meaning and effect of a judicial determination that the original provision was invalid. After this period of reflection, those legislators who believe that the fallback itself violates the Court's new constitutional ruling or is otherwise unwise could then try to persuade their colleagues to adopt new legislation that supersedes the fallback. But simply relying on a fallback provision without prior deliberation about Supreme Court doc-

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1998, but Parliament retains the final decision whether to change the law in accordance with the Court's holding. See Human Rights Act, 1998, c. 42, § 4 (U.K.).

172. See Quill v. Vacco, 80 F.3d 716, 735, 738–43 (2d Cir. 1996) (Calabresi, J., concurring) (voting to strike down state ban on assisted suicide where enforcement had "fallen into virtual desuetude," while reserving judgment on validity of ban if state were to "reenact [the ban] while articulating the reasons for the distinctions it makes in the laws, and expressing the grounds for the prohibitions themselves"), rev'd, 521 U.S. 793 (1997).

trine and a commitment to reconsideration after a decision invalidating the original provision would seem inconsistent with the dialectic conception of court-legislature relations.

C. *The Judicial Exclusivity View*

It might appear that fallback law should generally be acceptable to those who believe in judicial exclusivity in constitutional interpretation. In this view, the courts worry about the constitutionality of legislation but legislators do not, except insofar as legislators will not want their handiwork invalidated, and will thus endeavor to enact only laws that the courts will uphold. If a legislator is uncertain whether the courts will uphold a proposed law that he favors on policy grounds, he might well vote for it, but include a fallback of undoubted constitutionality in the event that the courts strike the original law. In this approach, the legislature's relation to the Constitution resembles the relation of Holmes's bad man to the law in general.[173] Legislators care about the Constitution (as authoritatively interpreted) only as a limit on what they can get away with.

Even a judicial exclusivist may have grounds to be uncomfortable with fallback law in many circumstances, however. One only employs fallback law if one thinks there is a realistic chance that the courts will invalidate the original provision, but the judicial exclusivist equates judicial rulings regarding constitutionality with the meaning of the Constitution itself.[174] Suppose that: (a) the Constitution means what the courts say it means; and (b) there is a prima facie duty of legislators not to enact unconstitutional laws. If both of these conditions were true, then legislators would be obligated not to enact laws that they thought the courts would likely strike down and would thus have very few occasions to enact fallback law. They would be entitled to enact fallback law only as insurance against an unlikely event: A legislature might occasionally conclude that there is a low probability that its original law will be held invalid, and thus that enacting it is consistent with its duty to the Constitution, but that even the small risk of an unexpected invalidating decision warrants adoption of a fallback to prevent the harm that would otherwise arise from a temporary legal vacuum.

But is it plausible to think that both conditions (a) and (b) could simultaneously hold? Isn't the whole point of judicial exclusivity that the legislature does not need to worry about constitutionality, so that if proposition (a) is true, then proposition (b) is false? Perhaps not. Certainly the Supreme Court's rhetoric in *Cooper v. Aaron* suggests that it is possible simultaneously to equate the Constitution with the Supreme Court's interpretations of it and to believe that the elected branches are duty-

173. See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897) (articulating bad-man principle).

174. See Alexander & Schauer, Extrajudicial, supra note 149, at 1387 (arguing that nonjudicial officials, no less than lower court judges, can and should subjugate their understanding of Constitution to that of Supreme Court).

bound to comply with the Constitution thus defined.[175] Immediately after identifying the Constitution with the Court's interpretation thereof, the Court went on to state: "No . . . legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."[176]

To be sure, many scholars who sympathize with the cause of racial justice that occasioned the *Cooper* Court's pronouncements nonetheless criticize the Court's conception of its role relative to that of political actors.[177] However, those critics reject judicial exclusivity, whereas judicial exclusivists tend to treat *Cooper* as a more or less canonical statement of their view.[178] Thus, while one *could* defend a view of judicial exclusivity in which legislators had no obligation to abide by the anticipated constitutional rulings of the courts, in fact, actual judicial exclusivists tend to find such an obligation. And, as I have explained, that combination makes most instances of fallback law problematic.

D. *Judicial Enforceability and Severability*

Thus, we have seen that under each of the leading views of the relation of political actors to courts—Lincoln's view, the dialectic view, and the judicial exclusivity view—fallback law is or can be troubling to varying degrees. However, because each of these is a view about the duty that a legislator has by virtue of her conception of her role, the courts would not be likely candidates for enforcing such duties. If a legislator enacts invalid legislation, the courts will invalidate it; they will not invalidate what they otherwise deem valid legislation on the ground that it violated the legislator's own independent judgment about what the Constitution requires or on the ground that in enacting arguably invalid but ultimately valid legislation, the legislators violated a duty to abide by their best guess

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175. 358 U.S. 1, 18 (1958) ("[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

176. Id. The word I have replaced by an ellipsis is "state," but it is clear that the Justices would apply the same principle to acts of Congress. See City of Boerne v. Flores, 521 U.S. 507, 529 (1997) ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

177. See, e.g., Tushnet, Taking, supra note 147, at 8 ("The Little Rock case presented a particularly appealing setting for asserting judicial supremacy. . . . But there are other cases where strong assertions of judicial supremacy are less appealing. The notorious *Dred Scott* case makes the point.").

178. See, e.g., Alexander & Schauer, Extrajudicial, supra note 149, at 1362 ("[W]e defend *Cooper* and its assertion of judicial primacy without qualification . . . .").

about what the courts would do. Merely to describe such possibilities is to explain why they are untenable as formal doctrines.[179]

To say that legislators have judicially unenforceable duties not to enact fallback law in certain circumstances is not, however, to say that legislators have no duty to avoid enacting fallback law.

Indeed, for one species of fallback law—severability—the legislative duty of independent constitutional interpretation may actually be the source of judicially enforceable rules. To see how, begin by recalling that under both the dialectic view and the most common version of the judicial exclusivity view, a legislator must take into account judicial doctrine in deciding whether to enact legislation. Severability, if improperly used, permits legislators to shirk this duty by enacting laws they regard as constitutionally dubious or worse, and leaving the courts to sort things out.

But why does that give rise to justiciable rules? Consider the following example. In clear violation of current Supreme Court doctrine, the South Dakota Legislature recently enacted a law banning abortion except to save the life of a pregnant woman.[180] (The law was rescinded by referendum in November 2006, a fact that I shall assume away for purposes of this discussion).[181] Some of the South Dakota legislators who voted for the bill may adhere to Lincoln's view that they have the right to enact new legislation that clearly violates governing Supreme Court doctrine, but others may take the dialectic or judicial exclusivity view. These latter legislators would have violated their constitutional duty were they to have

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179. Thus, there is no judicially enforceable doctrine requiring Congress to deliberate. But see Victor Goldfeld, Note, Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes, 79 N.Y.U. L. Rev. 367 (2004) (arguing for such doctrine). However, a variety of doctrines may have the effect of providing Congress with incentives to deliberate. These include clear statement rules, see, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (brackets and internal quotation marks omitted)), and judicial deference to congressional findings of fact based on congressional hearings. See, e.g., United States v. Lopez, 514 U.S. 549, 563 (1995) (explaining that Congress has no obligation to make formal findings but that such findings could help Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye").

180. This law was titled the Women's Health and Human Life Protection Act and was codified at S.D. Codified Laws §§ 22-17-7 to -12 (2006).

181. See Monica Davey, South Dakota Rejects Abortion Ban as Ballot Measures Nationwide Draw Voters to Polls, N.Y. Times, Nov. 8, 2006, at P8. We can assume that the legislators who voted for the bill expected it to be challenged in the courts, not the voting booth. See Cynthia Gorney, Reversing *Roe*, New Yorker, June 26, 2006, at 47, 47 ("The legislators who wrote [the bill] . . . assumed that it would face an immediate legal challenge; that a federal judge would declare it unconstitutional and block its enforcement before the . . . startup date; and that it would then begin a journey through the appellate system and toward the Supreme Court."); id. (quoting "outspoken defender[ ]" of law, State Senator Bill Napoli, as saying: "'We only wanted to challenge Roe v. Wade[, 410 U.S. 113 (1973)].'").

voted for the abortion ban on the assumption that courts would subsequently narrow it, by, for example, upholding it insofar as it applies to postviability abortions for which there is no medical justification.[182]

Now suppose that the Supreme Court thought it unconstitutional for legislators to vote for a law that the legislators have every reason to expect will be struck down at least in part. The Justices could discipline the legislators by applying a rule of nonseverability, notwithstanding the legislators' expressed preference for severability. "We're not going to cooperate with you in your effort to shirk your duty to apply the Constitution for yourselves" would be the rough message of the Court, and we would expect to find such a judicially imposed rule of nonseverability in just those areas—such as abortion—where the Court has reason to think that legislators view constitutional doctrine as an intrusion to be circumvented rather than a source of norms for their own deliberation. And indeed, as Richard Fallon has documented, in the abortion area, the Supreme Court has traditionally applied a constitutional rule of nonseverability.[183] Understanding severability as a form of fallback law helps explain why.[184]

V. Crafting and Implementing Fallback Law

This Article has thus far identified circumstances in which substitutive fallback law, severability, and nonseverability raise constitutional issues. It now turns to matters of design and implementation. After discussing the difficult choices that primary actors face in the event that their conduct is regulated by a constitutionally dubious law containing a fallback, this Part observes that legislators will often face tradeoffs in designing a fallback law, and that courts will face related tradeoffs in implementing it.

A. *Notice*

Suppose Congress or a state legislature enacts a statute containing some original provision P and a fallback F to take effect in the event that P is found invalid. Should a prudent primary actor subject to the law conform her conduct to P or to F? What should a prudent attorney advise a prudent client about the latter's legal obligations? Following Learned Hand, the lawyer might try to tally up the harms that would be visited upon the client by noncompliance with P in the event it is held valid and those that would be visited upon the client by noncompliance with F in the event that P is held invalid, as well as the benefits to be

182. South Dakota courts apply a presumption of "separability." See Simpson v. Tobin, 367 N.W.2d 757, 768 (S.D. 1985).

183. See Fallon, As-Applied, supra note 77, at 1347 n.132, 1350.

184. For additional arguments for disallowing severability to cure overly broad abortion restrictions, see Dorf, Challenges, supra note 32, at 270–71.

obtained from noncompliance with each, all discounted by the respective probabilities of validity and invalidity of P.[185]

In principle, such calculations are no more difficult than the sorts of calculations a lawyer must make under any regulatory regime at the border between two rules or standards. For example, whether the earnings from a profitable transaction qualify as ordinary income or a capital gain (and are thus typically subject to taxation at a lower rate)[186] will sometimes be unclear,[187] but a taxpayer who wishes to engage in the transaction will want to be able to plan on how much money to set aside for the ultimate tax bill. Although a good tax lawyer will advise her client to structure the transaction in a way that ensures capital gains treatment, it will not always be possible to maintain the substance of the transaction exactly as the taxpayer desires without risking its classification as ordinary income by a court ultimately charged with ruling on the validity of the client's tax return.

Of course, in the tax example, the law's ambiguity does not place the taxpayer squarely on the horns of a dilemma. He can always plan as though the relevant transaction will ultimately be subject to the less favorable rule and hope to be pleasantly surprised. And the same is true with respect to some fallbacks: If a prohibition on "indecent communications over the internet" is backed up by a prohibition of "obscene communications over the internet," the prudent speaker can comply with the stricter limit (here the indecency prohibition). Or, if the original and the fallback establish independent obligations—for example, refrain from indecent communications over the internet, unless that prohibition is found invalid, in which case facilitate parental controls over content that is inappropriate for minors—the prudent speaker can comply with both.

However, we can conceive of circumstances in which it would be literally impossible to comply with both P and F, because they impose conflicting obligations. Suppose P mandates some conduct X and F prohibits X. Compliance with the original violates the fallback, and vice versa.

Would it ever be rational for a legislature to do *that*? If the legislature's first choice is to mandate X, wouldn't its second choice be to permit X, rather than to prohibit X? Perhaps not, at least where P and F are embedded in complex regulatory schemes.

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185. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (explaining so-called Hand formula).

186. The maximum marginal tax rate on ordinary income is currently thirty-five percent, see 26 U.S.C. § 1(i)(2) (2000 & Supp. IV 2004), while the maximum rate for capital gains is twenty-eight percent, and usually lower, even for high-income earners, see id. § 1(h)(1)(E) (2000).

187. See Michelle Arnopol Cecil, Toward Adding Further Complexity to the Internal Revenue Code: A New Paradigm for the Deductibility of Capital Losses, 1999 U. Ill. L. Rev. 1083, 1084 ("Those provisions in the [Internal Revenue] Code pertaining to capital gains and losses alone account for a significant amount of its complexity.").

B. *A Hypothetical Fallback That Contradicts the Original Provision*

Consider a not-too-unrealistic example. Suppose that Congress wished to maintain the existing system of campaign finance, including the requirement that various campaign contributions be publicly disclosed.[188] Congress worries, however, that the existing regime may be held invalid,[189] and accordingly, wishes to adopt a fallback. Although Congress prefers the current regime, it is also intrigued by the proposal of Bruce Ackerman and Ian Ayres to permit citizens to "vote with dollars."[190] Ackerman and Ayres urge funding elections with "patriot dollars," government funds that each citizen directs to the candidate or candidates she supports.[191]

The Ackerman/Ayers proposal avoids the chief difficulty (other than underfunding) faced by most public campaign finance proposals—the need for a formula to decide who gets how much funding; here, voters themselves decide. From a doctrinal perspective, the proposal's chief advantage is that it does away with strict limits on campaign contributions of regular (nonpatriot) dollars, and so it stands a better chance of being upheld than does existing law, in the event that the Court cuts back on government power to restrict campaign contributions.

To prevent the corruption or appearance of corruption that accompanies large donations, under the Ackerman/Ayers proposal, all donations of private (nonpatriot) funds would have to be made anonymously.[192] Hence, if Congress adopted the Ackerman/Ayres proposal as a fallback to existing regulation, we would have an original law that *mandated* public disclosure of donor identity, and a fallback that *prohibited* such disclosure.

Plainly, a primary actor cannot be expected to comply with both a law mandating some course of conduct and a different law prohibiting the same course of conduct. Nor would it ordinarily be fair to require people to guess correctly whether the original law will be upheld or invalidated. At least where criminal penalties are imposed or rights of free speech implicated, constitutional doctrines prohibiting unduly vague laws

188. See 2 U.S.C. § 434(b) (2000).

189. In the Court's most recent pronouncement on the subject, three Justices criticized current doctrine as permitting too-strict limits on campaign contributions. See Randall v. Sorrell, 126 S. Ct. 2479, 2501 (2006) (Kennedy, J., concurring in the judgment); id. at 2501–06 (Thomas, J., joined by Scalia, J., concurring in the judgment). A fourth Justice hinted that he might be willing to reexamine Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), if the issue were squarely presented. See *Randall*, 126 S. Ct. at 2500–01 (Alito, J., concurring in part and concurring in the judgment) ("Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue."). We can imagine that personnel changes or intimations of a possible change of heart from current Justices lead Congress to worry that five Justices would be willing to overrule campaign finance case law.

190. See Bruce Ackerman & Ian Ayres, Voting with Dollars (2002).

191. Id. *passim*.

192. Id. at 26–30.

might provide protection for persons who guessed wrong.[193] And that might even be true in the more likely situation in which the original provision and fallback imposed merely different obligations, rather than contradictory obligations.

C. *Limits on the Legislature's Ability to Draft Around the Notice Problem*

We might think that the precise conditional formulation of most fallbacks solves the notice problem. A legislature *could* write a fallback in the following form: "The law is P, unless P is unconstitutional, in which case the law is F." A law of this form would seem to say that the obligation to comply with F exists from the moment of enactment, so long as P is in fact unconstitutional. If so, primary actors really would have to disobey P or F at their peril. In fact, however, fallbacks are typically written in the following, somewhat different, form: "In the event that P is held invalid, the law shall thereafter be F."[194] Judicial invalidation of P, not P's invalidity in some objective sense, triggers the applicability of F, and thus, the obligation to comply with F does not arise until a court actually invalidates P. Accordingly, the typical drafting of fallback provisions reduces the extent to which persons and entities subject to regulation must bear the risk of uncertainty.

A fallback F whose operation is not formally triggered until a judicial decision invalidating the original P does not, however, solve all notice problems, and may create additional difficulties. Even if the formal legal obligation to comply with F does not come into existence until the judi-

193. Due process requires fair notice that conduct is criminal. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion) (explaining that statute may violate void-for-vagueness doctrine either because it fails to provide sufficient notice or because "it may authorize and even encourage arbitrary and discriminatory enforcement"); Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding that everyone is "'entitled to be informed as to what the State commands or forbids'" (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939))). Similarly, fears that speakers will self-censor are said to justify a parallel limit on the vagueness of laws abridging speech. See, e.g., Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."); Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973) (recognizing need for "breathing space" that underwrites First Amendment vagueness and overbreadth doctrines).

194. See, e.g., 19 U.S.C. § 1516a(g)(7)(B) (2000) ("In the event that the provisions of subparagraph (A) are held unconstitutional . . . , the provisions of this subparagraph shall take effect."); Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, § 274(f)(1), 99 Stat. 1037, 1100 ("In the event that any of the reporting procedures described in section 251 are invalidated, then any report . . . shall be transmitted . . . ."); Ala. Code § 15-18-82.1(c) (LexisNexis Supp. 2005) ("If electrocution or lethal injection is held to be unconstitutional by [certain courts under certain circumstances], all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution.").

cial decision invalidating P, that judicial decision will cast a backward shadow. Outside the criminal law, where the Ex Post Facto Clauses of Article I, Sections 9 and 10 apply, laws can and frequently do have at least a practical retroactive effect.[195] If P and F are tax provisions, for example, then P's invalidation cannot make the taxpayer criminally liable for failure to comply with F in the period prior to P's invalidation. However, the taxpayer's subsequent tax bill will be measured by F, and if the taxpayer has planned his activities under the assumption that P would apply, this could lead to wasteful investments or substantially greater tax liability than if the taxpayer knew all along that F would be the governing rule or standard. Such disruptions of planning are hardly limited to laws involving taxation.

Moreover, once a legislature decides to make judicial invalidation the trigger for the applicability of a fallback, it faces the difficulty of specifying *which* court's decisions serve as the trigger. The California law discussed in Part III was unusual in specifying that the fallback would be triggered by a decision of "an appellate court or the California Supreme Court."[196] More typically, the legislature will provide, as Congress provided in section 201(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), that in the event that the original provision is found to "be constitutionally insufficient by final judicial decision," the fallback will go into effect.[197]

D. *Which Court's Decision Should Trigger a Fallback?*

The wording of the BCRA fallback raises an obvious question: Found unconstitutional by final judicial decision of which court? There were two choices in cases arising under BCRA, because all challenges to it were required to be heard by a special three-judge district court in the District of Columbia,[198] with an automatic right of appeal to the Supreme Court. And lest the reader think that a decision is not "final" until ren-

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195. See generally Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055 (1997) (cataloguing and analyzing various ways in which laws can have retroactive effect).

196. Cal. Health & Safety Code § 44091.2 (West 2006). Still more unusual in its precision is the Alabama death penalty fallback provision, which states:

> If electrocution or lethal injection is held to be unconstitutional by the Alabama Supreme Court under the Constitution of Alabama of 1901, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding a method of execution to be unconstitutional under the United States Constitution made by the Alabama Supreme Court or the United States Court of Appeals that has jurisdiction over Alabama, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution.

Ala. Code § 15-18-82.1(c).

197. 2 U.S.C. § 434(f)(3)(A)(ii) (Supp. IV 2004).

198. Id. § 437h note (Judicial Review) ("The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened

dered or left in place by the Supreme Court, even a cursory perusal of the U.S. Code reveals that lower courts can issue "final" rulings, even if those rulings are subject to appeal; indeed, it is their very finality that typically makes them subject to appeal.[199] In BCRA, Congress would have done better to state whether the fallback would have been triggered by a district court's invalidation of the electioneering communication definition, or only by the Supreme Court's decision on review.

To make matters worse, while clarity is useful, Congress (or a state legislature) cannot simply make the "which court?" issue go away by clear drafting. There are real tradeoffs. If a fallback specifies that only an invalidating decision of the Supreme Court will trigger the substitute provision, Congress will ensure uniformity and predictability but will exacerbate the very problem that fallbacks are meant to cure; it will lengthen the period during which there is a legal vacuum. What happens after a lower court has invalidated the original law but before the Supreme Court has acted? The original provision cannot be enforced, but neither can the fallback.

Furthermore, making a Supreme Court decision the triggering event for a fallback all but requires Congress to provide for mandatory appellate jurisdiction in the Supreme Court whenever it writes a fallback, or at least mandatory appellate jurisdiction where the lower court holds the original provision unconstitutional.[200] Invalidation of an act of Congress by a lower federal court may be thought to render a decision worthy of review by the Supreme Court. Yet all such cases fell within the Court's mandatory appellate jurisdiction before 1988.[201] Presumably Congress relegated them to the certiorari process because it thought that flexibility would sometimes be warranted. Thus, Supreme Court docket crowding is an additional (albeit modest) cost of a Supreme-Court-only rule for triggering a fallback.

The situation is more complicated still for state legislatures. Suppose that a state legislature wishes to make clear which court's decision triggers the application of F. Because the state and federal courts largely

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pursuant to section 2284 of title 28, United States Code." (internal quotation marks omitted)).

199. See 28 U.S.C. § 1257(a) (2000) (granting Supreme Court jurisdiction over cases following "[f]inal judgments" of state high courts); id. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . . ." (emphasis added)).

200. It would be more sensible for Congress to grant the Supreme Court *original* jurisdiction over challenges to laws containing fallbacks, but *Marbury v. Madison* precludes this option. 5 U.S. (1 Cranch) 137, 174 (1803) (construing Article III to forbid Congress from expanding Supreme Court's original jurisdiction). Indeed, if Congress could fast track such challenges directly to the Supreme Court, the justification for writing a fallback in the first place would diminish, because the temporal gap between judicial invalidation and legislative response would narrow: As soon as the Court invalidated the original provision, Congress could begin its deliberations regarding new legislation.

201. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (eliminating mandatory jurisdiction provisions in 28 U.S.C. §§ 1254, 1257, 1258).

have concurrent jurisdiction over federal question cases,[202] the state legislature cannot predict what court will have the last word in any particular litigation. If the litigation originates and remains in state court, the legislature can ensure jurisdiction in the state high court and specify that only an invalidating decision of P by the state high court can trigger F. But what if the litigation originates in federal court or is removed thereto after having been originally filed in state court? If the U.S. Supreme Court grants a petition for certiorari, it will have the last word, but it typically denies certiorari, and a state legislature cannot mandate review of its legislation by the U.S. Supreme Court. Thus, the final say as to the validity of P could belong to the state high court, a federal appeals court, or the U.S. Supreme Court, and there is no way for the state legislature definitively to narrow the possibilities in advance.

If we now return to our California example[203] (as modified by the assumption that the law contained a genuine fallback provision), we see that the legislature was not so prudent after all in specifying which courts' judgments would trigger the fallback, for it neglected the possibility of litigation in federal court.

Similar problems confound state legislatures even when the concern is that P may violate a *state* constitutional provision. In such circumstances, the final word will belong to the highest court of the state—except that the issue might arise first in a diversity or supplemental jurisdiction case in the federal courts, in which case (absent the rarely-used mechanism of certification) its final stop will be the federal court of appeals.[204] The state courts will not be bound as a matter of precedent by the federal court ruling of state constitutionality, but it will bind the parties as a matter of preclusion. If the federal court case involved the leading parties to whom the statute applies, such preclusive effect of the federal court judgment may have the same effective force in subsequent state court actions as a binding precedent would. Accordingly, regardless of whether the potential flaw in the original provision is a matter of state or federal constitutional law, a state legislature cannot specify that any single court will be the sole body to trigger the application of a fallback, for there is no single court that the state legislature can empower to hear all such cases.

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202. E.g., Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981) ("[S]tate courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication.").

203. See supra note 196 and accompanying text.

204. The Supreme Court has long held that cases validly in federal court but presenting no federal question are not within its appellate jurisdiction. See Michigan v. Long, 463 U.S. 1032, 1041–42 (1983) ("The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on 'the limitations of our own jurisdiction.'" (quoting Herb v. Pitcairn, 324 U.S. 117, 125 (1945))).

E. *Authorizing Any Court to Trigger a Fallback*

In light of the difficulties with waiting for centralized review and the additional difficulties created for state legislatures by our dual court system, would Congress and state legislatures do better to make the decision of any court invalidating the original provision sufficient to trigger the fallback? This approach creates a different set of problems, mostly having to do with defining who is bound by particular judgments. To see why, we must briefly review the effect that lower court rulings have in the usual course.

Ordinarily, a legal ruling of a trial court sets no binding precedent, and has no preclusive effect, for persons not parties to the case.[205] This is true even if the trial court decision strikes down a law *on its face*.[206] Rulings of intermediate appellate courts have greater but still limited effect on nonparties. Within the federal system, if not overruled by the Supreme Court or an en banc court, circuit court rulings serve as precedent for the district courts and other courts within the circuit,[207] but even these rulings do not literally bind primary actors not party to the litigation. For example, a ruling by the Ninth Circuit that a California statute is unconstitutional would not prevent—as a matter of precedent or preclusion—the California state courts from applying the statute to persons not party to the federal litigation, if the California courts conclude that the statute is constitutional.[208] To be sure, a prudent actor in California would be wary of relying on the statute after it had been invalidated by the Ninth Circuit. Likewise, we can envision circumstances—such as cases involving claims of qualified immunity—in which an enforcement officer not party to prior federal litigation was nonetheless put on notice by a federal finding of unconstitutionality that reliance on the state statute would no longer be reasonable.[209] Nonetheless, the actual direct ef-

205. See, e.g., Neary v. Regents of the Univ. of Cal., 834 P.2d 119, 124 (Cal. 1992) (observing that California trial court decisions create no binding precedent); 18 James Wm. Moore et al., Moore's Federal Practice ¶ 134.02[1][d] (3d ed. 2006) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (citing Old Republic Ins. Co. v. Chuhak & Tecson, P.C., 84 F.3d 998, 1003 (7th Cir. 1996))).

206. See Fallon, As-Applied, supra note 77, at 1339 ("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." (footnotes omitted)).

207. 18 Moore et al., supra note 205, ¶ 134.02[1][c] ("The published decision of a panel of a court of appeals is a decision of the court and carries the weight of stare decisis."); id. ¶ 134.02[2] ("[T]he district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and ordinarily must follow it until the court of appeals overrules it.").

208. See Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366, 368 (Cal. 2000) ("While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight.").

209. Under *Harlow v. Fitzgerald*, a civil rights plaintiff can only overcome the qualified immunity that protects enforcement officers if the former alleges a violation of a "clearly

fect of a federal appeals court's ruling is limited to the parties before it and future parties to cases within the same circuit.

Against this backdrop, how might Congress make a district or circuit court's ruling trigger the application of a fallback? One possibility would be to leave the ordinary rules of precedent and preclusion intact: Original provision P would be replaced by fallback F only for the parties to the litigation and, if the invalidating decision were issued by an appeals court, for any parties to future federal court litigation in the same circuit. However, for persons outside the states comprising the relevant circuit, and for actors within the circuit who find themselves in state court, P would continue to be valid until supplanted by F.

If such a regime seems balkanized or even bizarre, it is important to remember that this *is* our current regime for most litigation, including the very large subset of fallback law called severability. Litigants can avoid some of the confusion that arises from a law being enforceable in some places as to some parties and unenforceable in other places as to other parties by taking advantage of expansive joinder devices and seeking broad injunctive relief. However, limitations on class actions,[210] personal jurisdiction, and standing for injunctions[211] mean that some degree of confusion may be inevitable until the Supreme Court resolves conflicting interpretations of federal law among the state courts and lower federal courts.

If we tolerate the confusion that arises from potentially multifarious judicial pronouncements regarding constitutionality, can we not tolerate equal confusion when the effect of a ruling of unconstitutionality is to trigger a substitutive fallback provision? If not, it must be because the mischief is greater in the latter case.

And so it appears to be. The prudent planner can comply with a potentially invalid law until he has received a definitive ruling in a case to which he is a party or that will certainly bind him as a matter of precedent. Where the challenged law contains a fallback provision, however, the prudent planner must now comply with both the original provision and the fallback. Even if that is not—as in my hypothetical example of a

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established . . . constitutional right[ ]." 457 U.S. 800, 818 (1982). Nothing in the Court's cases indicates that a decision of a state court or lower federal court cannot clearly establish a right. Compare id., with 28 U.S.C. § 2254(d)(1) (2000) (permitting habeas petitioner in state custody to obtain relief in federal court only upon establishing that his conviction rests on "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

210. See Fed. R. Civ. P. 23 (governing federal class actions and requiring that class satisfy requirements of numerosity, commonality, typicality, and adequacy of representation).

211. See City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (requiring class action plaintiff to demonstrate likelihood of future injury at defendants' hands to establish standing for injunctive relief).

campaign finance fallback[212]—literally impossible, the cost of compliance with two different sets of legal obligations is greater. Accordingly, Congress might reasonably conclude that uncertainty should be reduced with respect to the effects of rulings that trigger substitutive fallbacks.

Yet Congress does not have a free hand. Some of the doctrines currently limiting the effect of lower court rulings are themselves constitutionally required. With respect to preclusion, due process prescribes 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.'"[213] Thus, Congress could not extend the preclusive effect of a fallback-triggering ruling to persons not parties. Likewise, Congress could not lift standing limits rooted in Article III.[214] And while the personal jurisdiction requirements of the federal district courts include Fourteenth Amendment due process limits only because the readily changeable Federal Rule of Civil Procedure 4(k) incorporates them,[215] the Fifth Amendment Due Process Clause imposes personal jurisdiction limits for the federal courts that cannot be lifted by ordinary legislation.[216]

If Congress has only a limited ability to expand the preclusive effect of lower court decisions, could it nonetheless expand their precedential effect? Because Congress had no obligation to create lower federal courts in the first place, or to arrange them in geographic districts and circuits,[217] one might think that it can fashion any rules of precedent that it

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212. See discussion supra Part V.B.

213. Martin v. Wilks, 490 U.S. 755, 761 (1989) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

214. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (discussing "irreducible constitutional minimum of standing"); Warth v. Seldin, 422 U.S. 490, 500–01 (1975) (differentiating between Congress's authority to alter prudential standing limits and its inability to reduce Article III's standing requirements).

215. Compare Fed. R. Civ. P. 4(k)(1)(A) ("Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant . . . who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located . . . ."), with Fed. R. Civ. P. 4(k)(1)(D) ("Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant . . . when authorized by a statute of the United States.").

216. 16 Moore et al., supra note 205, ¶ 108.120 ("[T]he source of constitutional due process limits on the exercise of federal court jurisdiction is the Due Process Clause of the Fifth Amendment . . . .").

217. See Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe."); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) (discussing Congress's plenary power over lower federal courts' jurisdiction); Paul M. Bator, Congressional Power over the Jurisdiction of the Federal Courts, 27 Vill. L. Rev. 1030, 1030 (1982) ("The Constitutional text itself makes clear that Congress is free to decide that there should be no lower federal courts at all."). See generally Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 330–37 (5th ed. 2003) (exploring debate over Congress's power to control lower federal courts' jurisdiction).

deems necessary and proper to their operation. Yet, perhaps Article III's invocation of "[t]he judicial [p]ower" entails principles of precedent that Congress could not alter.[218] Somewhat surprisingly in light of its fundamentality, the question whether Congress can dictate rules of precedent for the federal courts is an open one.[219]

Let us assume, arguendo, that Congress could, in general, alter the rules and standards that now govern the precedential effect of lower court decisions. How might it do so with respect to a fallback provision?

To begin, Congress would have to choose between permitting *any* judicial invalidation of the original law to trigger the fallback and limiting the triggering decisions to some subset of the courts lower than the Supreme Court—federal district courts, federal appeals courts, and state courts at every level. The principal argument for permitting any decision invalidating P to trigger F tracks the argument against restricting fallback-triggering decisions to the Supreme Court: If a district court decision or state trial court decision invalidating P does not trigger F, then we have a temporary legal vacuum of precisely the sort that fallbacks are meant to prevent.

However, if a decision of a federal district court can trigger a fallback, other confusions may arise. Suppose that the Federal District Court for the Southern District of New York invalidates some federal law provision P, thereby activating fallback F, not only for the parties to the case, but also for all those whose cases may be heard in the future in the Southern District and perhaps even elsewhere. What happens if and when the Second Circuit Court of Appeals overrules the Southern District ruling? Unless Congress intends to eliminate the (admittedly statutory) right to appeal, presumably P springs back into life.

Congress might therefore choose to limit its precedent-expanding treatment to decisions of the courts of appeals after all—swallowing the cost of the temporary legal vacuum between district courts' invalidating decisions and appellate rulings thereon—but in doing so, it will only have transferred the resurrection problem to the Supreme Court. P, having been invalidated and replaced by F in a ruling by some federal appeals court, will spring back to life if and when that ruling is in turn reversed by the Supreme Court.

It soon becomes apparent why Congress, when it writes a substitutive fallback, also tends to empower only one court to hear cases in the first instance and then provides for an automatic right of appeal to the Su-

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218. U.S. Const. art. III, § 1.

219. See Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 754–55 (1988) (raising but not answering question whether Congress could require Supreme Court to disregard precedent); Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535 (2000) (arguing that federal statute abrogating stare decisis would be valid).

preme Court.[220] Although this procedure can lead to some uncertainty during the period between when the court of first instance invalidates P and the Supreme Court either affirms or reverses, by restricting to two the number of courts in play, such special jurisdictional provisions greatly simplify matters.

F. *As-Applied Litigation*

As we have seen, however, such special jurisdictional statutes cannot typically be crafted by state legislatures for state laws containing fallback provisions.[221] Nor do they necessarily solve another category of practical difficulties that can arise for both state and federal laws containing fallbacks: the complexity introduced by the fact that laws are typically invalidated "as applied" rather than facially.

The Supreme Court has stated a preference for invalidating "only the unconstitutional applications of a statute while leaving other applications in force."[222] Although some commentators, including this author, have argued that the Supreme Court permits facial challenges in a wider range of cases than it commonly acknowledges,[223] there can be no doubt that in many cases, a court will hold only that some law cannot constitutionally be applied to a particular set of circumstances, but will not facially invalidate the law. If a court holds that some original provision P is unconstitutional as applied, should that holding trigger the application of the fallback F, and if so, would F operate only in the circumstances before the court?

The foregoing is clearly a question of statutory interpretation, and thus Congress or a state legislature could prevent the ambiguity through

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220. The NAFTA Implementation Act authorizes a facial constitutional challenge to the binational panel provisions of NAFTA to be filed exclusively as an original action in the United States Court of Appeals for the D.C. Circuit, 19 U.S.C. § 1516a(g)(4)(A) (2000), with automatic review of that court's decision by the Supreme Court. Id. § 1516a(g)(4)(H). Invalidation under this procedure triggers the NAFTA fallback. Id. § 1516a(g)(7)(B). Similarly, sections 403(a)(1) and (3) of BCRA, which appear at 2 U.S.C. § 437h note (Supp. IV 2004) (Judicial Review), provide that any action for declaratory or injunctive relief challenging BCRA "shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court . . . . A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States." And the Gramm-Rudman-Hollings Act was to similar effect. See 2 U.S.C. § 922(a)(5) (2000) ("Any action brought under [the expedited review provisions] shall be heard and determined by a three-judge court in accordance with section 2284 of title 28."). In turn, 28 U.S.C. § 2284 (2000) sets out the composition and procedures of the three-judge district court panels, and 28 U.S.C. § 1253 establishes the direct right of appeal from these panels to the Supreme Court.

221. See supra text accompanying notes 202–204.

222. Ayotte v. Planned Parenthood of N. New Eng., 126 S. Ct. 961, 967 (2006) (citing United States v. Raines, 362 U.S. 17, 20–22 (1960)).

223. See, e.g., Dorf, Challenges, supra note 32, at 251–83; Fallon, As-Applied, supra note 77, at 1342–59; Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 421–56 (1998).

careful drafting. But this raises the question of what the legislature should draft.

The legislature might specify a maximal fallback: "In the event that P is held invalid in any of its applications, F shall replace P in all circumstances." The maximal fallback clearly expresses the legislature's intent, but it is overkill. Presumably the reason that F is only a fallback is that the legislature prefers P. Yet the maximal fallback substitutes F for P even in circumstances in which P would be held valid.

At the other extreme, the legislature might specify a minimal fallback: "In the event that P is held invalid on its face, F shall take effect; invalidation of P in some but not all of its applications shall not trigger F." Yet such a fallback would have no effect whatsoever in the event that P was held invalid as applied. Even in the very case in which P was invalidated as applied, F would not be triggered, leaving the legal vacuum that fallbacks are supposed to avoid.

Because of the inadequacy of the two polar approaches, the possibility of as-applied invalidation would seem to call for an as-applied fallback provision, that is, a fallback F that is triggered by the as-applied invalidation of P, but that then operates only with respect to the applications in which P is invalid.

How would that work? Consider an example. Suppose that a state establishes a uniform system of expedited review of final determinations by state agencies. For concreteness, imagine that the state provides postdeprivation opportunities for presentation of written materials to an administrative law judge but does not permit live testimony. As set forth in *Mathews v. Eldridge*[224] and subsequent cases, the constitutional validity of this procedure depends on a weighing of "'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."[225] Review of written materials might well be perfectly adequate for some sorts of determinations—say, a challenge to a written examination for a state professional license—but inadequate for other sorts of determinations—such as eligibility for state welfare payments or their equivalent.[226] If the state legislature anticipates the possibility that its administrative review procedures may be held invalid in some but not all circumstances, it may want to adopt a targeted

224. 424 U.S. 319 (1976).

225. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (quoting *Mathews*, 424 U.S. at 335). The Court further explains: "The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute procedural safeguards.'" Id. (quoting *Mathews*, 424 U.S. at 335).

226. See Goldberg v. Kelly, 397 U.S. 254, 264 (1970) ("[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.").

fallback, one that applies in just those circumstances in which the original procedures fail the *Mathews* test.

One way to accomplish that goal would be with an all-purpose fallback, a set of alternative procedures that would become operative in any context in which a court held the original procedures unconstitutional. Alternatively, the legislature might specify different fallbacks for different applications: For example, invalidation of the original procedures in the context of welfare payments might trigger a fallback that provides for a predeprivation oral hearing, whereas in other contexts, the fallback would only permit live testimony postdeprivation.

As these alternatives illustrate, the ability of the legislature effectively to craft as-applied fallbacks depends upon the ability of the legislature to anticipate the circumstances in which the original provision P might be found invalid. Legislators have some such ability, but it is hardly perfect. Indeed, one might even think that it is in the nature of as-applied constitutional challenges that they tend to reveal constitutional infirmities that were not easily foreseeable, or at least not in fact foreseen, when the legislation was adopted.[227]

G. *Standing*

Next consider a related issue of standing. Suppose that Plaintiff sues to enjoin the enforcement of some original provision of law P that Plaintiff claims is unconstitutional. Suppose further, however, that a clearly

227. Consider a gruesome example. A number of states have laws providing that in the event that the primary method of execution shall be found unconstitutional, some alternative method shall be used. See Ala. Code § 15-18-82.1(c) (LexisNexis Supp. 2005) (authorizing death by "any constitutional method of execution" in event that electrocution or lethal injection is held invalid on state or federal constitutional grounds); Ark. Code Ann. § 5-4-617(b) (2006) (providing for electrocution as fallback method of execution); 725 Ill. Comp. Stat. Ann. 5/119-5(a)(2) (West 2006) (same). These fallback execution laws do not distinguish between facial and as-applied invalidation of the primary method of execution. Yet it is possible for a method of execution to be facially valid but to constitute cruel and unusual punishment in particular circumstances. Thus, in *Rupe v. Wood*, the district court found that death by hanging was not facially unconstitutional but that hanging an obese inmate violates the Eighth Amendment because of the significant risk of decapitation. 863 F. Supp. 1307, 1314–15 (W.D. Wash. 1994), vacated as moot, 93 F.3d 1434 (9th Cir. 1996). At the time, Washington law provided that a condemned inmate would be hanged unless he chose lethal injection. See *Wood*, 93 F.3d at 1438. Because Rupe had not affirmatively chosen lethal injection, arguably he could not be executed by any state-approved method. Clearly, however, the state legislature's preference would have been to execute him by lethal injection in the event that he failed to elect a method and a court invalidated the default method. Had the legislature anticipated this particular as-applied invalidation, it might have written a fallback ensuring that in the event of as-applied or facial invalidation of one or more methods of execution, the condemned would be executed by a permissible method. As it happened, while the appeal was pending, the Washington legislature changed the default method to lethal injection, resulting in the dismissal of the constitutional challenge to hanging as moot. Id. at 1438–39.

valid fallback provision F also prohibits Plaintiff's conduct. Does Plaintiff have standing to challenge P in federal court?[228]

Article III standing doctrine requires that a plaintiff's claimed injury be redressable by a favorable ruling,[229] and it is difficult to see how Plaintiff can satisfy this requirement. A judicial declaration that P is invalid avails Plaintiff not at all, for Plaintiff remains subject to the prohibition of F.[230] (Let us assume that the consequences for Plaintiff of violating F are identical to the consequences of violating P.) Accordingly, we would think that Plaintiff cannot challenge P.

Another way to put that conclusion is to say that when Plaintiff attempts to challenge P, Plaintiff raises a question of third-party standing.[231] By hypothesis, F is valid while P is not, and thus there are some differences between F and P. In particular, let us assume that P prohibits some conduct that F does not.[232] Therefore, there is some third party T whose constitutionally protected conduct is prohibited by the unconstitutional P but is not prohibited by the valid F. When the court says that Plaintiff cannot challenge P, it is telling the world that it will wait until T comes along because T really is injured by the use of the original P rather than the fallback F. In this view, Plaintiff is attempting to raise T's rights.

As I and others have argued elsewhere, such principles of third-party standing largely account for the Supreme Court's nominal refusal to entertain overbreadth challenges outside of a limited range of cases.[233] If Plaintiff, whose conduct is constitutionally unprivileged, challenges some law L that is invalid in some applications, the Court rejects the challenge unless there is some special reason—such as a chilling effect—to think that the third parties whose constitutionally privileged conduct L actually infringes cannot or likely will not bring challenges of their own. Plaintiff

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228. I limit my discussion of this question to federal court because the Article III standing doctrine does not apply in state courts. See ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . ."). Similar issues arise in states with parallel justiciability limits. For a detailed discussion of states' justiciability doctrines, see generally Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 Harv. L. Rev. 1833 (2001).

229. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976))).

230. See supra note 141 and accompanying text.

231. For a discussion of the third-party standing doctrine, see Craig v. Boren, 429 U.S. 190, 192–97 (1976).

232. This assumption will not always hold. We can imagine provisions such that F and P prohibit the exact same conduct but the constitutionally significant differences between them relate to structures or procedures, rather than prohibited conduct. See discussion supra Part I.B.

233. See, e.g., Dorf, Challenges, supra note 32, at 261–64; Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853, 867–75 (1991).

may have a right to be judged only by a constitutionally valid rule,[234] but the Court assumes that application of the putatively unconstitutional rule contained in L respects that right, because it presumes that L's unconstitutional applications are severable from its valid ones. Thus, Plaintiff will lose her challenge because a formal victory would not actually yield Plaintiff a benefit; rather than complete invalidation of L, victory for Plaintiff would only result in the severance of the invalid applications of L, and those applications (by hypothesis) do not affect Plaintiff.[235]

Severability is just a special case of fallback law, and so we might think that these same third-party standing principles neatly explain why the courts would not permit Plaintiff (rather than T) to challenge the original provision P when Plaintiff's unprivileged conduct will still be proscribed by the substitutive fallback F. There is, however, a puzzle. The requirement that claims be redressable is rooted in Article III, and thus cannot be waived by the courts or Congress, while the general prohibition on third-party standing is merely prudential, and thus is waivable.[236] It therefore seems to matter whether we conceptualize the question as one of redressability or third-party standing.

In the severability context, third-party standing is a sensible description of the issue because Plaintiff's injury really is redressable if the court finds no severability. That is, when a court permits Plaintiff, whose conduct is unprivileged, to challenge an overbroad law L, the court can readily redress an actual injury to Plaintiff by declaring the law unenforceable even as against Plaintiff. As Richard Fallon has explained, when courts do so, they effectively say that the Constitution imposes a rule of nonseverability, one that permits Plaintiff to benefit from a defect in L that does not directly bear on his own conduct.[237]

Is there a useable analogue of the nonseverability rule in the context of a substitutive fallback? Justice Marshall's dissent in *Renne v. Geary* suggests that there is.[238] In that case, the majority dismissed as nonjusticiable a challenge to a California prohibition on party *endorsements* in official voter pamphlets on the ground that a separate and unchallenged

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234. See Matthew D. Adler, Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon, 113 Harv. L. Rev. 1371, 1402–06 (2000) (discussing valid-rule principle in both strong and weak forms, and concluding that both are "incorrect"); Dorf, Challenges, supra note 32, at 242–49 (providing rationales to support valid-rule principle); Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3 ("Under 'conventional' standing principles, a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law.").

235. See Dorf, Challenges, supra note 32, at 278.

236. See Allen v. Wright, 468 U.S. 737, 750–51 (1984) (distinguishing between prudential standing limits, including third-party standing, and constitutionally required limits, including redressability).

237. Fallon, As-Applied, supra note 77, at 1351 ("[D]emands for relatively full specification and limits on severability are aspects of the particular constitutional tests developed by the Supreme Court to enforce specific constitutional provisions . . . .").

238. 501 U.S. 312, 337–38 (1991) (Marshall, J., dissenting).

California statute prohibiting candidates from listing party *affiliation* in voter pamphlet statements would also bar such endorsements, even if the challenged law were held invalid. Justice Marshall (joined by Justice Blackmun) objected that this approach was

> clearly wrong. If the existence of overlapping laws could defeat redressability, legislatures would simply pass "backup" laws for all potentially unconstitutional measures. Thereafter, whenever an aggrieved party brought suit challenging the State's infringement of his constitutional rights under color of one law, the State could advert to the existence of the previously unrelied-upon backup law as an alternative basis for continuing its unconstitutional policy, thereby defeating the aggrieved party's standing.[239]

Justice Marshall thus implied that the existence of a substitutive fallback (or, as he put it, "backup") provision should not affect a federal court's ability to consider the constitutionality of the original provision.

Although he was in dissent in *Renne,* something like Justice Marshall's position prevails in another context. In civil rights cases in which defendant officers have qualified immunity from suit because they have acted objectively reasonably, a federal court must first determine whether the facts alleged show a constitutional violation, and only if so should it then turn to the qualified immunity question.[240] Following this procedure, the Supreme Court explained, ensures that other actors receive guidance about the scope of constitutional rights.[241] By fairly close analogy, where Plaintiff challenges an original provision P, a court should first consider its constitutionality, and only if P is found invalid should the court consider whether the fallback F, which also covers Plaintiff's conduct, is valid.

But this merely brings us back to where we began, for in my example, we assumed that F was valid. By contrast, in order to avoid summary judgment, a plaintiff in a civil rights suit must *challenge* a defense of qualified immunity, if asserted. If a plaintiff concedes that the defendant has qualified immunity, he may have standing but will quickly lose on the merits. Likewise, a plaintiff who challenges P but concedes that F validly proscribes the same conduct may technically have standing but will quickly lose on the merits. Accordingly, this "solution" to the standing problem does not much help the typical plaintiff seeking to challenge an original law that is backed up by what the plaintiff concedes to be a valid fallback.

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239. Id. at 338.

240. See Saucier v. Katz, 533 U.S. 194, 201 (2001) (setting forth this order of operations).

241. See id. (stating that Court's reasoning in resolving threshold inquiry "is the process for the law's elaboration from case to case," and that "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case").

In this doctrinal morass, it is easy to lose sight of the questions that really matter. Whether we denominate Plaintiff's concession that F validly proscribes his conduct relevant to standing or to the merits should be the conclusion of a reasoning process that takes account of the real stakes. Here, those stakes seem fairly clear: If there is some reason to think that a third party T, whose constitutionally privileged conduct is forbidden by P but not F, will be unable or unlikely to press his own claims, then ordinary principles of third-party standing counsel in favor of permitting Plaintiff to challenge P; if we worry that courts cannot provide Plaintiff with redress, we could authorize them to make Plaintiff immune to the fallback F, or even invalidate F in its entirety in such circumstances. This would truly be the substitutive-fallback equivalent of the rule of nonseverability that Fallon and I have argued is an outgrowth of some constitutional doctrines.

However, if no reason exists to suppose that third parties cannot or will not assert their own rights, then it would be inappropriate to permit Plaintiff's case to go forward. We can attribute that conclusion to prudential reasoning or even to Article III, at least once we recall that modern standing doctrine is itself largely a judicial creation.[242]

* * *

This Part has described the principal practical difficulties that legislatures, primary actors, and courts face in, respectively, designing, complying with, and interpreting fallback law. These difficulties may be starkest where a legislature attempts to write a substitutive fallback law, but most of them exist whenever courts invalidate legislation on its face or as applied. How should persons not parties to litigation order their affairs when a trial court or intermediate appellate court invalidates a law? Should a legislature provide for fast-track high court review of a constitutionally dubious law? Insofar as every constitutional challenge raises questions of severability, which is in turn a subset of fallback law, the tradeoffs identified in this Part are ubiquitous.

VI. The Inevitability of Severability

We have just seen how many of the practical difficulties involved in designing and implementing substitutive fallback law also arise when legislatures and courts respectively make and implement rules governing severability. In addition, as noted throughout this Article, one can raise most of the constitutional objections to substitutive fallback law discussed above as objections to legislative rules governing severability.

But if legislatures cannot escape the problems associated with fallback law no matter what they do, should they therefore have a free hand to craft substitutive fallback provisions and severability rules? If sev-

242. See William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 224 (1988) ("[C]urrent standing law is a relatively recent creation.").

erability, nonseverability, and substitutive fallback law all create potential practical and constitutional difficulties, what can a legislature do? Must the legislature decline entirely to specify its preference in the event of judicial invalidation of the original law, leaving the choice of remedy to the courts? Why would courts be better situated than legislatures to make the policy-laden choice between partial invalidation, complete invalidation, and substitute provisions?

The short answer is that legislatures retain considerable remedial discretion. This Article has not suggested that the Constitution poses insurmountable obstacles to fallback law. I have offered a yellow light for fallback law, not a red one.

Moreover, while many of the concerns raised in this Article apply to severability as well as substitutive fallback law, no workable system of judicial review could function without a large role for severability. Otherwise, any judicial decision finding any law unconstitutional, on its face or as applied, would call into question the entire legal code.

To see why, let us ask what it means to say, in some particular case, that a plaintiff challenges the application to him of some "law." Consider federal statutes. Article I, Section 7 of the Constitution uses the word "Law" to refer to bills that have been successfully enacted, a category that, in modern times, includes omnibus legislation concerning disparate subjects codified in different sections of the U.S. Code. In addition, courts frequently and sensibly use the term "law" to refer to an uninterrupted string of text appearing somewhere in the U.S. Code, even if that text emerged from successive enactments of Congress, each one amending what came before.[243] If courts generally employed a rule of nonseverability, would the invalidation of some snippet of text imply the invalidation of everything else that was enacted as part of the same omnibus bill as that snippet? Would it imply the invalidation of the provision in which the snippet was embedded at the time of the challenge? Why just the provision rather than the Code section, the Code title, or the entire U.S. Code itself?

Because the more extreme of these options are plainly implausible, courts never face a choice of *whether* to sever invalid provisions or applications from valid ones, but instead must always decide *how much* to sever. Even in contexts in which we say the Constitution forbids severability—such as the First Amendment overbreadth doctrine[244]—what we really mean is that the Constitution forbids total severability. Applications of a federal criminal indecency ban to obscenity cannot (let us suppose) be severed from applications of the ban to profane or erotic but nonobscene protected speech, but of course the applications to obscenity can be severed from the balance of title 18 of the U.S. Code and whatever other,

243. See, e.g., FEC v. Beaumont, 539 U.S. 146, 156 (2003) (describing 2 U.S.C. § 441b (Supp. IV 2004) as "the law" in as-applied First Amendment challenge); see also U.S.C. § 441b note (2000) (Amendments) (noting prior amendment to law).

244. See supra notes 233, 237 and accompanying text.

unrelated snippets of statutory text were enacted as part of the same Article I, Section 7 law that included the indecency ban.

No legislature concerned about the survival of any of its output could do away with the role that severability plays in the background of every successful constitutional challenge. Accordingly, legislatures need not worry that all uses of severability clauses, nonseverability clauses, or substitutive fallback provisions create equally large constitutional and practical problems. The issues this Article has identified do arise, however, when legislatures go beyond articulating the background role that severability invariably plays and specify a greater or lesser role for severability, or enact a substitutive fallback provision.

CONCLUSION

This Article has identified constitutional and other limits on both severability and substitutive fallback provisions. Beyond these limits, three additional factors may explain why legislators less frequently write substitutive fallback law than severability clauses. First, the use of a fallback provision may signal to the courts that the legislature itself has doubts about the validity of the main provision or provisions. Second, a severability clause is general. In one fell swoop, the legislature can enact a fallback for every possible constitutional ruling invalidating the enactment in whole or in part—namely, the original provision minus whatever parts or applications the courts ultimately invalidate. By contrast, in utilizing substitutive fallback provisions, legislators must identify each plausible ground for invalidation and fashion an appropriate fallback. Unlike a severability provision, substitutive fallbacks usually cannot be taken off the rack. Third, once a legislator or her staffer has done the legwork of writing a fallback, political considerations come into play. Securing agreement on a fallback may be as difficult as, or more difficult than, securing agreement on the original provision.

None of these factors seems likely to deter a legislature from placing increasing reliance on substitutive fallback law, once it becomes alert to the possibility. First, a severability clause arguably sends the same signal as a substitutive fallback provision, and yet one rarely sees courts treating the existence of such a clause as evidence of a law's invalidity. Moreover, the signal that either a severability clause or a substitutive fallback provision sends is simply that the legislature fears that the courts may invalidate the statute, but despite lip service to the "presumption of constitutionality" enjoyed by most legislation,[245] modern constitutional law cares

245. The classic modern statement comes from *United States v. Carolene Products Co.*:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it

little for whether the legislature thought it acted constitutionally,[246] much less for whether the legislature thought the courts would think it acted constitutionally. Thus, the signaling worry appears quite unrealistic.[247]

Second, the off-the-rack savings to be derived from severability clauses come with a corresponding disadvantage. Severance will result in a law that is less well-tailored to the legislature's aims than a substitutive fallback provision. Severability may serve well enough in circumstances in which no potential constitutional flaw is evident to the legislature, but where the stakes are high, and lobbyists are thus active, legislators are likely to know which provisions are vulnerable to challenge and on what grounds.

Third, as to the costs of legislation, including a fallback will sometimes make securing agreement more difficult, but other times it will make such agreement easier. A fence-sitting legislator who thinks an original provision is likely to be found unconstitutional could be induced to vote for the bill as a whole if a fallback to his liking is included. A priori, one cannot say for certain that the first effect always dominates the second.

Indeed, the inclusion of substitutive fallback provisions in three very high-profile federal statutes over the last two decades—the Gramm-Rudman-Hollings Act, the NAFTA Implementation Act, and BCRA, all discussed above—suggests that Congress may be catching on to the potential uses of fallback law.

If so, this Article should serve as a cautionary note. The courts should not regard all substitutive fallback law as unconstitutional, but

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rests upon some rational basis within the knowledge and experience of the legislators.

304 U.S. 144, 152 (1938).

246. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (concluding that Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, "was designed to control cases and controversies, such as the one before [the Court]; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control").

247. But not entirely unrealistic. Where a constitutional test requires "narrow tailoring," the fallback may alert the court to the possibility that the original provision is overbroad. See McConnell v. FEC, 251 F. Supp. 2d 176, 367–68 (D.D.C. 2003) (Henderson, J., concurring in the judgment in part and dissenting in part) ("The wording—indeed the very inclusion in the statute—of the fall-back definition informs any interpretation of the primary definition . . . ."). But the argument may well be flawed in that a law can be narrowly tailored even if another, less effective, law would trench less on constitutional interests. As John Hart Ely explained, it is nearly always possible for a law that burdens expression to burden expression at least a little less by achieving a little less of its otherwise-valid objective; accordingly, the least-restrictive-means test is really a balancing test. John Hart Ely, Comment, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1484–90 (1975). Further, insofar as a fallback provision does show that an original provision fails narrow tailoring, that would be equally true if the fallback had not been enacted but had instead been merely hypothesized by the parties challenging the law.

writing fallback law may nonetheless be inconsistent with widely held views of the constitutional obligations of legislators. Moreover, the courts should regard discrete subcategories of fallback law as unconstitutional. In particular, courts should not enforce fallback provisions that are tainted by the original law's defects, nor should they enforce a fallback provision that appears aimed at coercing judicial acceptance of an unconstitutional original provision, unless the fallback is clearly germane to the law as a whole. Finally, constitutionally valid fallback law will frequently create practical difficulties that careful drafting cannot readily avoid.

Even if legislators heed my caution and craft substitutive fallback law, if at all, only with great care, severability is itself a form of fallback law, and thus simply avoiding substitutive fallback is no solution. Legislators thus must exercise similar care in crafting severability provisions. However, good faith alone will not cure all problems. So long as courts exercise the power of judicial review, difficult questions will inevitably arise about the consequences of a ruling of unconstitutionality.