Printed in U.S.A.
Vol. 109, No. 2

# Articles

## SUPPLEMENTAL STANDING FOR SEVERABILITY

*Erik R. Zimmerman*

**ABSTRACT**—The Supreme Court has recently insisted that plaintiffs must have standing for every claim that they raise. But this claim-specific approach to standing is at odds with established practice in several contexts, including rulings on the severability of statutes. Courts often permit plaintiffs to claim that statutory provisions should be invalidated pursuant to severability doctrine, without requiring that they have standing for those claims. This Article argues that existing practice for severability is a form of "supplemental standing." Supplemental standing is analogous to supplemental jurisdiction. It allows a plaintiff with standing for one claim to raise related claims, even if the plaintiff lacks standing for those other claims. Although the Supreme Court has purported to reject this concept, current law effectively grants supplemental standing for severability claims—and with good reason. When a court rules that part of a statute is unconstitutional, a ruling on severability is necessary to give effect to Congress's intent regarding the remainder of the statute. Supplemental standing permits those rulings, but claim-specific standing would often prevent them. In the severability context, therefore, supplemental standing is more faithful to the central purpose of standing doctrine: preserving the separation of powers. This Article contends that current practice also implicitly grants supplemental standing in additional contexts, including facial challenges to statutes and cases involving multiple plaintiffs. These examples suggest that, while the claim-specific approach to standing is a useful default rule, the Court has been wrong to insist on that approach as a categorical matter. The Article concludes by exploring additional circumstances in which shifting to a supplemental-standing approach appears to be justified on separation of powers grounds.

**AUTHOR**—Olin-Smith Fellow in Law, Constitutional Law Center, Stanford Law School. For helpful discussion and comments, I thank Jonathan Abel, William Baude, Samuel Bray, Jud Campbell, Jared Ellias, Daniel Epps, Don Herzog, Michael McConnell, Stephen Sachs, Derek Webb, Andrew Woods, and participants in the Stanford Law School Fellows Workshop.

## INTRODUCTION

In recent years, the Supreme Court has adopted a claim-specific approach to standing doctrine. Under that approach, plaintiffs must have standing for every claim that they raise.[1] Suppose, for example, that a plaintiff argues that two provisions of a statute are unconstitutional. The Court has held that the plaintiff must satisfy the test for standing, including the injury in fact requirement, with respect to both provisions.[2]

This claim-specific theory of standing can be contrasted with an alternative approach that this Article calls "supplemental standing."[3] Supplemental standing would be analogous to supplemental jurisdiction, which permits a plaintiff who asserts a federal claim to assert related state law claims even if those state law claims do not independently fall within

[1] *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352–53 (2006).

[2] *See* Davis v. FEC, 554 U.S. 724, 733–34 (2008).

[3] *See Cuno*, 547 U.S. at 353 (describing this concept as "ancillary standing," and rejecting it); *cf.* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.16 (3d ed. 2008) (referring to a related but distinct question of whether a party can challenge a given transaction based on any substantive theory as a question of "supplemental standing").

the subject matter jurisdiction of the federal courts.[4] A supplemental-standing approach would similarly permit a plaintiff with standing for one claim to assert related claims, even if the plaintiff lacked standing for those other claims. For example, plaintiffs who have standing to challenge one provision of a statute could theoretically have supplemental standing to challenge other provisions of the statute that do not injure them. Supplemental standing would therefore expand the universe of claims that a federal court has the constitutional power to decide.

In its recent decision in *DaimlerChrysler Corp. v. Cuno*, the Supreme Court rejected the concept of supplemental standing on two grounds.[5] First, it asserted that the claim-specific theory of standing is dictated by established practice.[6] The Court relied on previous decisions that required plaintiffs to establish standing for each claim that they raised, albeit without mentioning the possibility of supplemental standing.[7] Second, it concluded that the claim-specific approach is required for functional reasons.[8] Standing doctrine is meant to protect the separation of powers and promote sound decisionmaking by limiting courts to the resolution of concrete, adverse disputes.[9] The Court reasoned that the claim-specific approach to standing is also necessary to preserve these interests.[10] In other words, if standing requirements are not applied on a claim-specific basis, the Court concluded that they might as well not be applied at all.

The academic literature on standing has largely overlooked the Court's adoption of a claim-specific approach and its rejection of supplemental standing. Scholars have focused on the application of the doctrine to individual claims, rather than cases involving multiple claims.[11] Of course, academic treatment of standing has not been sympathetic. Scholars have argued for decades that the doctrine—at least to the extent that it requires a showing of injury in fact—should be abandoned because it is illegitimate

---

[4] *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

[5] *See* 547 U.S. at 351–52.

[6] *See id.*

[7] *See id.*

[8] *See id.* at 352–53.

[9] *See, e.g.*, *id.* at 341–42; *see also* Massachusetts v. EPA, 549 U.S. 497, 516–17 (2007).

[10] *See Cuno*, 547 U.S. at 352–53.

[11] For scholarly critiques of standing doctrine as applied to individual claims, see, for example, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

and unprincipled.[12] The Supreme Court has nevertheless remained committed to standing doctrine in the face of this scholarly criticism.[13]

This Article suggests that supplemental standing offers a way forward. That is because adopting the concept of supplemental standing would help to alleviate the problems that scholars have identified with standing doctrine. Yet it should also appeal to supporters of existing standing principles, including a majority of the Supreme Court.

Supplemental standing would help to address at least two substantial scholarly concerns with existing standing principles. First, scholars have observed that standing doctrine can undermine the rule of law.[14] Sometimes, when the government commits a legal violation, no plaintiff will have standing to challenge it. Under current standing principles, the courts can never remedy such a violation. The result is that the law goes unenforced.[15] Supplemental standing could help to alleviate this problem by authorizing the federal courts to decide more claims, and thus to remedy some legal violations that might otherwise never be redressed.

Second, scholars have pointed out that existing standing law is often undemocratic.[16] Because it treats an injury in fact as a constitutional requirement, standing doctrine limits Congress's power to create new private rights of action.[17] Even when Congress concludes that it is important to allow private parties to bring suit to enforce federal law in the absence of standing, current doctrine forbids it. Supplemental standing, in contrast, would not require an injury in fact for every claim, and would therefore grant Congress more discretion to decide who should be able to bring suit in federal court. Thus, supplemental standing would help to ensure that standing requirements are subject to democratic control. For these reasons, while it cannot solve every problem with standing law, supplemental standing would almost certainly be preferable to the claim-specific approach from the perspective of those who are skeptical of existing doctrine.

The bulk of this Article, however, is dedicated to a more difficult question—whether even the *supporters* of existing standing doctrine should agree that supplemental standing is warranted in at least some circumstances. To address that question, this Article considers whether implementing standing doctrine on a claim-specific basis makes sense on

---

[12] *See* Elliott, *supra* note 11, at 466–67 (summarizing the criticisms of standing doctrine).

[13] *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142–43 (2013) (holding that plaintiffs lacked standing to raise a Fourth Amendment challenge against government surveillance of electronic communications).

[14] *See, e.g.*, Re, *supra* note 11, at 1205.

[15] *See id.*

[16] *See, e.g.*, Sunstein, *supra* note 11, at 210–11.

[17] *See, e.g.*, *id.* at 211, 219–20.

its own terms. That is, assuming that standing is a constitutional requirement, do the purported rationales for taking a claim-specific approach to standing hold up? Is it truly consistent with established practice, and does it serve the purposes that the Court says it does?[18] If not, then even defenders of standing law should agree that there is a problem.

On inspection, there is such a problem. This Article argues that the claim-specific approach to standing conflicts with established practice in a context that has become increasingly important in recent years: rulings on the severability of statutes. It also argues that requiring claim-specific standing for severability would contradict the central purposes of standing doctrine. The Court's justifications for claim-specific standing therefore break down in the context of severability.

To develop these points, a brief introduction to severability doctrine is helpful. When part of a statute is unconstitutional, severability principles determine what happens to the remainder of the statute.[19] The Supreme Court's current approach to severability focuses on Congress's intent. It asks whether, if Congress had been aware of the constitutional problem with part of the statute, it would still have enacted the remainder of the statute.[20] Severability doctrine therefore aims to preserve the separation of powers by leaving the constitutionally valid parts of a statute intact only if Congress would have wanted them to stand on their own.[21]

Established practice on severability is at odds with the claim-specific theory of standing. Courts and scholars widely agree that a court always has the power to apply severability doctrine after it rules that part of a statute is unconstitutional.[22] For reasons explained below, however, the

---

[18] Professor Elliott has argued that standing doctrine itself does not serve the purposes that the Court has assigned to it. *See* Elliott, *supra* note 11, at 467–68. The Court, however, has continued to assert that the doctrine advances the separation of powers and ensures good judicial decisions. *See, e.g.*, *Clapper*, 133 S. Ct. at 1146–47; Massachusetts v. EPA, 549 U.S. 497, 516–17 (2007). To meet the Court on its own terms, therefore, this Article assumes that standing doctrine can achieve those objectives, and asks whether a claim-specific approach is better or worse at achieving them than a supplemental-standing approach.

[19] *See, e.g.*, Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 743–44 (2010).

[20] *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330–31 (2006) (holding that the partially unconstitutional applications of a statute regulating abortion were potentially severable and remanding for consideration of legislative intent).

[21] *See id.* at 329–31.

[22] *See, e.g.*, Nat'l Fed'n of Ind. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2607–08 (2012) (plurality opinion) (addressing severability without mentioning standing); *id.* at 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (same); *id.* at 2671 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (arguing that standing principles do not limit a court's power to decide severability); Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 305 (2007) ("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 . . . ."); Kevin C. Walsh, *The Ghost that Slayed the Mandate*, 64 STAN. L. REV. 55, 76–77 (2012) (arguing that, if a court rules that the statutory provision that injures

claim-specific approach would prevent a court from applying severability doctrine if the plaintiff lacked standing to raise it.[23] As a result, existing practice on severability is best understood as a form of supplemental standing. When a court rules that part of a statute is unconstitutional, current law implicitly grants the plaintiff supplemental standing to raise a claim about severability.

Consider, for example, *National Federation of Independent Business v. Sebelius* (*NFIB*),[24] in which the Court nearly struck down the entire Patient Protection and Affordable Care Act (ACA) on inseverability grounds. There was no doubt in *NFIB* that the plaintiff States had standing to argue that the ACA's expansion of the Medicaid program was unconstitutional.[25] Under the claim-specific approach, however, the States did not appear to have standing to challenge the many other provisions of the ACA, such as the requirement that individuals purchase health insurance, or the requirement that insurance coverage be provided without regard for preexisting health conditions.[26] The Court nonetheless effectively granted the States supplemental standing to challenge those other provisions by considering their argument that the Medicaid expansion could not be severed, and that the entire statute should therefore be struck down.[27] The States did not succeed on that argument, but that is because the Court rejected it on the merits, not for lack of standing.

Although it would be possible to depart from current practice and apply the claim-specific theory to severability questions, supplemental standing for severability is more faithful to the interests that standing law is meant to serve—separation of powers and sound decisionmaking. When a court rules that part of a statute is unconstitutional, a ruling on severability protects the separation of powers by ensuring that the court does not leave in place a revised version of the statute that Congress never would have

---

the plaintiff is unconstitutional, then the court can decide whether that provision is severable from other provisions that do not injure the plaintiff).

[23] Although at least one commentator has recently recognized this inconsistency between severability doctrine and the claim-specific approach to standing, he took the claim-specific standing theory as a given, and did not address the possibility of supplemental standing. *See* Eric S. Fish, *Severability as Conditionality*, EMORY L.J. (forthcoming) (manuscript at 48–51) (*available at* http://ssrn.com/abstract=2395650 [http://perma.cc/N67V-JF6B]) (assuming that standing should be claim-specific in the severability context).

[24] 132 S. Ct. 2566.

[25] *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1244 (11th Cir. 2011) (holding that "the state plaintiffs undeniably ha[d] standing to challenge the Medicaid provisions").

[26] *See NFIB*, 132 S. Ct. at 2585 (plurality opinion) (describing these provisions of the ACA); *cf. Florida*, 648 F.3d at 1243 (declining to decide whether the States had standing to challenge the requirement that individuals purchase health insurance).

[27] *See NFIB*, 132 S. Ct. at 2607–08 (plurality opinion); *id.* at 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

enacted. Supplemental standing permits the court to make such a ruling on severability, but the claim-specific approach often would not. As a result, even the defenders of narrow standing principles on the Supreme Court have recognized that limiting a court's authority to make severability decisions would interfere with the separation of powers.[28] Using standing law to limit severability rulings also would do little to promote accurate decisions. Because severability is a purely legal question of Congress's intent, judicial accuracy on severability is particularly unlikely to be enhanced by the injury in fact requirement.[29]

The claim-specific approach would also undermine the purposes of standing doctrine in the severability context for additional reasons. As explained below, even though it would limit a court's power to make severability rulings, the claim-specific approach would not limit the court's power to make highly abstract constitutional rulings. That is because the claim-specific approach would still permit plaintiffs to argue that, even if the part of the statute that applies to them is constitutional, that part of the statute is invalid because some *other* part of the statute is both unconstitutional and inseverable. This type of claim is analogous to a First Amendment overbreadth claim, under which plaintiffs have standing to argue that a statute is wholly invalid because its application to other parties is unconstitutional.[30]

The claim-specific approach would therefore produce a counterintuitive asymmetry: It would limit plaintiffs' ability to make *severability* arguments about parts of a statute that do not apply to them, but not their ability to make *constitutional* arguments about parts of a statute that do not apply to them. From the perspective of separation of powers, that would get things backwards—particularly because Congress can overturn a court's severability rulings, but not its constitutional rulings.[31] As a result, applying the claim-specific theory of standing to severability would not only depart from existing practice, but also have deeply troubling consequences.

---

[28] *See NFIB*, 132 S. Ct. at 2671 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); *see also* Heather Elliott, *Standing Lessons: What We Can Learn when Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 551 (2012) (recognizing that "conservative members of the Court usually support restrictive standing doctrine").

[29] *Cf.* Elliott, *supra* note 11, at 474 (arguing that the injury in fact requirement does little to ensure good judicial decisionmaking even as a general matter).

[30] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 473 (2010) (describing overbreadth doctrine); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 368–70 (1998) (recognizing that overbreadth claims and inseverability claims are analogous).

[31] *See, e.g.*, United States v. Booker, 543 U.S. 220, 265 (2005) (observing that "[t]he ball now lies in [Congress's] court" after ruling on the severability of federal sentencing provisions, and noting that Congress could overturn the Court's severability ruling).

If severability were the only context in which the claim-specific theory encountered these problems, the Court's categorical embrace of that theory might still be defensible as a matter of uniformity and simplicity. But at least two other well-known doctrines conflict with claim-specific standing, and instead follow a supplemental-standing approach. First, when courts strike down statutes pursuant to facial challenges, they rule on whether the statute can be applied not just to the plaintiff, but to anyone.[32] In effect, therefore, courts grant plaintiffs raising facial challenges supplemental standing to assert the claims of other potential plaintiffs. Second, it has long been agreed that, if one plaintiff has standing for a claim, a court need not decide whether other plaintiffs in the same case also have standing for that claim.[33] This rule operates as a form of supplemental standing because it permits plaintiffs who lack standing for their own claims to obtain relief when another plaintiff has standing.[34] Like severability, the established practices for facial challenges and cases with multiple plaintiffs are also faithful to the purposes of standing doctrine.[35]

These examples confirm that the Court has been incorrect in purporting to adopt the claim-specific theory of standing as a categorical matter. Although that theory provides a useful default rule, it is subject to well-established and well-justified exceptions. And those exceptions are best explained by the concept of supplemental standing. Because supplemental standing already applies in practice and is justified in principle, standing doctrine should be revised to account for it. Although this Article does not attempt to develop a comprehensive theory of supplemental standing, it sketches some potential contours of such a theory, and explores additional categories of cases in which shifting to a supplemental-standing approach may be warranted.

---

[32] *See, e.g.*, Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1326 (2000) (explaining that a favorable ruling on a facial challenge results in the "total unenforceability" of the statute).

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

[34] *See, e.g.*, Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be—Part 1: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 741–48 (1995) (relying on principles drawn from supplemental jurisdiction to argue that this practice is consistent with Article III).

[35] *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 964 (2011) (explaining that facial challenges are consistent with the separation of powers because "[i]t is the Court's function sometimes to resolve uncertainty and to ensure effective constitutional implementation by laying down broad, clear rules or tests that may have the effect of establishing . . . that a particular statute is unconstitutional in all applications"); Steinman, *supra* note 34, at 729 (observing that the rule for multiple plaintiffs "comports with a number of the basic values that are served by standing doctrine," including the separation of powers, because "so long as some plaintiff has standing, the courts can be assured that, by hearing the case, they are fulfilling the role of the federal judiciary in our governmental system, but not exceeding their proper sphere").

Part I of this Article provides background on standing and severability doctrines, and describes established practice on the interaction between standing and severability principles. Part II introduces the concepts of claim-specific standing and supplemental standing, and considers why the Court has recently insisted on the claim-specific approach. Part III argues that the claim-specific standing theory is inconsistent with existing practice on severability, and that applying the claim-specific theory to severability would contradict the purposes of standing doctrine. Part IV contends that the Court's established approach to severability should be understood as a form of supplemental standing. It also suggests that supplemental standing explains accepted practice in other contexts. This Part concludes by considering how the concept of supplemental standing could be incorporated into standing doctrine as a more general matter.

## I. ESTABLISHED PRACTICE FOR STANDING AND SEVERABILITY

### *A. Standing*

The basic contours of standing doctrine are well established, albeit highly controversial.[36] The Supreme Court has held that, at its core, standing is a constitutional limitation on the authority of the federal courts.[37] Article III grants power to the federal courts only over "Cases" and "Controversies,"[38] and the Court's view is that a dispute is an Article III "Case" or "Controversy" only if the plaintiff has standing.[39] The Court has further held that a plaintiff has standing for constitutional purposes only if (1) the plaintiff has suffered an injury in fact, (2) the injury was caused by the defendant, and (3) the injury is likely to be redressed by a favorable ruling.[40] Because the Court views these requirements as constitutional in character, Congress cannot eliminate them.[41]

The Court has identified two central purposes for standing doctrine.[42] First, standing principles are meant to preserve the constitutional separation of powers.[43] The injury in fact requirement narrows the circumstances in which the federal courts can exercise judicial review, and therefore restrains the authority of the courts vis-à-vis the other branches of the

---

[36] *See, e.g.*, Elliott, *supra* note 11, at 466–67 (describing the "extensive controversy" that surrounds standing law and collecting scholarly sources that criticize the doctrine).

[37] *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006).

[38] U.S. CONST. art. III, § 2.

[39] *Cuno*, 547 U.S. at 342.

[40] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

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

[42] *See* Re, *supra* note 11, at 1194.

[43] *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013); *Cuno*, 547 U.S. at 341–42.

federal government.[44] Second, standing doctrine is supposed to promote sound judicial decisions.[45] The theory is that courts are best at deciding the types of concrete disputes that have traditionally been viewed as "cases" or "controversies."[46] Courts also rely heavily on the presentations of the parties in the adversary system, and the injury in fact and causation requirements help to ensure that the parties have a sufficient stake in a dispute to frame the issues properly for the court.[47]

Even when the constitutional test for standing is satisfied, courts can rely on additional, prudential considerations to limit the exercise of their jurisdiction.[48] These prudential standing principles include a general prohibition on third-party standing, meaning that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[49] The Supreme Court has stated that these prudential limitations also protect the separation of powers and promote sound decisionmaking.[50]

Because prudential standing limitations are not imposed by the Constitution, they are subject to exceptions.[51] The general rule against third-party standing, in particular, is not absolute. The Court has held that a plaintiff can raise the rights of a third party when the plaintiff and the third party have some relationship, and when it would be difficult for the third party to assert his or her own rights.[52] For example, when the prosecution strikes prospective jurors based on their race, criminal defendants can raise

---

[44] *Clapper*, 133 S. Ct. at 1146–47.

[45] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 517 (2007).

[46] *See id.* at 516 (observing that the case-or-controversy requirement limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968))); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (explaining that the injury in fact requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

[47] *See Massachusetts*, 549 U.S. at 517 ("At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

[48] See United States v. Windsor, 133 S. Ct. 2675, 2685–86 (2013).

[49] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[50] *See id.* at 498 (explaining that, in both its constitutional and prudential dimensions, standing doctrine "is founded in concern about the proper—and properly limited—role of the courts in a democratic society"); *see also Windsor*, 133 S. Ct. at 2687 (observing that prudential standing limitations also help to sharpen the issues and ensure that disputes are concrete and adverse).

[51] *See Windsor*, 133 S. Ct. at 2687 (explaining that "the relevant prudential factors that counsel against hearing [a] case [can be] subject to 'countervailing considerations'" (quoting *Warth*, 422 U.S. at 500–01)).

[52] *See* Powers v. Ohio, 499 U.S. 400, 411 (1991) (citing Singleton v. Wulff, 428 U.S. 106, 113–16 (1976)).

an equal protection challenge that rests on the third-party rights of the prospective jurors.[53] Prudential standing limitations are also subject to control by Congress, which can add to them, subtract from them, or eliminate them altogether.[54]

Before considering how these constitutional and prudential standing principles have traditionally been applied to severability questions, the next section describes the fundamentals of severability doctrine.

### *B. Severability*

Severability governs whether a statute that is partially unconstitutional is invalid as a whole.[55] It asks whether the unconstitutional part can, metaphorically speaking, be "severed" from the remainder of the statute. Under current severability doctrine,[56] the "normal rule" is that the unconstitutional part of a statute should be severed, and the remainder should be left intact.[57] Considerations of statutory interpretation and legislative intent, however, can overcome that default rule.[58] The principal inquiry is whether Congress, had it been aware of the constitutional problem, would have "preferred what is left of its statute to no statute at all."[59] If Congress would have preferred what is left, the remainder is valid. If it would have preferred no statute at all, the remainder is invalid.[60]

To understand how the intent-based theory of severability works, consider a hypothetical. Suppose that Yellowstone National Park has been overwhelmed by extreme levels of traffic and an endless series of protests and counter-protests concerning federal environmental policies. Congress enacts the following statute:

---

[53] *See id.* at 415.

[54] *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Warth, 422 U.S. at 501).

[55] *See, e.g.*, Walsh, *supra* note 19, at 743.

[56] This discussion focuses on the severability of federal statutes, which is a matter of federal law. The severability of state statutes is primarily a matter of state law. *See* Leavitt v. Jane L., 518 U.S. 137, 139 (1996) (per curiam).

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

[58] *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006) (explaining that the "touchstone" for a severability ruling is "legislative intent," and that "[a]fter finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?").

[59] *Id.* at 330. The Court also asks whether the remainder of the statute can "function[] independently" of the unconstitutional part. *Free Enter. Fund*, 561 U.S. at 509 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).

[60] *See Ayotte*, 546 U.S. at 330–31.

> The Yellowstone Act
>
> (1) Operating a private motor vehicle is prohibited within or in close proximity to Yellowstone National Park. Any person who violates this provision shall be fined $500.
>
> (2) Protests concerning federal environmental policies are prohibited within Yellowstone National Park. Any person who violates this provision shall be fined $500.
>
> (3) $10 million per year is appropriated to the National Park Service. Those funds shall be used solely for the purpose of reporting to Congress on the effects of § 1 and § 2 of this Act.

The private motor vehicle ban in § 1 is likely a constitutionally valid, albeit seemingly imprudent, regulation of federal property to the extent that it applies within Yellowstone; it might nevertheless exceed Congress's power to the extent that it applies outside the park.[61] The protest ban in § 2 is an unconstitutional content-based regulation of speech.[62] And the appropriation of funds in § 3 is a lawful exercise of Congress's spending power.[63]

Severability principles determine how an unconstitutional provision, like the protest ban in § 2, affects the other provisions of the statute. The intent-based approach asks whether Congress would have enacted the remainder of the Yellowstone Act if it had been aware that the protest ban in § 2 violated the First Amendment. If Congress would have enacted the remainder—e.g., on the theory that traffic in Yellowstone was a serious problem that should be addressed even apart from the ongoing protests—the protest ban would be severable, and the other provisions of the Act would be valid. But if the protest ban were such an integral part of the statute that Congress would not have enacted the rest without it—e.g., on the theory that a motor vehicle ban alone would lead to more protests and make conditions at the park even worse—the remainder of the statute would be invalid.

Severability questions can also arise with respect to different applications of a single provision.[64] In other words, a court can metaphorically "sever" an unconstitutional application of a provision from the remaining applications of that provision. For example, if the motor vehicle ban in § 1 of the Yellowstone Act is unconstitutional as applied to vehicles outside the park, severability principles determine whether § 1

---

[61] *See* U.S. CONST. art. IV, § 3, cl. 2; *cf.* Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (designating land in the territories of Montana and Wyoming as Yellowstone National Park).

[62] *Cf.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295, 298–99 (1984) (upholding a content-neutral regulation issued by the National Park Service against a First Amendment challenge).

[63] *See* U.S. CONST. art. I, § 8, cl. 1.

[64] *See, e.g.*, Walsh, *supra* note 19, at 743–44.

remains valid as applied to vehicles inside the park. This inquiry is governed by the same intent-based test that applies to the severability of provisions.[65]

Much like standing doctrine, the Supreme Court has justified existing severability principles on the ground that they preserve the separation of powers. The Court presumes that the unconstitutional part of a statute is severable so that it can "limit the solution to the [constitutional] problem" and avoid undue interference with the work of Congress.[66] It is nonetheless concerned that, when a court severs part of a statute that has a constitutional flaw, it can resemble the "quintessentially legislative work" of rewriting the statute.[67] Severability doctrine ultimately balances these separation of powers concerns by looking to the intent of Congress.[68] If Congress would have favored partial invalidation of a statute, a court would not be engaging in improper legislative work by severing the unconstitutional part of the statute. But if Congress would have favored total invalidation, respect for the separation of powers would require striking down the statute as a whole.[69]

In recent years, severability doctrine has become increasingly important and controversial. For example, the Court's severability decision in *United States v. Booker*, which transformed the Federal Sentencing Guidelines into an advisory scheme,[70] sparked scholarship criticizing the intent-based approach as overly speculative and subject to manipulation based on judges' policy preferences.[71] Moreover, in its recent decision in

---

[65] *See* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 885–86 (2005); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950 n.26 (1997).

[66] Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328 (2006); *see also id.* at 329 ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" (alteration in original) (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion))).

[67] *Id.* at 329.

[68] *See id.* at 330.

[69] *See id.*; Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (explaining that severance is improper if it results in "legislation that Congress would not have enacted"); *see also NFIB*, 132 S. Ct. 2566, 2668 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (arguing that, if a court severs a statute in a manner that contradicts Congress's intent, the court "assumes the legislative function" and "imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact," which "can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset").

[70] *See* 543 U.S. 220, 246 (2005).

[71] *See* Walsh, *supra* note 19, at 750 (observing that *Booker* was a "spur to critical evaluation of severability doctrine" and citing recent scholarship on severability). *See generally* Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011); Tobias A. Dorsey, Remark, *Sense and Severability*, 46 U. RICH. L. REV. 877 (2012). For earlier, similar critiques of severability, see, for example, John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993), and Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

*NFIB*, the Court came within a single vote of invalidating the entire Affordable Care Act (ACA) on inseverability grounds, and the dissent bitterly criticized the majority for ruling that the statute was severable and striking down only the portion of the statute that expanded the Medicaid program.[72] The dissent framed this criticism in separation of powers terms, arguing that the Court had engaged in "vast judicial overreaching" by severing the statute and "creat[ing] a debilitated, inoperable version of health-care regulation that Congress did not enact and the public [did] not expect."[73]

Scholars who have criticized the intent-based theory of severability have proposed a number of alternative approaches. A common proposal is that statutes should be severed absent a clear statement to the contrary in the statutory text.[74] Other scholars have argued, in contrast, that statutes should always be severed,[75] or even that statutes should never be severed.[76] Although these approaches would produce different results, they rest on the same principle as current doctrine: respect for the separation of powers.[77] Commentators disagree about how severability doctrine should give effect to separation of powers interests in practice, but not that severability doctrine should give effect to those interests in the first place.[78]

Recent controversy has centered on how severability issues should be decided. In contrast, as the next section explains, the views of courts and scholars on the threshold question of when courts have power to decide severability issues—that is, how standing principles apply to severability—have long been stable and largely uncontroversial.

---

[72] *See* 132 S. Ct. at 2667–68, 2676 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[73] *Id.* at 2676; *see also id.* at 2668 (arguing that the Court had taken "the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen," even though "under the Constitution, that power and authority do not rest with this Court").

[74] *See, e.g.*, Nagle, *supra* note 71, at 254–58; Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 272 (2004); Walsh, *supra* note 19, at 784.

[75] *See* Dorsey, *supra* note 71, at 891.

[76] *See* Campbell, *supra* note 71, at 1496–97.

[77] *See* Walsh, *supra* note 19, at 790 (recognizing that, "[a]t its core," the debate over severability "rests on judgments about how best to implement the separation of powers in the U.S. Constitution").

[78] *Compare, e.g.*, Campbell, *supra* note 71, at 1496 (arguing that "traditional separation of powers principles" always require total invalidation on the theory that severance is an exercise of legislative power because it involves rewriting the statute), *with* Walsh, *supra* note 19, at 790 (arguing that courts should sever more statutes than under current doctrine because total invalidation is the greater intrusion on the separation of powers).

### *C. Standing and Severability*

Severability can arise in two postures, which this Article calls the "as-applied" posture and the "overbreadth" posture.[79] To understand how standing principles have traditionally applied to severability questions, considering these postures separately is helpful.

*1. As-Applied Posture.*—In the as-applied posture, plaintiffs argue that the part of a statute that applies to them is unconstitutional, and that other parts of the statute are also invalid because the unconstitutional part cannot be severed.[80]

To illustrate, suppose that a plaintiff, Speaker, challenges the hypothetical Yellowstone Act.[81] Speaker has concrete plans to protest federal environmental policies within Yellowstone, but does not plan to operate a private motor vehicle in or around the park. He is therefore injured by the protest ban in § 2, but not by the motor vehicle ban in § 1 or the appropriation of funds in § 3. In the as-applied posture, Speaker argues that the provision of the statute that applies to him (the protest ban in § 2) is unconstitutional because it is a content-based regulation of speech, and the remainder of the Act is invalid because § 2 is inseverable. Speaker does not need to prevail on his inseverability argument to secure relief on his constitutional claim. Rather, severability arises only after Speaker prevails under the Constitution.

The severability question in the as-applied posture can concern other provisions of the same statute—as when Speaker argues that the protest ban in § 2 is unconstitutional and inseverable from the rest of the statute. The severability question in this posture can also concern other applications of the same provision. For example, Speaker can argue that the protest ban is unconstitutional as applied to him because he plans to engage in protected speech, and that the protest ban is invalid as a whole because its applications to protected speech are inseverable from its applications to unprotected speech—e.g., protests involving incitement or defamation.[82] This posture therefore covers both "facial" and "as-applied" constitutional challenges. This Article nevertheless refers to it as the "as-applied" posture because even when a challenge to a statutory provision is "facial," a plaintiff like Speaker is still arguing that the statute is unconstitutional as

---

[79] Although some scholars have observed that severability questions can arise in different ways, the literature has not systematically distinguished between these postures. *See* Vermeule, *supra* note 65, at 1951 (describing "severance proper" and "*jus tertii* severance" as two different "forms of severance"); *see also* Nagle, *supra* note 71, at 208–09 (describing contexts in which severability questions can arise).

[80] *Cf.* Vermeule, *supra* note 65, at 1951 (describing this posture as "severance proper").

[81] *See supra* Part I.B.

[82] *Cf.* United States v. Stevens, 559 U.S. 460, 468 (2010) (describing traditionally unprotected categories of speech).

applied to him, albeit for a "facial" reason.[83] In any event, the key defining feature of this posture is that it is arguably unconstitutional to apply the statute to the plaintiff, regardless of the outcome on the severability question.

Established practice is that severability can always be decided in the as-applied posture, and any potential standing concerns are immaterial. That means the court in Speaker's case can rule on severability after deciding that the protest ban is unconstitutional, even though the other provisions of the Yellowstone Act do not injure Speaker.

All nine Justices recently appeared to follow this approach in *NFIB*. The plaintiffs argued that the entire ACA was invalid on inseverability grounds.[84] The government objected that the plaintiffs lacked standing to challenge, on the basis of inseverability, statutory provisions that did not apply to them.[85] For example, the plaintiff States were injured by the expansion of the Medicaid program, but not by the other provisions that they sought to invalidate, such as the requirement that insurance coverage be provided without regard for preexisting health conditions.[86]

After concluding that the Medicaid expansion was unconstitutional, however, Chief Justice Roberts's plurality opinion did not mention the standing issue. It instead proceeded directly to consider (and reject) the States' inseverability claim on the merits.[87] Justice Ginsburg's separate opinion similarly concluded that the statute was severable without addressing standing.[88] The dissent, for its part, expressly rejected the government's standing argument, relying on both past practice and pragmatic concerns.[89] Because the Court was obligated to consider whether the requirements of Article III were satisfied before addressing the merits,[90] it is doubtful that the Justices in the majority overlooked the question of standing. Rather, the natural conclusion is that the five Justices in the

---

[83] As Professor Fallon has explained, "In order to raise a constitutional objection to a statute, a litigant must always assert that the statute's *application* to her case violates the Constitution." Fallon, *supra* note 32, at 1327. A court can use a doctrinal test that "marks the statute as unenforceable in its totality," and thus renders the statute "facially invalid." *See id.* at 1327–28. But "[a]s-applied challenges are [still] the basic building blocks of constitutional adjudication." *Id.* at 1328.

[84] *See, e.g.*, Brief for State Petitioners on Severability at 27–29, *NFIB*, 132 S. Ct. 2566 (2012) (Nos. 11-393 & 11-400), 2012 WL 72454, at *27–29.

[85] *See* Brief for Respondents (Severability) at 14–16, 24–25, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400), 2012 WL 273133, at *14–16, *24–25.

[86] *See id.* at *22, *24–25; *see also* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1244 (11th Cir. 2011).

[87] *See NFIB*, 132 S. Ct. 2566, 2607–08 (plurality opinion).

[88] *See id.* at 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[89] *See id.* at 2671 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[90] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93–94 (1998).

majority agreed with the four Justices in dissent that standing simply did not pose an obstacle to a ruling on severability.

That conclusion is consistent with previous practice. The Court has decided numerous severability questions after ruling that a statute was unconstitutional as applied to the plaintiff,[91] without addressing whether the plaintiff had standing to raise severability.[92] These decisions have often used language suggesting that courts always have the power to decide severability questions in this posture.[93] Recent scholarship on severability similarly asserts or assumes that severability can be decided even when it affects only parts of the statute that do not injure the plaintiff.[94]

The Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* is a particularly striking example of established practice in the as-applied posture.[95] That case concerned 28 U.S.C. § 1471(b), which granted jurisdiction to bankruptcy courts over a broad range of civil proceedings.[96] Northern Pipeline filed an action against Marathon Pipe Line in bankruptcy court for, inter alia, breach of contract.[97] A plurality of the Court, in an opinion by Justice Brennan, concluded that § 1471(b) was unconstitutional as a whole—both because its broad grant of jurisdiction to Article I bankruptcy judges violated Article III and because its unconstitutional application to Northern's contract claims against

---

[91] In some of these cases, the party challenging the constitutionality of the statute was the defendant in an enforcement action, as noted when particular cases are discussed. Generally, however, this Article refers to the party challenging a statute as the "plaintiff" for simplicity.

[92] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–10 (2010); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–31 (2006); United States v. Booker, 543 U.S. 220, 245–46 (2005); New York v. United States, 505 U.S. 144, 186–87 (1992).

[93] *See, e.g.*, *Ayotte*, 546 U.S. at 330 ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"); *New York v. United States*, 505 U.S. at 186 (similar).

[94] *See* Walsh, *supra* note 22, at 76–77 (arguing that, if a court rules that the statutory provision that injures the plaintiff is unconstitutional, the court can decide whether that provision is severable from other provisions that do not injure the plaintiff); *see also, e.g.*, Dorf, *supra* note 22, at 305 ("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 . . . ."); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 652 (2008) (criticizing the Court for sometimes "ignor[ing] its obligation to apply the doctrine" of severability); Ryan Scoville, *The New General Common Law of Severability*, 91 TEX. L. REV. 543, 598 (2013) (arguing that Article III limits *how* to answer severability questions because it prohibits a court from excessively rewriting a statute, but assuming that Article III does not limit *when* a court can answer severability questions). Professor Nagle noted in passing that severability questions can implicate standing concerns, but did not develop this point. Nagle, *supra* note 71, at 209–10 n.30.

[95] 458 U.S. 50 (1982).

[96] *Id.* at 54 (plurality opinion).

[97] *See id.* at 56.

Marathon could not be severed from its other applications.[98] Justice Rehnquist concurred in the judgment. He argued that the Court should hold § 1471(b) unconstitutional only as applied to Northern's claims against Marathon.[99] Justice Rehnquist nevertheless agreed that the Court should hold § 1471(b) invalid in its entirety because its applications to different types of claims were inseverable.[100] Thus, even though the statute's applications to other types of claims had no effect on the parties, the Court invalidated all of those applications on inseverability grounds.

This practice of deciding severability in the as-applied posture seems to rest, at least in part, on the common assumption that severability is a "remedial" question. The Supreme Court and the academic literature have described severability as remedial because it affects the scope of the remedy that a court will provide for a constitutional violation.[101] Indeed, all of the Justices adopted that characterization in *NFIB*.[102] The reasoning seems to be that, if severability arises only in the remedial phase, after standing and the merits have already been considered, any additional standing analysis of severability is unnecessary.

That is not to say, however, that existing practice *requires* courts to make a severability decision when they rule in a plaintiff's favor on a constitutional challenge. Courts often do not even mention severability.[103] That is perhaps because there is little doubt that the statute would be

---

[98] *See id.* at 87 & n.40 (reasoning that, at the least, the statute was unconstitutional as applied to Northern's "state-law contract claim against Marathon," and that this application could not be severed from the application to other claims).

[99] *See id.* at 89–91 (Rehnquist, J., concurring in the judgment).

[100] *See id.* at 91–92.

[101] *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–31 (2006) (repeatedly characterizing the question of severability as one of "remedy"); *id.* at 328 (severability is about "limit[ing] the solution to the problem"); United States v. Booker, 543 U.S. 220, 245 (2005) (describing severability analysis as a "question that concerns the remedy"); Dorf, *supra* note 22, at 324 (describing severance as "the remedy for partial invalidation" of statutes); Dorsey, *supra* note 71, at 891 (describing severability as a "judicial remedy"); Gans, *supra* note 94, at 643 ("[Severability] asks a remedial question about the scope of the relief a court should order . . . ."). In fact, David Gans has argued that severability is "part of the federal common law of constitutional remedies," and that the current test for severability is misplaced because it turns on substantive questions of statutory interpretation and legislative intent rather than remedial considerations. *See id.* at 643–45.

[102] *NFIB*, 132 S. Ct. 2566, 2607 (2012) (plurality opinion) (describing severability as a "decision about remedy" (quoting *Ayotte*, 546 U.S. at 330)); *id.* at 2630, 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (characterizing severability as a question regarding the "appropriate remedy"); *id.* at 2667 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (agreeing that the question of how much of the Medicaid expansion to invalidate on severability grounds was a "question of remedy").

[103] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (not addressing severability after holding that § 3 of the Defense of Marriage Act was unconstitutional); Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) (not addressing severability after holding that § 4(b) of the Voting Rights Act was unconstitutional).

severable, particularly in light of the presumption in favor of severance under current law.[104] Courts also sometimes note that they are not deciding severability because the parties did not raise it.[105] The result in these cases is to leave the severability issue open for resolution in a subsequent case.

Moreover, even when the parties raise the issue and the proper resolution is unclear, the Court has sometimes concluded that it would be inappropriate to make a severability ruling in the as-applied posture. But these decisions have declined to address severability on what appeared to be prudential grounds, rather than constitutional ones. For example, in *Printz v. United States*, the Court held that the provisions of federal law that required state officers to conduct background checks in connection with handgun purchases were unconstitutional on anticommandeering grounds.[106] The plaintiff officers also argued that additional provisions of the statute that applied to firearm dealers and purchasers were invalid on inseverability grounds.[107] The Court decided not to answer that severability question because no firearm dealers or purchasers were parties to the case.[108] It did not mention standing doctrine, and instead stated only that it "decline[d] to speculate regarding the rights and obligations of parties not before the Court."[109] Particularly in light of its many rulings on severability in the as-applied posture, this language suggests that the Court declined to decide severability for prudential, third-party standing reasons. In other words, the Court felt no obligation to rule on severability, but it did not question its power to make such a ruling if there were important reasons to do so. The Court has similarly appeared to rely on prudential reasoning to avoid rulings on severability in other cases.[110]

Thus, under current practice, courts always have the power to rule on severability questions in the as-applied posture, even if they do not affect any part of the statute that applies to the plaintiff. Courts can nonetheless

---

[104] *See Ayotte*, 546 U.S. at 329.

[105] *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124 n.6 (1989).

[106] *See* 521 U.S. 898, 902, 933 (1997).

[107] *See id.* at 935.

[108] *Id.*

[109] *Id.*

[110] *See Legal Servs. Corp.*, 531 U.S. at 549 (exercising "discretion and prudential judgment" in declining to decide a severability issue that had not been briefed); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 625–26 (1996) (plurality opinion) (appearing to decline to address severability on prudential grounds); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 477–78 (1995) (reversing the D.C. Circuit's ruling of inseverability on what appeared to be the prudential ground that it was unnecessary to reach the severability question); Regan v. Time, Inc., 468 U.S. 641, 649 n.6 (1984) (plurality opinion) (suggesting that it would be improper to decide a severability question that concerned only the validity of a statutory provision that did not injure the plaintiffs before the Court, but framing this conclusion in terms of both Article III power and prudential restraint).

decline to decide severability questions in this posture on prudential grounds—including that the parties have not raised the issue of severability, or that it concerns only the rights of third parties.

*2. Overbreadth Posture.*—Unlike the as-applied posture, plaintiffs in the overbreadth posture do not argue that the part of the statute that applies to them is unconstitutional. Rather, they argue that, even if the part of the statute that applies to them is constitutional, that part is invalid because some *other* part of the statute is unconstitutional and cannot be severed.[111]

To illustrate, consider again the hypothetical Yellowstone Act,[112] and suppose that a different plaintiff, Biker, challenges the Act. Biker has concrete plans to ride her motorcycle in Yellowstone, but not to protest. She is therefore injured by the motor vehicle ban in § 1, but not by the protest ban in § 2 or the appropriation of funds in § 3. In the overbreadth posture, Biker argues that the motor vehicle ban is invalid because the *protest* ban in § 2 is both unconstitutional and inseverable. Plaintiffs in this posture, like Biker, need to prevail on both their constitutional argument and their inseverability argument to secure relief.

The severability question in the overbreadth posture can concern other provisions of the same statute—for example, Biker's claim that the protest ban in § 2 is unconstitutional as a whole and inseverable from the motor vehicle ban in § 1. The severability question can also concern other applications of the same provision. For example, Biker can argue that, even if the motor vehicle ban is constitutional as applied to her because she plans to ride her motorcycle inside Yellowstone, the ban is unconstitutional as applied to vehicles outside the park, and those unconstitutional applications cannot be severed. The key defining feature of this posture is that the provision or application of the statute that injures the plaintiff is invalid only if the statute is inseverable.

Referring to this as the overbreadth posture reflects that these claims are analogous to First Amendment overbreadth claims. Overbreadth doctrine permits a plaintiff to obtain relief when a statute has a substantial number of applications that violate the First Amendment, even if a more narrowly drawn statute could be constitutionally applied to the plaintiff.[113]

---

[111] *Cf.* Vermeule, *supra* note 65, at 1951 (describing this posture as "*jus tertii* severance").

[112] *See supra* Part I.B.

[113] *See, e.g.*, United States v. Stevens, 130 559 U.S. 460, 473 (2010) (explaining that "[i]n the First Amendment context," a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008))); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (explaining that the First Amendment permits "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity" (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965))).

That means a plaintiff can, in effect, invoke the constitutional rights of third parties to obtain relief.[114] For example, suppose that a plaintiff wants to engage in an obscene protest inside Yellowstone. Even though obscene speech is constitutionally unprotected, the plaintiff could challenge the protest ban in § 2 of the Yellowstone Act as overbroad because it applies primarily to the protected speech of third parties.[115] That claim is comparable to Biker's inseverability claim. Biker effectively argues that the protest ban is unconstitutional as applied to third parties, and that she should prevail even if a more narrowly drawn statute would be constitutional—e.g., a statute that includes the motor vehicle ban, but not the protest ban. For these reasons, scholars have recognized that inseverability arguments in this posture are analogous to overbreadth arguments.[116]

Existing practice with respect to a court's power to rule on severability in the overbreadth posture is somewhat less clear than in the as-applied posture. Some recent circuit court decisions and scholarship on severability have asserted that inseverability claims in the overbreadth posture are inconsistent with Article III standing principles.[117] But the position of the Supreme Court, consistent with the more common view in the academic literature, appears to be that inseverability claims in the overbreadth posture are permitted under Article III. These claims are therefore subject, at most, to prudential limitations on third-party standing.

The Supreme Court has, albeit rarely, ruled on the merits of severability questions that arose in the overbreadth posture. For example, in *Alaska Airlines, Inc. v. Brock*, the plaintiff airlines challenged provisions of § 43 of the Airline Deregulation Act.[118] The plaintiffs did not argue that the provisions that injured them were unconstitutional. Instead, they argued that the legislative veto provision in § 43(f)—which did not injure them—

---

[114] *See Broadrick*, 413 U.S. at 610–12.

[115] *See Stevens*, 559 U.S. at 468, 473.

[116] *See, e.g.*, Isserles, *supra* note 30 at 368–70 (recognizing that overbreadth challenges and challenges raising inseverability questions are analogous); Vermeule, *supra* note 65, at 1967 ("Overbreadth . . . functions as a doctrine of nonseverability."); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423–24, 438–40 (1974) (observing that an inseverability argument is analogous to an overbreadth argument).

[117] *See, e.g.*, Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202, 210 (5th Cir. 2011) (holding that plaintiffs lacked Article III standing to argue that provisions that did not injure them were unconstitutional and inseverable); CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1270–74 (11th Cir. 2006) (similar); Walsh, *supra* note 22, at 75–77 (arguing that a plaintiff lacks standing to argue that a statutory provision that does not apply to him is unconstitutional and inseverable); *see also* Campbell, *supra* note 71, at 1503 (stating that a plaintiff "lacks standing; end of argument" in this posture); Dorsey, *supra* note 71, at 889 (asserting that a challenge in this posture does not "make[] any sense"); Fish, *supra* note 23, at 50 n.146 (assuming that inseverability generally cannot be raised in this posture).

[118] *See* 480 U.S. 678, 680, 683 (1987).

was unconstitutional and inseverable from the remainder of § 43.[119] The Court disagreed with the plaintiffs on the merits and severed the legislative veto provision.[120] But the Court never suggested that the plaintiffs faced a standing problem. It instead appeared to assume that the plaintiffs had Article III standing to challenge the provisions that injured them, and that they could therefore challenge those provisions on inseverability grounds.[121] In other decisions, the Supreme Court and the courts of appeals have similarly ruled on the merits of severability questions in the overbreadth posture.[122]

First Amendment overbreadth doctrine also confirms that plaintiffs raising inseverability claims in this posture do not face any sort of special Article III standing problem. It is commonly understood that First Amendment overbreadth claims are consistent with Article III, and that overbreadth is an exception only to prudential limitations on third-party standing.[123] In other words, when a plaintiff is injured by a statute, the plaintiff has Article III standing to challenge it, including by raising an overbreadth claim. And even if the court rejects that claim on the ground

---

[119] *See id.* at 683.

[120] *See id.* at 697.

[121] Professor Walsh has observed that the plaintiffs in *Alaska Airlines* also challenged administrative regulations that had been issued pursuant to § 43, and that those regulations were subject to the legislative veto provision in § 43(f). *See* Walsh, *supra* note 22, at 75–76. It might therefore have been possible to view the severability question as arising in the as-applied posture on the theory that the regulations were unconstitutional. The Supreme Court, however, viewed the severability question as arising in the overbreadth posture because the Court framed the case as a challenge to the provisions of § 43, rather than to the regulations. *See, e.g.*, *Alaska Airlines*, 480 U.S. at 680 ("[Plaintiffs] contend that provisions protecting employees in the Airline Deregulation Act of 1978 . . . are ineffective . . . ."); *id.* at 683 n.5 (describing the "issue at hand" as the severability of the "remaining provisions").

[122] *See* Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 77 (1961) (holding that provisions of the Subversive Activities Control Act of 1950 were severable); Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 439 (1938) (holding that provisions of the Public Utility Holding Company Act of 1935 were severable); Carter v. Carter Coal Co., 298 U.S. 238, 286–87, 289, 304, 310–16 (1936) (holding that tax provisions of the Bituminous Coal Conservation Act of 1935 that injured the challengers were invalid because the labor provisions and price-fixing provisions of the statute were unconstitutional and inseverable); Local 514 Transp. Workers Union of Am. v. Keating, 358 F.3d 743, 749–50 (10th Cir. 2004) (holding that the plaintiffs had standing to raise an inseverability argument in the overbreadth posture); Catholic Soc. Serv. v. Shalala, 12 F.3d 1123, 1125–26 (D.C. Cir. 1994) (similar). Professor Walsh has argued that the Supreme Court refused to consider inseverability arguments in the overbreadth posture in *Communist Party of the United States* and *Electric Bond & Share Co. See* Walsh, *supra* note 22, at 76. But the Court in those cases held that the statutes were severable, rather than holding that the severability questions were not properly before it. *See Communist Party of the U.S.*, 367 U.S. at 70, 76–77; *Elec. Bond & Share Co.*, 303 U.S. at 439.

[123] *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973) (describing overbreadth as an exception to third-party-standing limitations); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 869 (1991) (recognizing that overbreadth is consistent with Article III); Isserles, *supra* note 30, at 368–70 (characterizing overbreadth as an exception to the third-party standing rule); Note, *supra* note 116, at 438–40 (characterizing an overbreadth claimant as raising the rights of third parties and challenging the application of the statute to third parties).

that the statute is not overbroad, that is a ruling on the merits, not a ruling that the plaintiff lacks standing. For example, in *Virginia v. Hicks*, the Supreme Court explained that deciding whether a statute is overbroad is not a decision on standing, but instead "the determination of a First Amendment challenge on the merits."[124]

As decisions such as *Alaska Airlines* reflect, Article III applies in the same way to a plaintiff raising an inseverability claim in the overbreadth posture. If the plaintiff is injured by the statute, the plaintiff has Article III standing to challenge it, including by raising an inseverability claim. Scholars have therefore described inseverability, like overbreadth, as an exception to limitations on third-party standing.[125] In fact, some have gone even further, arguing that plaintiffs in the overbreadth posture are not asserting the rights of third parties at all, and are instead asserting their own right not to be penalized under an invalid statute.[126] Either way, these scholars agree that plaintiffs in this posture have Article III standing, whether they are raising an overbreadth claim or an inseverability claim. And even if a court rejects an inseverability claim on the ground that the statute is severable, that is also a ruling on the merits, rather than a ruling that the plaintiff lacks standing.

Indeed, it would be odd if a plaintiff had Article III standing to raise an overbreadth claim, but lacked Article III standing to raise an inseverability claim. The test for Article III standing is centered on the injury in fact requirement, and whether plaintiffs have suffered an injury in fact does not depend on which substantive arguments they raise.[127] To be sure, if the Court adopted then-Professor Fletcher's proposal to abandon the injury in fact test and treat standing as a question of the merits, standing would depend on which substantive argument the plaintiff raises.[128] Rather than accept this invitation to restructure standing doctrine, however, the Court

---

[124] 539 U.S. 113, 120 (2003) (brackets omitted) (quoting Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 958–59 (1984)).

[125] *See, e.g.*, Isserles, *supra* note 30, at 368 ("This is technically an exception to the rules barring third-party standing because the litigant must invoke unconstitutional applications of the statute against third parties to prove the case of statutory inseverability."); Note, *supra* note 116, at 438–40 & n.82 (similar).

[126] *See, e.g.*, Fallon, *supra* note 83, at 1348–49, 1360–61, 1369 (observing that, if a statute is severable, the third-party standing rule is not necessary to explain why the plaintiff loses in this posture); Metzger, *supra* note 65, at 889 & n.68 (recognizing that severability is a substantive question that determines the outcome on the merits in the overbreadth posture); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (arguing that overbreadth is not a special standing doctrine); *see also* City of Chicago v. Morales, 527 U.S. 41, 80 n.3 (1999) (Scalia, J., dissenting) (describing the related question of when a statute should be invalidated on its face as a question of "substantive law," not "a question of standing").

[127] *See* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 78–79 (1978).

[128] *See* Fletcher, *supra* note 11, at 223–24.

has remained committed to the injury in fact requirement.[129] Under current practice, therefore, a plaintiff who suffers an injury in fact from a statute has Article III standing to raise both overbreadth and inseverability.[130]

It is true that inseverability and overbreadth are not identical. Overbreadth provides special protection for speech rights on the theory that those rights are particularly prone to chilling effects from expansively written statutes.[131] It permits a statute to be struck down in its entirety if it covers too much protected speech, even if the statute's applications are severable as a matter of legislative intent.[132] Overbreadth is therefore a way to *overcome* the severability of a statute when the freedom of speech is at stake.

Inseverability and overbreadth nevertheless have the same *effect* in the posture considered here. Both permit a plaintiff whose own conduct is not constitutionally privileged to challenge a statute because it covers conduct that is constitutionally privileged.[133] Thus, if a plaintiff like Biker succeeds on an inseverability claim, resort to an overbreadth claim is unnecessary, and vice versa. From the perspective of Article III standing doctrine, therefore, inseverability claims in this posture are equivalent to First Amendment overbreadth claims.

It is also true that overbreadth claims are typically directed at the applications of a single provision, whereas an inseverability claim can be directed at different provisions. Although that might make a difference for purposes of prudential standing rules, it should not make a difference for purposes of Article III. For example, if Biker argues that the protest ban is unconstitutional and inseverable from the motor vehicle ban, she is still seeking to redress her injury from the motor vehicle ban. She therefore has Article III standing for this claim. Indeed, given that Congress cannot revise constitutional standing principles,[134] it would be counterintuitive if Biker's Article III standing turned on whether Congress chose to codify the motor vehicle ban and the protest ban in separate provisions. That choice might, however, affect the application of third-party standing rules, which

---

[129] *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013); Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992).

[130] *Cf., e.g.*, WildEarth Guardians v. Jewell, 738 F.3d 298, 308 n.3 (D.C. Cir. 2013) (holding that the plaintiffs raised only one "claim" for purposes of standing because they challenged a single government leasing decision, even though they "advance[d] several arguments in support of that claim"); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 47–48 (1st Cir. 2011) (similar).

[131] *See* United States v. Stevens, 559 U.S. 460, 473 (2010); Virginia v. Hicks, 539 U.S. 113, 119 (2003).

[132] *See Hicks*, 539 U.S. at 121–22 (explaining that, even if a statute was severable, it could still be overbroad).

[133] *See* Isserles, *supra* note 30, at 369–71.

[134] *See* Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).

Congress can alter.[135] A court could reasonably be more cautious, as a prudential matter, when a plaintiff like Biker seeks a ruling on the constitutionality of a provision that does not apply to her. Such a claim could easily be in tension with the separation of powers and sound decisionmaking interests that standing doctrine is meant to serve.

Claims in the overbreadth posture also seem to be rare in practice.[136] But they do happen,[137] and their infrequency does not mean that the overbreadth posture is inconsistent with Article III.[138] One explanation for the rarity of claims in the overbreadth posture is that severability can always be raised in the as-applied posture, so litigants have not needed to use the overbreadth posture to obtain rulings on severability. Another is that severability is often described as a "remedial" question when it arises in the as-applied posture.[139] That may have caused litigants simply to overlook that severability can also be raised in the overbreadth posture, in which it operates more like a merits question.[140]

* * *

There is a basic symmetry between established practice for severability in the as-applied posture and the overbreadth posture. In both postures, Article III allows plaintiffs to raise severability questions. But courts are not required to decide severability questions in either posture, and instead can limit their consideration of severability issues based on prudential standing principles, including third-party standing rules.

Existing practice on severability, however, has not yet taken account of a recent development in the law of standing—the Supreme Court's categorical adoption of a claim-specific approach. Before considering how that approach applies to severability in Part III, Part II introduces the claim-specific approach and an alternative approach that the Court could have adopted—supplemental standing.

---

[135] *See* Bennett v. Spear, 520 U.S. 154, 162 (1997).

[136] *Cf.* Walsh, *supra* note 22, at 76–77 (arguing that there is no precedent for inseverability claims in the overbreadth posture).

[137] *See supra* Part I.C.2.

[138] *Contra* Walsh, *supra* note 22, at 76–77 (arguing that the overbreadth posture conflicts with Article III).

[139] *See supra* notes 101–102.

[140] For example, when the Court decided a severability question in the overbreadth posture in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), it appeared to treat severability as a merits issue, and it did not refer to severability as a remedial matter.

## II. CLAIM-SPECIFIC STANDING VS. SUPPLEMENTAL STANDING

Setting aside for now the question of severability, suppose that Biker challenges the hypothetical Yellowstone Act and argues that both the motor vehicle ban in § 1 and the protest ban in § 2 are unconstitutional. How should the court proceed given that Biker is injured only by the motor vehicle ban?

The Supreme Court has adopted a claim-specific approach to standing that requires plaintiffs to have Article III standing for every claim that they raise.[141] Under that approach, Biker would be viewed as raising two claims because she is challenging two provisions as unconstitutional.[142] Biker would therefore be required to establish standing for both claims—meaning that she would need to demonstrate that both provisions injure her.[143] Because she is injured only by the motor vehicle ban, she would have standing to challenge only that provision, and the court could not decide whether the protest ban is unconstitutional.

This Part lays the groundwork for scrutinizing this claim-specific approach to standing. It first explains that the text of Article III does not require a claim-specific approach, and instead also permits the more flexible concept of "supplemental standing." It then explores the decisions in which the Court has nonetheless adopted the claim-specific theory and rejected the supplemental-standing approach.

### *A. The Text of Article III Permits Claim-Specific Standing or Supplemental Standing*

Even assuming that an Article III "case" or "controversy" exists only if the plaintiff has standing, the text of Article III does not specify how the standing requirement should apply in cases involving multiple claims. It is possible to interpret "case" narrowly—as the claim-specific approach effectively does—to include only claims that the plaintiff has standing to raise.[144] Under that interpretation, the injury in fact requirement both defines when a case exists, and establishes the outer boundaries of a case for purposes of Article III.

Although that interpretation is possible, it is not textually required. Article III can also support a broader interpretation of a "case" that would permit a plaintiff to assert multiple claims, even if only one of those claims satisfies the test for standing. Under this approach, standing would still be necessary to give rise to an Article III case. But such a case could also

---

[141] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352–53 (2006).

[142] *See* Davis v. FEC, 554 U.S. 724, 733–34 (2008).

[143] *See id.*

[144] *See Cuno*, 547 U.S. at 352 (holding that Article III does not grant jurisdiction "over a claim that does not itself satisfy . . . constitutional standing" requirements).

include other claims that the plaintiff would lack standing to bring on their own. That means the injury in fact requirement would still define when a case exists, but would not establish the outer boundaries of a case under Article III.

This broader interpretation of an Article III "case" is not purely theoretical. The Supreme Court has long embraced an analogous interpretation of an Article III "case" under the doctrine of supplemental jurisdiction. Article III grants the federal courts power over "Cases" and "Controversies" that fall within nine categories of subject-matter jurisdiction, including cases arising under federal law, and controversies in which the parties are diverse.[145] But it is well established that a case can include claims that do not themselves fall within one of these nine categories. The Court held, in *United Mine Workers of America v. Gibbs*, that a court with jurisdiction over a federal claim can also exercise supplemental jurisdiction over a state law claim, even if the parties are not diverse.[146] The federal and state law claims fall within the same constitutional "case," the Court explained, if they arise from a "common nucleus of operative fact."[147] Thus, the categories in Article III define when a federal court has jurisdiction over a case, but the "common nucleus of operative fact" standard defines which claims fall within the boundaries of such a case.

The text of Article III could also support a similar "supplemental standing" approach.[148] The central principle of supplemental standing would be that, if a plaintiff had standing for one claim, the plaintiff's Article III case could also include claims that would not themselves satisfy the test for standing. Again, standing would still define when a constitutional case exists. But some criterion other than standing—perhaps, for example, the *Gibbs* standard of a common nucleus of operative fact—would define the outer limits of the case.

In fact, this supplemental-standing approach not only is textually permissible, but also is ultimately more faithful to the text than a claim-specific approach to standing. Article III speaks in terms of "cases," not "claims." That suggests federal jurisdiction should be determined on a case-specific basis, rather than a claim-specific basis—as the Court has long held for purposes of supplemental jurisdiction.

---

[145] U.S. CONST. art. III, § 2.

[146] 383 U.S. 715, 725 (1966).

[147] *Id.*

[148] *Cf.* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 22 n.115 (1984) (hinting at such a concept by arguing that requests for different remedies arising from the same operative facts would be part of the same Article III "case"); Laura E. Little, *It's About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 974 & n.182 (1993) (similar).

The Supreme Court has nevertheless adopted a claim-specific approach to standing, and recently rejected the concept of supplemental standing. The Court has not argued that a claim-specific theory of standing is textually required, or even preferred by the text. Instead, as the next section explains, the Court initially appeared to adopt the claim-specific approach almost by accident, and has since attempted to justify it based on past practice and functional considerations.

### *B. The Supreme Court Has Adopted Claim-Specific Standing and Rejected Supplemental Standing*

*1. Early Decisions.*—In the 1970s, at about the same time that it began to embrace the injury in fact requirement as part of standing doctrine,[149] the Court began to adopt a claim-specific approach to standing that required plaintiffs to establish an injury in fact for every claim that they raised. For several decades, the Court provided little justification for this approach, and instead presented it almost as a *fait accompli*.

The claim-specific approach to standing can be traced to *Moose Lodge No. 107 v. Irvis*.[150] In that case, the Court held that the plaintiff had standing to challenge a fraternal club's policy regarding the service of guests because the club had refused to serve the plaintiff based on his race.[151] But the plaintiff could not, the Court held, challenge the club's membership policy because he had never sought to become a member, and the membership policy therefore had not injured him.[152] Although that holding appeared to assume that standing is claim-specific, the Court did not make that assumption explicit. Nor did it address the text of Article III or the possibility of supplemental standing.

A decade later, in *Blum v. Yaretsky*, the Court similarly held that a group of plaintiffs had standing for some of their claims, but not others.[153] In particular, the plaintiff Medicaid patients were allowed to challenge decisions by nursing homes to transfer them to a lower level of care, but not decisions to transfer them to a higher level of care.[154] The Court asserted that "a plaintiff who has been subject to injurious conduct of one kind [does not] possess[] by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not

[149] *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) (adopting the injury in fact requirement).

[150] 407 U.S. 163 (1972).

[151] *Id.* at 168.

[152] *See id.* at 166–68, 171.

[153] 457 U.S. 991, 1000–02 (1982).

[154] *See id.*

been subject."[155] That assertion appears to embrace a claim-specific approach to standing. But the Court did not explain why such an approach was required, and instead merely cited *Moose Lodge*.

Shortly thereafter, in *City of Los Angeles v. Lyons*, the Court extended the claim-specific approach to the remedial context and held, without explanation, that plaintiffs must have Article III standing for every remedy that they seek.[156] The Los Angeles police had stopped the plaintiff in *Lyons* for a traffic violation and, without provocation, applied a chokehold that rendered him unconscious.[157] The plaintiff sued for both damages and an injunction against the future use of chokeholds.[158] The Court acknowledged that the plaintiff had standing to seek damages for his injuries, but held that he lacked standing to seek an injunction because the threat that the police would choke him again was too remote.[159] It thus assumed that the plaintiff was required to establish standing for both types of relief. Justice White's majority opinion did not cite any authority for that assumption—even though Justice Marshall's dissent disputed it and argued that separate standing was not required for the injunctive claim.[160]

Several years later, in *Lewis v. Casey*, the Court held that the claim-specific approach to standing also limits the scope of the remedy that a court can provide for a constitutional violation.[161] The plaintiff prisoners in *Lewis* alleged that the law libraries in their prisons were inadequate.[162] The district court agreed, and entered an injunction that required the State of Arizona to provide better services for prisoners on "lockdown" status, illiterate prisoners, and non-English-speaking prisoners.[163] The Supreme Court held that the scope of the injunction exceeded the district court's authority under Article III.[164] The only cognizable injury the plaintiffs had established, the Court held, was caused by the failure to provide special services for illiterate inmates.[165] Justice Scalia wrote for the Court that "standing is not dispensed in gross," and relied on *Blum* for the proposition that standing to challenge one form of conduct does not imply standing to challenge a different form of conduct.[166]

---

[155] *Id.* at 999.
[156] 461 U.S. 95, 109 (1983).
[157] *Id.* at 97–98.
[158] *Id.* at 98.
[159] *See id.* at 106 n.7, 109.
[160] *See id.* at 126–30 (Marshall, J., dissenting).
[161] 518 U.S. 343, 357 (1996).
[162] *See id.* at 346.
[163] *See id.* at 347–48.
[164] *See id.* at 358–60.
[165] *See id.* at 358.
[166] *Id.* at 358 n.6.

*2. Recent Developments.*—Although the Supreme Court applied a claim-specific approach to standing in *Moose Lodge*, *Blum*, *Lyons*, and *Lewis*, those decisions did not address the potential concept of supplemental standing, and thus did not expressly reject it. Those decisions also left open several questions regarding the claim-specific approach to standing, including how it would apply in constitutional challenges to statutes. The Court has recently addressed these potential sources of uncertainty.

The Court categorically dismissed the concept of supplemental standing in *DaimlerChrysler Corp. v. Cuno*.[167] The plaintiffs in that case asserted a Commerce Clause challenge against state and municipal tax benefits that had been granted to DaimlerChrysler pursuant to state statutes in Ohio.[168] The Court held that, even assuming the plaintiffs had standing to challenge the municipal tax benefits, they could not challenge the state tax benefits, which did not cause them a sufficient injury.[169] Standing was not "commutative," the Court decided, and concepts drawn from the doctrine of supplemental jurisdiction could not be used to define an Article III "case" for purposes of standing analysis.[170]

*Cuno* asserted that its rejection of supplemental standing was dictated, at least in part, by past practice. It relied on decisions such as *Lyons* and *Lewis* for the proposition that standing is claim-specific.[171] The Court also asserted that it had "never" previously permitted "a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that serve to identify those disputes which are appropriately resolved through the judicial process."[172]

Perhaps because its prior decisions had not directly addressed the concept of supplemental standing, the Court in *Cuno* also offered its own functional justification for rejecting that concept in favor of the claim-specific approach.[173] According to the Court, the claim-specific approach reinforces the purposes of standing doctrine, including the separation of powers.[174] It expressed concern that, if plaintiffs were not required to have

---

[167] 547 U.S. 332 (2006).

[168] *See id.* at 337–39.

[169] *Id.* at 350. The question of whether the plaintiffs had standing to challenge the municipal tax benefits was not before the Court. *See id.* at 340, 349. The Court also held that the plaintiffs lacked independent standing under *Flast v. Cohen*, 392 U.S. 83 (1968), to challenge the state tax benefits based on their status as state taxpayers. *See Cuno*, 547 U.S. at 342–49.

[170] *See Cuno,* 547 U.S. at 352.

[171] *See id.* at 352–53.

[172] *Id.* at 351–52 (brackets and internal quotation marks omitted).

[173] *See id.* at 352–53.

[174] *See id.* at 352.

standing for every claim, they could easily evade the limits of Article III. Courts would be permitted to "decid[e] issues they would not otherwise be authorized to decide," and a litigant could, "by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him."[175] In those circumstances, the separation of powers "would quickly erode," and the Court's "emphasis on the standing requirement's role in maintaining this separation would be rendered hollow rhetoric."[176]

*Cuno* also helped to clarify how the claim-specific approach to standing applies when a plaintiff challenges multiple statutory provisions as unconstitutional. The Court treated the plaintiffs' challenge to the municipal tax benefits and their challenge to the state tax benefits as separate "claims" for purposes of the claim-specific analysis.[177] It therefore appeared to conclude that plaintiffs must establish standing for each provision of a statute that they challenge. In other words, the Court suggested that a "claim" for purposes of the claim-specific approach to standing is defined on a provision-specific basis, rather than some other basis, such as a statute-specific one.

The Court confirmed that conclusion in *Davis v. FEC*.[178] In that case, the plaintiff argued that two provisions of the Bipartisan Campaign Reform Act of 2002 violated the First Amendment.[179] Section 319(a) relaxed the limits on campaign contributions for congressional candidates whose opponents expended personal funds above a certain threshold, and § 319(b) required self-financing candidates to make disclosures about their expenditures.[180] The Court reaffirmed the claim-specific approach to standing and, consistent with *Cuno*, held that the plaintiff was required to establish standing for each provision that he challenged.[181] It ultimately concluded that the plaintiff had standing to challenge both provisions.[182]

In sum, the Court recently adopted the claim-specific approach to standing as a categorical matter, and asserted that this approach is both consistent with existing practice and necessary to advance the purposes of standing doctrine. As the next section explains, however, the manner in which the Court has applied the claim-specific approach in constitutional challenges to statutes would conflict with existing practice on severability,

---

[175] *Id.* at 353 & n.5.

[176] *Id.* at 353 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982)).

[177] *Id.* at 350.

[178] 554 U.S. 724 (2008).

[179] *Id.* at 733–34.

[180] *See id.* at 729–30.

[181] *See id.* at 733–34.

[182] *See id.* at 733–35.

and would ultimately undermine the objectives of standing doctrine in severability cases.

## III. CLAIM-SPECIFIC STANDING AND SEVERABILITY

Both of the Supreme Court's rationales for the claim-specific approach to standing—consistency with past practice, and reinforcing the aims of standing doctrine—break down in the context of severability doctrine. In fact, the claim-specific approach to standing conflicts with established practice on severability. Under current practice, if a plaintiff has standing to challenge a statute, Article III always permits a ruling on severability in both the as-applied and overbreadth postures. The plaintiff need not, in other words, make an additional showing of standing to raise an argument about severability. But the claim-specific approach would treat severability in the as-applied posture as an independent claim that the plaintiff would need standing to raise—which means that Article III would often prevent a court from ruling on severability in the as-applied posture. At the same time, the claim-specific approach would not impose that constitutional limitation in the overbreadth posture. The result would be an unexpected asymmetry: Article III standing principles would make it harder to rule on severability in the as-applied posture than in the overbreadth posture.

These changes to established practice on severability would contradict the purposes of standing doctrine. Preventing severability rulings in the as-applied posture would interfere with the separation of powers because a ruling on severability is often necessary to give effect to Congress's intent. It would also do little, if anything, to advance the interest in sound decisionmaking. Moreover, the claim-specific approach would allow rulings in the overbreadth posture, even though that posture is far more suspect from the perspective of standing principles because it permits plaintiffs to challenge provisions that do not even apply to them. Although existing practice also allows claims in the overbreadth posture, the claim-specific approach would channel more severability claims into the overbreadth posture because the as-applied posture could no longer serve as an outlet for severability rulings. In the process, it would do considerable damage to the interests in the separation of powers and accurate judicial decisions.

### *A. Claim-Specific Standing Conflicts with Practice on Severability*

*1. Severability Is Sometimes a Claim.*—The claim-specific approach requires plaintiffs to have standing for every claim that they raise. The Supreme Court's decisions adopting that approach—as well as background standing theory—make clear that an argument about severability is a

separate claim that requires standing in the as-applied posture, but not in the overbreadth posture.

To understand how the claim-specific approach to standing works in the as-applied posture, consider Speaker and our hypothetical Yellowstone Act.[183] Suppose initially that Speaker argues that (1) the protest ban is unconstitutional, and (2) the motor vehicle ban is unconstitutional. If Speaker prevailed on both arguments, the court would invalidate both provisions. Under *Cuno* and *Davis*, however, Speaker must have Article III standing for each provision that he challenges. Because he is not injured by the motor vehicle ban, he cannot argue that it is unconstitutional, and the court cannot strike it down.

Now suppose that Speaker argues that (1) the protest ban is unconstitutional, and (2) the motor vehicle ban is invalid because the protest ban cannot be severed. If Speaker prevailed on both arguments, the effect would be the same as above: The court would invalidate both provisions. The claim-specific standing analysis should therefore be the same. It would treat Speaker as raising two claims—a constitutional challenge to the protest ban, and an inseverability challenge to the motor vehicle ban—and he would need standing for each. Because he is not injured by the motor vehicle ban, Speaker could not argue that it is invalid on inseverability grounds. Thus, the court would be barred, as a constitutional matter, from ruling on severability.

To be sure, *Cuno* and *Davis* did not directly address inseverability arguments, and instead addressed arguments that multiple provisions were unconstitutional.[184] But it is hard to see why that distinction should make a difference. If the claim-specific approach requires Speaker to have standing to argue that the motor vehicle ban is invalid because it is unconstitutional, it also would seem to require Speaker to have standing to argue that the motor vehicle ban is invalid on any other ground, including inseverability. Indeed, the Court's principal concern in adopting the claim-specific standing theory has been to prevent plaintiffs from invalidating statutory provisions or government actions that do not injure them[185]—which is exactly the effect of Speaker's inseverability argument. A faithful application of the claim-specific approach would therefore prohibit a court

---

[183] *See supra* Part I.B.

[184] *See Davis*, 554 U.S. at 736, 740, 744; DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 338–39 (2006).

[185] *See, e.g.*, *Cuno*, 547 U.S. at 353 & n.5 (holding that a plaintiff cannot, "by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him"); Lewis v. Casey, 518 U.S. 343, 357 (1996) (holding that the plaintiffs had standing to challenge only the "particular inadequacy in government administration" that caused their injury, as opposed to "*all* inadequacies in that administration").

from ruling on the severability question in Speaker's case in the as-applied posture.

The application of the claim-specific approach would lead to a different conclusion in the overbreadth posture. To understand why, consider Biker's challenge to the Yellowstone Act. Biker argues that the motor vehicle ban in § 1 is invalid because the protest ban in § 2 is unconstitutional and inseverable. As explained earlier, even though Biker is not injured by the protest ban, existing practice on both severability and First Amendment overbreadth doctrine grants her Article III standing to raise that argument.[186]

The claim-specific approach to standing would do nothing to change that conclusion. Even under that approach, Biker is effectively raising only a single claim—that the motor vehicle ban is invalid. It happens that her substantive theory for why the motor vehicle is invalid involves arguments about the constitutionality and severability of the protest ban. But those arguments are still directed toward redressing Biker's injury from the motor vehicle ban. She therefore has Article III standing to raise them, just as she would have Article III standing to argue that the motor vehicle ban is unconstitutional. And it makes no difference for constitutional purposes whether she is injured by the protest ban. Although she might face a prudential, third-party standing problem when raising an inseverability claim concerning the protest ban, she would not face an Article III standing problem.

Any other conclusion would cast substantial doubt on the continued viability of First Amendment overbreadth doctrine. As explained earlier, it is well established that overbreadth claims are consistent with Article III and are at most an exception to prudential limitations on third-party standing.[187] And Biker's inseverability claim is equivalent to an overbreadth claim for standing purposes. The claim-specific approach to standing therefore could not impose Article III limitations on Biker's inseverability claim—i.e., by requiring her to show an injury in fact from the protest ban—without imposing similar limitations on overbreadth claims. But the Court's claim-specific standing decisions do not suggest that they are in any way inconsistent with existing overbreadth doctrine.

In fact, *Cuno* strongly suggested that the claim-specific approach to standing does not affect the theory underlying overbreadth claims (or inseverability claims in the overbreadth posture). The Court took care to state that it was not displacing lower court decisions holding that, if a plaintiff has standing to challenge government action, the plaintiff "may do

[186] *See supra* Part I.C.2.

[187] *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973).

so by identifying all grounds on which" that action is unlawful.[188] That language suggests that a plaintiff who is injured by a statutory provision has Article III standing to challenge that provision on any ground, including an overbreadth claim. The same conclusion would apply to inseverability claims in the overbreadth posture. Biker is injured by the motor vehicle ban, and she would therefore have Article III standing to challenge it on any ground, including that the protest ban is unconstitutional and inseverable.

Ultimately, the difference between Speaker and Biker (and the as-applied and overbreadth postures) is this: Speaker is arguing that the provision that injures him is invalid *and* the statute is inseverable. Biker is arguing that the provision that injures her is invalid *because* the statute is inseverable. The Court's claim-specific approach to standing would treat this difference as dispositive, and would therefore require Speaker, but not Biker, to establish an injury in fact with respect to both the protest ban and the motor vehicle ban.

The claim-specific standing approach would therefore create a new distinction between the as-applied and overbreadth postures. Established practice is that Article III standing principles always permit severability rulings in both postures. Under the claim-specific approach to standing, Article III standing principles would limit severability rulings in the as-applied posture, but not in the overbreadth posture.

*2. Severability Is Not a Remedy.*—The previous section concluded that severability is a "claim" for purposes of the claim-specific standing analysis when it arises in the as-applied posture. But courts and scholars have often characterized severability as a remedial inquiry in this posture.[189] That might suggest a way to reconcile the claim-specific standing theory with established practice on severability: If severability is remedial, then perhaps it would not be a claim that requires a showing of standing under the claim-specific theory after all.

For several reasons, however, the characterization of severability as a remedial question cannot bear close scrutiny. Rather, severability is best viewed as a substantive claim that goes to the merits of the plaintiff's case. And when the remedial characterization of severability is set aside, it confirms that the claim-specific approach to standing is inconsistent with settled practice on severability.

As an initial matter, a severability ruling is not about which type of remedy to provide to the plaintiff. It is not about whether to provide an injunction, or a declaratory judgment, or damages. Courts and scholars

---

[188] *Cuno*, 547 U.S. at 353 n.5.

[189] *See supra* notes 101–02.

have rightly observed that a severability ruling can affect the *scope* of the remedy.[190] It can determine, for example, whether a declaratory judgment will cover part of the statute, or all of it. But that is the hallmark of a substantive, merits question.[191] Constitutional rulings regarding different provisions of a statute determine the scope of the court's remedy, but that does not mean that those constitutional rulings should be characterized as remedial. So, too, for severability.

The test for severability also is not remedial. It turns on substantive questions of statutory interpretation and legislative intent.[192] Remedial questions, in contrast, consider how to compensate plaintiffs for harm they have suffered, or how to prevent future harm to plaintiffs.[193] In other words, the law of remedies assumes that the plaintiff has suffered or will suffer a substantive wrong, and asks how to fix it. Severability doctrine, in contrast, determines whether the plaintiff has suffered a substantive wrong at all, or the extent of that wrong.[194]

Moreover, the precedential effect of a severability ruling is not equivalent to the precedential effect of a remedial ruling. A ruling that a

---

[190] *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328 (2006) (severability is about "limit[ing] the solution to the problem"); Gans, *supra* note 94, at 643 ("[Severability] asks a remedial question about the scope of the relief a court should order . . . .").

[191] The Article's argument assumes that justiciability, substantive, and remedial doctrines are distinct. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 647 (2006) (drawing the same distinction). Scholars have nevertheless observed that substantive rulings can influence courts' rulings on standing or remedies, and vice versa. *See id.* at 636–37; Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). Thus, even when severability is properly viewed as a substantive question, it may still influence a court's ruling on standing or remedies. This Article argues, however, that a problem arises when severability is characterized as remedial because it can create confusion about how to apply standing doctrine.

[192] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–10 (2010); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238 (1994) ("Generally, severability is a question of statutory interpretation, not constitutional law."); Nagle, *supra* note 71, at 226 ("[S]everability is properly considered a question of statutory construction . . . .").

[193] *See generally* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 3–5 (4th ed. 2010) (describing the objectives of the various types of remedies). In fact, commentators who have argued that severability should be characterized as a remedial inquiry have also recognized that, to fit that characterization, the test for severability would need to change to turn on remedial considerations, rather than statutory interpretation and legislative intent. *See* Gans, *supra* note 94, at 643–45 (arguing that "severability should not simply be a matter of divining the intent of the legislature," and courts "must play a more active role in answering the remedial question whether or not to sever"); *see also* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 484–86, 518–21 (2014) (characterizing severability rulings in cases such as *Free Enterprise Fund* as remedial rulings, and arguing that the Supreme Court should change its approach to severability to account for "remedial values").

[194] *Cf., e.g.*, Metzger, *supra* note 65, at 884–85 (suggesting that severability analysis is substantive by explaining that severability determines whether applications of the statute are "invalid"); Vermeule, *supra* note 65, at 1951 (similar).

plaintiff is entitled, for example, to an injunction as a remedy against a particular wrong has precedential effect only for other persons who have suffered a similar wrong.[195] A ruling that a statute is wholly invalid on inseverability grounds, in contrast, means that the statute cannot be applied to anyone.[196] Thus, the precedential effect of an inseverability ruling is not limited to persons who have suffered a similar wrong—an injury from the *unconstitutional* part of the statute—and instead extends to anyone who is injured by *any* part of the statute.

Consideration of both the as-applied and overbreadth postures confirms that severability should not be understood as "remedial." When Speaker argues in the as-applied posture that the protest ban in § 2 of the Yellowstone Act is unconstitutional and inseverable from the motor vehicle ban in § 1, he is making the same argument that Biker makes in the overbreadth posture. But the severability question is not "remedial" for Biker. It does not determine how to redress a wrong that Biker has suffered. It instead determines whether Biker has suffered a wrong at all, which makes it a substantive doctrine. In other words, it determines whether the motor vehicle ban is unlawful, not how to remedy that problem if it is unlawful. The same was true, for example, when severability arose in the overbreadth posture in *Alaska Airlines*. The severability issue in that case determined whether the provisions that injured the plaintiffs were lawful, not how to remedy an injury from the unconstitutional legislative veto provision.[197]

*3. Severability Is Still a Claim if It Affects the Scope of the Remedy.*—So there are good reasons not to view severability as a remedial question, and instead to view it as a substantive claim when it arises in the as-applied posture. But even if severability could be understood to be "remedial" in the sense that it affects the scope of the remedy, that still would not change the application of the claim-specific approach to standing. In fact, decisions such as *Lewis* and *Moose Lodge* make clear that the claim-specific approach limits the scope of the remedy.

In *Lewis*, the Supreme Court held that the district court had exceeded its authority under Article III by issuing an injunction that attempted to remedy violations of the law that had not injured the plaintiffs.[198] The

---

[195] *Cf.* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393–94 (2006) (rejecting rule that all plaintiffs who prove patent infringement are entitled to a permanent injunction because the application of equitable considerations can vary depending on the infringement at issue); *id.* at 396–97 (Kennedy, J., concurring) (observing that, in deciding whether to grant an injunction based on past practice, "courts must determine whether past practice fits the circumstances of the cases before them").

[196] *See, e.g.*, Fallon, *supra* note 32, at 1331–32.

[197] *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 683 (1987).

[198] *See* Lewis v. Casey, 518 U.S. 343, 358, 360 (1996).

plaintiffs had standing only to challenge the failure to provide special services to illiterate inmates, the Court held, and the district court therefore lacked constitutional authority to remedy other types of inadequacies in prison law libraries.[199] In other words, the court could not address constitutional problems that had not injured the plaintiffs simply by characterizing its consideration of those problems as determining the scope of its remedy. Similarly, in *Moose Lodge*, the Court held that the remedy entered by the district court was too broad because it was directed to both the defendant club's membership policy and its guest-service policy, even though the plaintiff had standing to challenge only the guest-service policy.[200]

This reasoning applies equally to the question of severability in the as-applied posture. If Speaker argues that the protest ban in the Yellowstone Act is unconstitutional and that the motor vehicle ban is invalid on inseverability grounds, he is seeking a remedy that covers both the protest ban and the motor vehicle ban—for example, a declaratory judgment that both are invalid. To support the full breadth of that remedy, *Lewis* makes clear that Speaker would be required to have Article III standing to challenge the motor vehicle ban under the claim-specific standing theory.[201]

*Lewis* and its discussion of the scope of the remedy also confirm that a plaintiff in the overbreadth posture would not face an Article III standing problem. If Biker argues that the motor vehicle ban is unlawful because the protest ban is unconstitutional and inseverable, the remedy need only cover the motor vehicle ban—for example, a declaratory judgment that the motor vehicle ban is invalid. Although the court's ruling would establish that the protest ban is unconstitutional as a matter of precedent, the *remedy* need not say anything about the protest ban in Biker's case. Thus, *Lewis* would not require Biker to have Article III standing with respect to the protest ban.

In sum, even to the extent that severability can be understood as a remedial inquiry, the claim-specific approach to standing would still limit the Article III power of courts to decide severability questions in the as-applied posture. It would not, however, limit their power to decide severability questions in the overbreadth posture.

*4. Application to Cases.*—This section applies the preceding analysis to three paradigmatic Supreme Court decisions that involved questions of severability—*Northern Pipeline*, *Alaska Airlines*, and *NFIB*. It concludes that, under the claim-specific approach to standing, the Court could not

---

[199] *See id.* at 357–58.

[200] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168, 170–71 (1972).

[201] *See* 518 U.S. at 357 ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.").

have reached the severability question in *Northern Pipeline*; that it could have reached the severability question in *Alaska Airlines*; and that it could have reached the severability question in *NFIB*, albeit for reasons that went unstated by the Court. This analysis confirms that the claim-specific approach would change the results of actual cases in which severability is at issue. And although there are also cases in which the result would not change, the severability rulings in those cases could no longer be explained as rulings in the as-applied posture. Instead, they would need to be viewed as rulings in the overbreadth posture.

In *Northern Pipeline*, the Court held that § 1471(b) was unconstitutional as applied to Northern's contract claims against Marathon, and that this application was inseverable from the other applications of the statute.[202] Under the claim-specific standing theory, the Court could not have reached that severability question because Marathon did not have Article III standing to raise it. The severability question arose in the as-applied posture—Marathon argued that the statute was unconstitutional as applied to it, and that the other applications of the statute were invalid on inseverability grounds. But Marathon was not injured by the other applications of the statute, so the Court would have lacked power to rule on severability.

The claim-specific theory would have required the Court in *Northern Pipeline* to defer any ruling on severability until a case arose that presented the severability issue in the overbreadth posture. For example, a party in a subsequent case could have been sued on a federal claim that arose under the bankruptcy code. That party could have argued that the application of § 1471(b) to this federal claim was unlawful because the statute was unconstitutional as applied to state law contract claims, and because the applications of the statute were inseverable. Until such a case arose, however, the severability question would have gone unanswered, and it would have remained unclear whether § 1471(b) was wholly invalid or only partially invalid.

In *Alaska Airlines*, in contrast, the outcome would have been the same under the claim-specific approach to standing. The challenge in that case arose in the overbreadth posture: The plaintiff airlines argued that the provisions of the statute that injured them were invalid because the legislative veto provision was both unconstitutional and inseverable.[203] The claim-specific theory does not limit plaintiffs' Article III standing to raise inseverability claims in this posture, so the Court still would have been correct to rule on severability.

---

[202] *See* 458 U.S. 50, 87 n.40 (1982) (plurality opinion); *id.* at 91–92 (Rehnquist, J., concurring in the judgment).

[203] *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 680, 683 (1987).

In *NFIB*, the Court also could have ruled on severability under the claim-specific approach to standing, albeit not for the reasons that it appears to have assumed. After the Court held that the Medicaid expansion in the Affordable Care Act (ACA) was unconstitutional as applied to the plaintiff States, it rejected the States' argument that the Medicaid expansion was inseverable without mentioning standing.[204] From the States' vantage point, this inseverability claim arose in the as-applied posture. The States therefore could not have raised inseverability under the claim-specific approach unless they had standing to challenge some other provision of the statute. Thus, if the States had been the only plaintiffs, the claim-specific theory might have precluded a severability ruling.[205]

The States, however, were not the only plaintiffs in *NFIB*. There were also private plaintiffs who were injured by the ACA's individual mandate, which required them to purchase health insurance or pay a penalty.[206] Under the claim-specific approach, these private plaintiffs had Article III standing to raise the severability question in the overbreadth posture by arguing that, even if the individual mandate was constitutional, it was still unlawful because the Medicaid expansion was unconstitutional and inseverable from the remainder of the ACA.[207] Because the severability issue determined the validity of the individual mandate, and because the private plaintiffs had standing to challenge the individual mandate, the Court had power under Article III to reach severability.

To be sure, the Court did not frame its analysis in these terms. The Justices in the majority did not even address standing for the severability question.[208] These Justices likely concluded that a standing analysis was unnecessary under established practice because the severability question arose in the as-applied posture with respect to the States. And the Justices in dissent explicitly argued that a standing analysis was not required in the as-applied posture.[209] Thus, none of the Justices attempted to apply the

---

[204] *See NFIB*, 132 S. Ct. 2566, 2607–08 (2012) (plurality opinion); *id.* at 2630, 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[205] In the decision from which *NFIB* arose, the Eleventh Circuit described the question of whether the States had standing to challenge the individual mandate as "interesting and difficult," and declined to decide that question because it was immaterial to the outcome. Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011).

[206] *See id.* at 1244 (concluding that it was "beyond dispute" that the private plaintiffs had standing to challenge the individual mandate). The Supreme Court did not question this conclusion in *NFIB*.

[207] *Cf.* Reply Brief for Private Petitioners on Severability at 3–4, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400), 2012 WL 864595, at *3–4 (arguing that the government's standing argument was inapposite because there were multiple plaintiffs with multiple injuries in the case, although not raising precisely this form of the severability argument).

[208] *See NFIB*, 132 S. Ct. at 2607–08 (plurality opinion); *id.* at 2630, 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[209] *See id.* at 2671 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

claim-specific approach to the severability issue. Yet the Court still happened to reach a result that was consistent with the claim-specific analysis.

So the claim-specific approach to standing would change the result in cases like *Northern Pipeline*, but not in cases like *NFIB*. To understand the practical impact of the claim-specific approach, therefore, it would help to know whether most cases are like *Northern Pipeline* or like *NFIB*. Unfortunately, it is difficult to answer that question with a high degree of accuracy. In past decisions in which it ruled on severability, the Court did not consider the claim-specific approach to standing. It simply assumed that a severability ruling was consistent with Article III, and did not address whether any of the plaintiffs had standing to raise the severability question. Any analysis of whether these plaintiffs had standing for severability is therefore subject to a substantial amount of uncertainty—particularly given the acknowledged vagaries of standing doctrine.[210]

Nevertheless, based on my review of the Court's severability decisions over the past four decades, and the Court's description of the parties and the facts in these decisions, it appears that most decisions in which the Court has expressly decided severability questions are similar to *NFIB*. That is, in most of these cases, at least one plaintiff seemed to have standing to raise an inseverability argument in the overbreadth posture—either because the plaintiff raising the constitutional claim was injured by multiple statutory provisions, or because there were multiple plaintiffs who were injured by different provisions.[211] This analysis suggests that many results would not change under the claim-specific approach.

Even so, there is an identifiable universe of cases in which the outcome would change under the claim-specific approach to standing. In these cases, the Court decided a severability question that arose in the as-applied posture. And although the Court did not address standing, it is evident from the Court's description of the facts and the parties that no

[210] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) ("[T]he concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . . .").

[211] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–10, 513–14 (2010) (plaintiffs appeared to be injured by both the provisions protecting Board members from removal and the provisions authorizing the Board to conduct investigations, and therefore had standing to argue that the provisions were inseverable); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 324–25 (2006) (plaintiffs appeared to be injured by multiple parts of an abortion statute, and therefore had standing to raise severability); United States v. Booker, 543 U.S. 220, 267–68 (2005) (there were two defendants challenging the statute, Booker and Fanfan, and the severability question appeared to make a difference as to how each defendant's case would proceed on remand, and thus they had standing to argue that the provisions of the Sentencing Reform Act were inseverable); New York v. United States, 505 U.S. 144, 186–87 (1992) (New York appeared to have standing to challenge separate provisions of a federal statute governing the disposal of radioactive waste).

plaintiff would have had Article III standing to raise severability under the claim-specific approach. Within the past few decades, these decisions include *Northern Pipeline*,[212] *Brockett v. Spokane Arcades, Inc.*,[213] and *Reno v. ACLU*.[214] There are undoubtedly more such decisions from prior years given that the Court has been deciding severability questions since the late nineteenth century,[215] but has not previously applied a claim-specific standing analysis.[216] Lower courts too have often addressed severability questions in the as-applied posture when it was evident that standing was lacking.[217] The claim-specific approach to standing would therefore disrupt the status quo on severability by changing the disposition in these types of cases.

Moreover, even in cases in which the outcome would be the same under the claim-specific approach, the severability ruling would generally need to be understood as a ruling in the overbreadth posture, rather than the as-applied posture. That change in rationale would have real effects. If the as-applied posture were no longer an outlet for severability rulings, more severability questions would be channeled into the overbreadth posture. Rather than being a rarity, claims in this posture would become the norm. Cases like *Alaska Airlines* would become more common, and plaintiffs would increasingly argue that parts of statutes that do not apply to them are

---

[212] 458 U.S. 50 (1982).

[213] 472 U.S. 491 (1985). In *Brockett*, the Court held that the Ninth Circuit erred in invalidating an obscenity statute in its entirety on overbreadth grounds. *See id.* at 507. The Court reasoned that the statute was unconstitutional as applied to the plaintiffs, who intended to engage only in nonobscene, protected speech, and it was therefore unnecessary to resort to overbreadth doctrine and facially invalidate the statute. *See id.* at 494, 504. The Court nevertheless proceeded to hold that the application of the statute to the plaintiffs was severable from the remaining applications to obscene speech. *See id.* at 506–07. Because those remaining applications did not appear to injure the plaintiffs, *see id.* at 494, the plaintiffs lacked standing to raise the severability question.

[214] 521 U.S. 844 (1997). In *Reno*, the Court addressed, among other things, the constitutionality of 47 U.S.C. § 223(a), which applied to "obscene or indecent" communications, and held that the application of the statute to "indecent" communications was unconstitutional. *See id.* at 883. Although the Court noted that the plaintiffs had not challenged the statute as applied to obscene communications, the Court held that the term "indecent" was severable from the remainder of the provision. *See id.* This severability question did not appear to affect any part of the statute that injured the plaintiffs.

[215] *See* Nagle, *supra* note 71, at 214.

[216] *Cf., e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 241–45 (1929) (ruling that statute was inseverable after holding that it was unconstitutional as applied to the plaintiffs, without conducting a separate standing analysis for the severability question); Hill v. Wallace, 259 U.S. 44, 70–71 (1922) (ruling that statute was inseverable in part and severable in part without conducting standing analysis).

[217] *See, e.g.*, Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202, 211, 215 (5th Cir. 2011) (ruling on severability even though the plaintiffs lacked standing to challenge the affected provisions); W. States Med. Ctr. v. Shalala, 238 F.3d 1090, 1096–98 (9th Cir. 2001) (holding that a statute was inseverable without suggesting that the affected provisions injured the plaintiffs); Bd. of Natural Res. v. Brown, 992 F.2d 937, 948 (9th Cir. 1993) (considering severability of statutory provisions that regulated federal lands and did not appear to affect the state plaintiffs).

unconstitutional and inseverable. It would also be more difficult for courts to use prudential, third-party standing principles to limit the overbreadth posture. In light of the constitutional restraints on the as-applied posture, applying prudential restraints in the overbreadth posture would severely diminish courts' ability to make severability rulings at all.

All of this would constitute a significant break from past practice. One might therefore expect that there should be a good reason for making the change. As the next section explains, however, no such reason exists.

### *B. Claim-Specific Standing for Severability Would Undermine the Purposes of Standing Doctrine*

In addition to its purported consistency with existing practice, the Supreme Court has justified the claim-specific theory on the ground that it reinforces the central purposes of standing doctrine—protecting the separation of powers and promoting sound judicial decisions. Although that justification is plausible in many cases, it fails when the claim-specific approach is applied to severability questions.

*1. Separation of Powers*.—Under the claim-specific standing theory, Article III standing principles would limit rulings on severability in the as-applied posture. That means courts would sometimes lack power to decide severability questions after ruling that part of a statute is unconstitutional. But a ruling on severability gives effect to the separation of powers. When a court finds that part of a statute is unconstitutional, severability doctrine permits the court to invalidate the statute to the extent that Congress would have wanted.[218] If a court cannot rule on severability, it can be forced to leave in place a new version of the statute that Congress never would have enacted. Preventing the court from deciding severability therefore harms the separation of powers, rather than preserving it

For example, consider *Northern Pipeline*. In that case, the Court concluded that granting jurisdiction to the bankruptcy courts over state law contract claims was unconstitutional, and that the entire jurisdictional provision should be invalidated on inseverability grounds.[219] That inseverability ruling was faithful to the separation of powers because it adhered to Congress's intent to have the statue stand or fall as a whole. Under the claim-specific approach to standing, in contrast, the Court could not have reached the severability issue, and thus could not have invalidated the entire statute. That disposition would have left the bankruptcy court's

[218] *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330–31 (2006).

[219] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 n.40 (1982) (plurality opinion); *id.* at 91–92 (Rehnquist, J., concurring in the judgment).

jurisdiction partially intact—a result that the Court found Congress never would have wanted.

It is true that the claim-specific approach to standing permits severability rulings to be made in the overbreadth posture. It thus does not completely eliminate courts' power to make severability rulings that are necessary to protect the separation of powers. In *Northern Pipeline*, for example, a severability ruling could have been made in a subsequent case. But there are some circumstances in which that is not true. Sometimes, even when the overbreadth posture is taken into account, no party would ever have Article III standing to challenge a statutory provision. In those cases, the claim-specific approach would never permit the separation of powers to be given effect through a severability ruling.

Consider, for example, § 3 of our hypothetical Yellowstone Act, which appropriates funds to the National Park Service so that it can report to Congress on the effects of the motor vehicle and protest bans.[220] This spending provision does not injure anyone—at least not in a way that gives rise to standing under current doctrine.[221] That means no plaintiff would have standing to argue that the appropriation of funds in § 3 is invalid on inseverability grounds. As a result, if a court struck down both the motor vehicle ban and the protest ban, it would be required to leave § 3 in place—even though Congress undoubtedly would not have appropriated funds so that the National Park Service could report on the effects of statutory provisions that have been invalidated. In fact, even if Congress included an inseverability clause in the Yellowstone Act providing that the entire statute should stand or fall together, a court would still lack constitutional power under the claim-specific approach to give effect to that clause and invalidate § 3.

Moreover, even when a severability question could be decided in the overbreadth posture in a later case, the failure to rule on severability in the same case as a constitutional ruling would still harm the separation of powers. It could require the court to leave intact, even if only temporarily, a new version of the statute that Congress would not have enacted. At minimum, it would create uncertainty regarding the state of the law, which would make Congress's work more difficult. Because it would not know whether the rest of the statute will be found invalid, Congress would not know whether a legislative solution is necessary. In contrast, when a court immediately rules on severability in the as-applied posture, it provides a definitive decision that Congress can either leave in place or overturn.

---

[220] *See supra* Part I.B.

[221] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006) (explaining that plaintiffs generally lack standing to challenge federal expenditures because any injury is insufficiently particularized).

Allowing rulings on severability in the overbreadth posture therefore would not solve the separation of powers problems produced by the claim-specific approach to standing.

In fact, this reliance on the overbreadth posture for rulings on severability would ultimately make things worse from the perspective of standing doctrine. At its core, standing principles are meant to serve the separation of powers by preventing constitutional rulings regarding government conduct that does not injure the plaintiff.[222] Because it would channel inseverability claims into the overbreadth posture, however, the claim-specific approach would fail to advance that purpose. Plaintiffs injured by one part of a statute would have an increasingly strong incentive to seek out a constitutional flaw in a different part of the statute that has no effect on them, and argue that the other part of the statute is unconstitutional and inseverable.[223] Courts would therefore be faced with far more constitutional questions in the overbreadth posture, which would produce more conflict between the branches.

A court need not, of course, always reach the merits of a constitutional claim in the overbreadth posture. In this posture, the court generally should rule on severability first because, if the statute is severable, the constitutional question is moot. But that is a prudential exercise of constitutional avoidance,[224] not an Article III limitation. The claim-specific approach would do nothing to limit the *power* of a court to decide a constitutional question in the overbreadth posture.

In the end, therefore, the effect of the claim-specific approach in statutory cases would be to impose Article III standing limitations on severability rulings, but not constitutional rulings. That is the opposite of what one would expect under bedrock principles of standing law. Because Congress can overturn severability rulings but not constitutional rulings,[225] a constitutional ruling is far more disruptive to the separation of powers than a severability ruling. Indeed, that is why the Court has described its standing inquiry as "especially rigorous" when a plaintiff challenges the constitutionality of a federal statute.[226] From the perspective of standing, therefore, it is better to have parties argue about the severability of provisions that do not apply to them than to argue about the

---

[222] *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013).

[223] *See, e.g.*, Dorsey, *supra* note 71, at 889 (suggesting a hypothetical in which a plaintiff whose assets are seized pursuant to one provision argues that an unrelated provision is unconstitutional and inseverable); Walsh, *supra* note 22, at 77 ("If a party affected by any [provision of a statute] could gain standing by pointing to a constitutional defect in any other provision . . . , then standing doctrine would be reduced to a sport for clever counsel.").

[224] *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2087 (2014) (describing avoidance canon).

[225] *See, e.g.*, United States v. Booker, 543 U.S. 220, 265 (2005).

[226] *Clapper*, 133 S. Ct. at 1147 (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)).

constitutionality of provisions that do not apply to them. Claim-specific standing would invert that principle.

Even the current members of the Supreme Court who are most committed to standing doctrine—i.e., the conservative Justices[227]—have recognized that limiting severability rulings in the as-applied posture would harm the separation of powers. In *NFIB*, the dissent argued that it would be "destructive of sound government" to use standing doctrine to prohibit a severability ruling.[228] If a court could not reach severability when it ruled that a statute was partially unconstitutional, the dissent was concerned that it would be unclear which parts of the statute remain valid.[229] The dissent also argued that this concern applied with particular force to a "multifaceted piece of legislation" such as the ACA, because "[i]t would take years, perhaps decades, for each of its provisions to be adjudicated separately—and for some of them (those simply expending federal funds) no one may have separate standing."[230]

*2. Sound Decisionmaking.*—The claim-specific approach to standing would therefore harm the separation of powers when applied to severability questions. But that approach might still be thought to support standing doctrine's other central purpose—promoting sound judicial decisions. After all, it would prevent courts from ruling on severability questions that concern the validity of statutory provisions that do not injure the plaintiff. It would therefore seem to limit courts to concrete, adverse disputes about severability. For several reasons, however, applying the claim-specific theory to severability could easily undermine the interest in sound decisionmaking. At minimum, the claim-specific approach would not sufficiently advance the interest in accurate judicial decisions to overcome the damage that it would do the separation of powers.

As an initial matter, it is doubtful that the injury in fact requirement would improve the quality of severability arguments and, in turn, the quality of severability rulings. Scholars have long argued that an injury in fact does not correlate with good advocacy.[231] Even assuming that standing doctrine nevertheless promotes good advocacy in some contexts, it is particularly unlikely to do so for severability. The claim-specific approach would limit severability rulings in the as-applied posture and channel them into the overbreadth posture. But severability arises in the as-applied

---

[227] *See* Elliott, *supra* note 28, at 587.

[228] *NFIB*, 132 S. Ct. 2566, 2671 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[229] *Id.*

[230] *Id.*; *cf.* Fallon, *supra* note 35, at 964 (explaining that the Court's function is sometimes to resolve uncertainty); Gans, *supra* note 94, at 683 (analyzing the practical costs when the effects of Court's ruling are not immediately clear).

[231] *See, e.g.*, Elliott, *supra* note 11, at 474 & n.77.

posture only if the plaintiff has succeeded on a constitutional claim—which suggests that the plaintiff is a strong advocate who would make a robust presentation on severability. In the overbreadth posture, in contrast, the court can rule on severability before ruling on the plaintiff's constitutional claim, so there is no assurance that the plaintiff is a strong advocate.

Moreover, severability is a purely legal question that turns primarily on Congress's intent.[232] A court's decision on the issue of severability is therefore unlikely to be aided by the development of a concrete record in a case in which the plaintiff has suffered an injury in fact. The facts of the case are unlikely to inform the decision on severability at all. The injury in fact requirement therefore seems unlikely to enhance the quality of decisionmaking on severability.

In any event, even if the claim-specific approach could be understood to promote the interest in sound decisionmaking on severability, it would undermine that interest for constitutional questions. The claim-specific approach would allow plaintiffs to raise claims in the overbreadth posture, and therefore permit highly abstract constitutional challenges to statutory provisions that do not apply to the plaintiffs. Again, this asymmetry would turn core principles of standing doctrine on their head. Standing is most concerned with promoting sound decisions on *constitutional* questions[233]—particularly because Congress can revisit a court's erroneous severability (or other statutory) rulings, but not its erroneous constitutional rulings.

* * *

In sum, the claim-specific approach to standing is inconsistent with current practice on severability and would interfere with the purposes of standing doctrine—particularly in cases in which a severability ruling in the as-applied posture is necessary to preserve the separation of powers. The next Part argues that there is a better alternative that both explains existing practice and advances the aims of standing doctrine in the severability context—supplemental standing.

## IV. SUPPLEMENTAL STANDING

The Supreme Court has justified its adoption of a claim-specific approach to standing—and its rejection of supplemental standing—on the ground that claim-specific standing is consistent with existing practice and serves the purposes of standing doctrine. As shown in the preceding Part, that justification fails in cases involving severability. In fact, established

[232] *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–31 (2006).

[233] *Cf.* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013).

practice for severability is best understood as a form of supplemental standing. This Part explains why a supplemental-standing approach both conforms to existing severability doctrine and better serves the functions of standing doctrine.

The problems with the claim-specific theory, however, are not limited to severability. Existing practice in additional cases already reflects a supplemental-standing approach. And shifting to a supplemental-standing approach appears to be warranted in others. This Part therefore concludes by considering how to develop a more general theory of supplemental standing.

### *A. Supplemental Standing for Severability*

*1. Supplemental Standing Explains Practice on Severability.*—As explained in Part II.A, the concept of supplemental standing does not require plaintiffs to have standing for every claim that they raise. Rather, a plaintiff can have standing for some claims and supplemental standing for related claims. Standing is still required for an Article III "case" to exist, but it does not define the outer boundaries of such a case. Some other criterion determines which claims are sufficiently related to fall within the same Article III case.

Established practice on severability is consistent with a form of supplemental standing that always grants courts Article III power to rule on severability in the as-applied posture. In other words, existing practice is explained by a supplemental-standing approach that treats constitutional challenges to statutes and severability claims as sufficiently related to fall within a single Article III case. Thus, when a plaintiff has standing to challenge a statute on constitutional grounds, the plaintiff has supplemental standing to raise a severability claim.

To illustrate, suppose again that Speaker challenges the protest ban in § 2 of the Yellowstone Act[234] as unconstitutional, and argues that the remainder of the statute is invalid because the protest ban is inseverable. Under the supplemental-standing approach described here, Speaker still needs standing for at least one claim to have an Article III case in the first place—which he does because he is injured by the protest ban. But standing requirements do not define the limits of that case. Thus, even though Speaker is not injured by the rest of the statute, his inseverability argument is not excluded on standing grounds. Rather, Speaker has supplemental standing for his inseverability claim, and that claim is part of the same Article III case as his constitutional claim.

[234] *See supra* Part I.B.

This supplemental-standing approach explains established understandings of when severability can be decided. Consistent with existing practice, supplemental standing always grants a court the power to rule on severability in the as-applied posture after ruling in the plaintiff's favor on a constitutional claim.[235] For example, the Court's decision in *Northern Pipeline* can be understood as resting on the theory of supplemental standing. After Marathon succeeded on its argument that § 1471(b) was unconstitutional as applied to Northern's contract claims against it, Marathon had supplemental standing to argue that the statute's applications to other types of claims were invalid on inseverability grounds. The Court properly accepted that inseverability argument, even though Marathon lacked standing to challenge the statute's other applications. Similarly, in *NFIB*, the plaintiff States had standing to challenge the Affordable Care Act's (ACA) expansion of the Medicaid program, and supplemental standing to argue that the remainder of the ACA should be invalidated on inseverability grounds. The Court correctly considered this inseverability argument under the theory of supplemental standing.

The supplemental-standing approach is also consistent with the principle that courts are not *required* to rule on severability arguments in the as-applied posture. Supplemental standing is about Article III power, not how it should be exercised. Although it grants courts the constitutional authority to rule on severability claims, it does not call into question the types of prudential, third-party standing limitations that courts have used to avoid immediate rulings on severability.[236] For example, in *Printz*, the Supreme Court had constitutional authority under a supplemental-standing theory to decide the question of severability in the as-applied posture, but was free to limit the exercise of that authority based on prudential considerations.[237]

In addition, supplemental standing is consistent with practice in the overbreadth posture. The prevailing view among courts and scholars is that a plaintiff has Article III standing for a claim in the overbreadth posture.[238] For example, in *Alaska Airlines*, the plaintiffs had standing to argue that the legislative veto was unconstitutional and inseverable from the provisions that injured them. That view is consistent even with claim-specific standing,[239] and is therefore consistent with the more permissive supplemental-standing approach as well. In other words, while supplemental standing supports the power to rule on severability in the as-

[235] *See supra* Part I.C.1.

[236] *See supra* Part I.C.1.

[237] *See supra* Part I.C.1; *see also* Printz v. United States, 521 U.S. 898, 935 (1997).

[238] *See supra* Part I.C.2.

[239] *See supra* Parts III.A.1, 4.

applied posture, it does not limit the power to rule on severability in the overbreadth posture. Supplemental standing would not, however, require severability rulings in decisions such as *NFIB* to be reformulated as rulings in the overbreadth posture, as the claim-specific approach would.[240]

*2. Supplemental Standing for Severability Advances the Purposes of Standing Doctrine.*—The supplemental-standing approach to severability also better serves the functions of standing doctrine—protecting the separation of powers and promoting sound decisions—than the claim-specific approach. This conclusion follows from the analysis in Part III.B, which showed that the claim-specific approach would undermine the aims of standing law in the severability context by preventing severability rulings in the as-applied posture. Supplemental standing for severability permits those rulings, and therefore advances the purposes of standing doctrine for all of the same reasons that the claim-specific approach for severability would not.

In particular, unlike claim-specific standing, the supplemental-standing approach always authorizes courts to make severability rulings that are necessary to preserve the separation of powers. That eliminates the problems that would arise if, after ruling in the plaintiff's favor on a constitutional challenge to a statute, the court were required to leave in place a revised statute that Congress never would have enacted. It also means that a court would not be required to leave the state of the law uncertain by deferring a ruling on severability to a later case. Congress would know immediately whether a legislative fix is required.

That said, the supplemental-standing theory would still allow courts to refrain from deciding severability questions if there were good prudential reasons to do so.[241] For example, the parties may fail to raise a severability dispute, or they may poorly frame the issue and thus fail to help the court reach a sound decision. Supplemental standing would allow courts to balance the harms and benefits of deferring a ruling on severability. And because the reasons for addressing or declining to address severability in particular cases would be prudential, rather than constitutional, they would be subject to democratic controls by Congress.[242]

The supplemental-standing approach to severability also avoids the counterintuitive asymmetry created by the claim-specific approach between the as-applied posture and the overbreadth posture. Under supplemental standing, Article III permits severability rulings in both postures, and both postures are subject to prudential standing limitations. Thus, the

---

[240] *See supra* Part III.A.4.

[241] *See supra* Part I.C.1.

[242] *See* Bennett v. Spear, 520 U.S. 154, 162 (1997).

supplemental-standing approach does not invert principles of separation of powers by making it easier to decide a constitutional question in the overbreadth posture than to decide a severability question in the as-applied posture.

In theory, another alternative for eliminating this asymmetry would be to double down on claim-specific standing and limit Article III standing in the overbreadth posture as well. One way to achieve that result would be to permit a severability ruling only when a single plaintiff is injured by multiple parts of a statute, and that plaintiff therefore has standing for both the constitutional claim and the inseverability claim. But this approach would, like the existing claim-specific approach, interfere with the separation of powers by preventing numerous severability rulings in the as-applied posture that are necessary to give effect to Congress's intent. For example, a court might never be able to rule on the validity of provisions of a complex statute like the ACA that do not directly injure anyone, even if it were clear that Congress would not have enacted those provisions on their own.[243] It would also be difficult to apply Article III standing limitations to severability questions in the overbreadth posture without casting doubt on well-established decisions and scholarship on First Amendment overbreadth doctrine.[244]

Ultimately, therefore, the concept of supplemental standing is preferable to the claim-specific approach in the severability context. Supplemental standing explains established practice on severability and is more faithful to the purposes of standing doctrine. The Court was therefore incorrect in *Cuno* to assert that the claim-specific approach is always consistent with existing practice and always furthers the aims of standing law. And the Court erred, at least as a matter of principle, in dismissing supplemental standing as a categorical matter.

### *B. Toward a General Theory of Supplemental Standing*

The preceding discussion has focused on the problems that arise when the claim-specific approach to standing is applied to severability, and the benefits of a theory that grants supplemental standing for severability claims. But does supplemental standing fit into the law more generally, or is severability merely an isolated case in which the claim-specific theory of standing breaks down? If the problems in the severability context were *sui generis*, it might make sense for purposes of uniformity and simplicity to accept those problems and apply the claim-specific theory across the board, rather than developing a new theory of supplemental standing. As this section explains, however, severability is not the only context in which

[243] *See NFIB*, 132 S. Ct. 2566, 2671 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
[244] *See supra* Part III.A.1.

established practice is inconsistent with the claim-specific approach to standing. In at least two other contexts, existing practice already appears to reflect a supplemental-standing approach. That means there is a broader problem with claim-specific standing, and suggests that there are additional contexts in which supplemental standing is warranted.

*1. Supplemental Standing Explains Practice in Other Contexts.*—In addition to cases involving severability, the Supreme Court has effectively adopted a supplemental-standing approach in cases involving facial challenges to statutes and cases involving multiple plaintiffs raising the same claim. And it has done so with good reason.

*a. Facial challenges.*—Existing practice for facial challenges can be explained by supplemental standing, but not the claim-specific approach to standing. When a court invalidates a statute pursuant to a facial challenge, it rules that the statute cannot be applied to anyone.[245] Courts therefore effectively grant plaintiffs raising facial challenges supplemental standing to assert the claims of other potential plaintiffs.

Take, for example, the Court's recent decision in *United States v. Windsor*.[246] The plaintiff in that case argued that § 3 of the Defense of Marriage Act, which defined "marriage" for purposes of federal law, was unconstitutional as applied to same-sex marriages.[247] Under the claim-specific approach, the Court could have ruled only on the application of the statute that the plaintiff had standing to challenge—its application to same-sex marriages. Yet under current practice, the effect of the Court's ruling was to strike down § 3 on its face because the Court held it was enacted pursuant to an improper legislative purpose.[248] The Court thus effectively granted the plaintiff supplemental standing to challenge the statute's application to other marriages.

Similarly, in *Citizens United v. FEC*, the Supreme Court held that a federal statute that regulated election-related expenditures by corporations

[245] *See, e.g.*, Fallon, *supra* note 32, at 1326. Professor Fallon has explained that, some doctrinal tests, such as "suspect-content" tests, result in facial invalidation because they preclude any subsequent severance of statutory applications. *Id.* at 1346. But other doctrinal tests, such as tests that turn on improper legislative purpose, result in facial invalidation because they mark every application of the statute as unconstitutional. *See id.* at 1345. The conflict between the claim-specific theory of standing and existing practice on facial challenges therefore overlaps with, but is not limited to, the conflict between the claim-specific theory and existing practice on severability.

[246] 133 S. Ct. 2675 (2013).

[247] *See id.* at 2683.

[248] *See id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *see also* Fallon, *supra* note 32, at 1345 (explaining that "[p]urpose tests" result in facial invalidation).

violated the First Amendment.[249] The plaintiff in *Citizens United* was engaging in—or at least was assumed to be engaging in—protected speech, and therefore would have had standing under the claim-specific approach to challenge only the application of the statute to protected speech.[250] But the Court made clear that it was invalidating the statute as a facial matter.[251] It therefore implicitly granted the plaintiff supplemental standing to challenge the statute's application to all speech, including unprotected speech.

Furthermore, as in the severability context, established practice for facial challenges is faithful to the purposes of standing doctrine, whereas the claim-specific approach would undermine those purposes. Limiting a court's power to decide a facial challenge on standing grounds could overly burden the court's exercise of judicial review and its ability to make clear what the law is.[252] It could also lead to excessive interbranch conflict by requiring courts to adjudicate the constitutionality of a statute repeatedly on an application-by-application basis over time.[253] The existing supplemental-standing approach, in contrast, authorizes a court to decide a facial challenge in a manner that accounts for separation of powers concerns. As in the severability context, however, the courts and Congress can still impose prudential restraints on the exercise of this authority to decide facial challenges.

*b. Multiple plaintiffs.*—The claim-specific approach to standing is also in serious tension with the oft-invoked rule that, if one plaintiff has standing for a claim, a court need not decide whether other plaintiffs in the case have standing for that claim.[254] Contrary to the claim-specific approach, this practice does not require plaintiffs to have standing for every claim that they raise. It is therefore better understood as a form of supplemental standing. It interprets Article III broadly, to allow a case to include claims that some of the plaintiffs lack standing to assert, so long as another plaintiff has standing for those claims.[255]

---

[249] 558 U.S. 310, 316 (2010).

[250] *See id.* at 336 (describing the speech at issue as "beyond all doubt protected").

[251] *See id.* at 333 (finding it "necessary" to "consider the facial validity" the statute); *see also* Fallon, *supra* note 32, at 1346 (explaining that suspect-content tests of the sort applied in *Citizens United* result in facial invalidation).

[252] *See, e.g.*, *Citizens United*, 558 U.S. at 333–34 (arguing that consideration of a facial challenge was necessary to resolve uncertainty); Fallon, *supra* note 35, at 964 ("It is the Court's function sometimes to resolve uncertainty and to ensure effective constitutional implementation by [ruling] . . . that a particular statute is unconstitutional in all applications . . . .").

[253] *See, e.g.*, *Citizens United*, 558 U.S. at 334–36.

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

[255] *See* Steinman, *supra* note 34, at 741–48 (relying on supplemental jurisdiction principles to conclude that this rule is consistent with Article III).

This practice is also faithful to the underlying purposes of standing doctrine. If one plaintiff has standing to raise a claim, a ruling on the merits of that claim is, by definition, consistent with the separation of powers and sound decisionmaking interests of standing doctrine.[256] To be sure, giving that ruling effect for other plaintiffs who have not been injured raises potential concerns.[257] But those concerns can be addressed through prudential rules on joinder, class actions, and preclusion, rather than with an inflexible constitutional requirement.

*2. Supplemental Standing Appears to Be Justified in Additional Circumstances.*—Current practice thus effectively adopts the concept of supplemental standing in at least three circumstances—severability, facial challenges, and cases with multiple plaintiffs. These examples establish that the Supreme Court was incorrect in *Cuno* when it purported to reject supplemental standing on a categorical basis. They also suggest that there may be other contexts in which the law should recognize supplemental standing. And they ultimately suggest that we need a general theory of supplemental standing that can both explain current practice and identify other cases in which courts should grant supplemental standing. This Article does not attempt to develop a full-blown theory of when supplemental standing is warranted—a question that I intend to address in future work. But it is possible to sketch two ways to approach the subject.

One potential approach would be category-based. This approach would treat the claim-specific standing requirement as a default rule, but recognize that there are exceptions for particular categories of cases and questions, such as severability. And it would identify those exceptions by looking for categories of cases or questions in which supplemental standing would be more faithful to the aims of standing doctrine, including the preservation of the separation of powers.

Another potential approach would be standard-based. This approach would be similar to the Court's approach to supplemental jurisdiction under *United Mine Workers of America v. Gibbs*, which defines a constitutional case for jurisdictional purposes to include all claims that arise from a "common nucleus of operative fact."[258] A standard-based approach for supplemental standing could likewise rely on a generally applicable definition of a constitutional case for standing purposes. Courts could then

[256] *See id.* at 729 (observing that the rule for multiple plaintiffs "comports with a number of the basic values that are served by standing doctrine," including the separation of powers and the interest in strong advocacy).

[257] *See id.* at 730–31 (observing that plaintiffs without standing can later seek to enforce a favorable judgment against the defendant).

[258] 383 U.S. 715, 725 (1966).

apply that definition and grant supplemental standing on a case-by-case and claim-by-claim basis.

My tentative view is that, in the standing context, a category-based approach is preferable. Experience has shown that the case-by-case application of a standard like the one from *Gibbs* can easily give rise to uncertainty and conflicting results.[259] A category-based approach, in contrast, would be conducive to greater certainty and ease of application. The goal would be to identify discrete exceptions to the claim-specific standing requirement, so that courts could easily determine whether a given claim falls within one of the exceptions.

Moreover, it is doubtful whether a single standard could both explain the current exceptions to the claim-specific standing approach and still preserve the aims of standing doctrine. For example, the *Gibbs* standard of a "common nucleus of operative fact" might not even solve the primary problem to which this Article is directed, which is to permit supplemental standing for severability claims. That standard looks to whether claims are factually related, but it is not clear that a constitutional claim and a severability claim are factually related in the sense of *Gibbs*. Scholars have proposed broader definitions of an Article III case for purposes of supplemental jurisdiction that might sweep in severability arguments—for example, a test that looks to whether claims are logically or legally related.[260] But those tests could easily go too far if adopted for purposes of standing doctrine. They would grant courts extensive authority to decide claims that plaintiffs lack standing to raise, which would threaten the separation of powers for the reasons that the Court expressed in *Cuno*.[261] The category-based approach, in contrast, would permit supplemental standing only when it is consonant with the purposes of standing doctrine, and would still maintain general limitations on the power of the federal courts.

All of this is not to say, however, that a category-based approach should be applied as a *constitutional* matter. Rather, such an approach could be applied as a statutory matter rather than as a matter of

---

[259] *See, e.g.*, Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1448 (1983) (explaining that "[t]he phrase 'common nucleus of operative fact' is not self-defining" and that "courts and commentators have given the phrase several different interpretations").

[260] *See, e.g.*, Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 908–11 (1992) (proposing a "logical relationship" test for supplemental jurisdiction); *id.* at 919–20 (addressing supplemental jurisdiction over legally related claims); *see also* William A. Fletcher, *"Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the* Gibbs *Test*, 74 IND. L.J. 171, 178 (1998); C. Douglas Floyd, *Three Faces of Supplemental Jurisdiction After the Demise of* United Mine Workers v. Gibbs, 60 FLA. L. REV. 277, 282, 310–11 (2008); Matasar, *supra* note 259, at 1478–79.

[261] *See* 547 U.S. 332, 351–53 (2006).

constitutional law. In other words, Article III could be interpreted to permit supplemental standing for a broad range of claims—perhaps based on a logical-relationship or legal-relationship standard. And category-based limitations on supplemental standing could then be imposed by statute. This approach would have the virtue of making standing doctrine more democratic by shifting control to Congress and away from the courts. Congress could then make the same sort of choice for supplemental standing that it has made for supplemental jurisdiction[262]—whether to implement supplemental standing to the full extent allowed by the Constitution, or whether to impose additional limitations on the exercise of supplemental standing.

So which additional categories of cases or questions might properly fall within a category-based approach to supplemental standing, either as a statutory or constitutional matter? I conclude by offering two potential examples. First, shifting to a supplemental-standing approach appears to be justified when a plaintiff seeks multiple remedies for the same constitutional violation, but does not have standing for all of those remedies. In other words, the Court erred in *Lyons* when it held that plaintiffs must have standing for every remedy they seek.[263] That requirement is counterproductive from a separation of powers perspective because courts can often protect the separation of powers more effectively through flexible remedial doctrines, rather than blunt jurisdictional doctrines.[264] Using standing requirements to limit the availability of particular remedies can also harm the separation of powers by narrowing Congress's authority to decide whether to provide particular remedies for particular wrongs.[265] A supplemental-standing approach for remedies could address these concerns and better preserve the separation of powers.[266]

Second, and more tentatively, supplemental standing might be justified for constitutional claims that have important separation of powers implications, and that no plaintiff would ever have standing to raise. The Supreme Court has often held that standing doctrine requires dismissal of a claim even if no plaintiff would conceivably have standing to raise it.[267] But scholars have recognized that the separation of powers and the law-declaring function of the federal courts are diminished when an important

---

[262] *See* 28 U.S.C. § 1367 (2012) (authorizing supplemental jurisdiction to the full extent allowed by the Constitution in federal-question cases, but imposing limitations in diversity cases).

[263] City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

[264] *See* Fallon, *supra* note 148, at 43–47.

[265] *See id.* at 30.

[266] *See id.* at 22 n.115 (appearing to endorse such an approach by suggesting that requests for different remedies arising from the same operative facts would be part of the same Article III case); Little, *supra* note 148, at 973 & n.182 (similar).

[267] *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1154 (2013).

constitutional question can never be decided.[268] Supplemental standing could help to address this problem by providing a basis for ruling on these types of claims without doing away with standing doctrine altogether.

For example, in *Schlesinger v. Reservists Committee to Stop the War*, the Court confronted a question laden with separation of powers consequences: whether members of Congress could constitutionally hold memberships in the Armed Forces Reserves.[269] The Court dismissed the case for lack of standing, even though it acknowledged that no plaintiff was likely to have standing to raise this question.[270] A supplemental-standing approach could provide an avenue for a ruling on the merits of such a claim. Under this approach, if a plaintiff had standing for some other claim, and if the claims were sufficiently related to be joined in a single case under the rules of procedure, there would be no Article III impediment to a ruling on the constitutional claim. The basis for this approach would be that a ruling on the merits would ultimately be more faithful to the separation of powers than rejecting the claim as a threshold matter. But this approach would still impose principled limitations on the power of the federal courts to decide constitutional questions in the absence of standing.

In any event, the aim of this Article is not to identify all of the problems with the claim-specific approach to standing, or to develop a complete theory of supplemental standing. Rather, it is to explain that the Court was wrong to adopt claim-specific standing as a categorical matter, and that the concept of supplemental standing should be adopted in at least some cases, including cases presenting severability questions.

## CONCLUSION

This Article has argued that the Supreme Court's rationales for a claim-specific approach to standing cannot withstand scrutiny in the context of severability doctrine. Well-established practice for severability already reflects the concept of supplemental standing, and is justified in doing so. In fact, for these reasons, it is unclear whether any current members of the Court would dispute that some form of supplemental standing is necessary in severability cases. The Court did purport to rule out supplemental standing in *Cuno*. But all nine Justices appear to have embraced supplemental standing for severability, at least implicitly, in *NFIB*. The five Justices who held that the ACA was severable did not even mention the possibility that standing principles might limit their consideration of severability. Absent a supplemental-standing approach, however, at least some deliberation on standing would have been

[268] *See, e.g.*, Re, *supra* note 11, at 1200 & n. 49, 1205.

[269] 418 U.S. 208, 209 (1974).

[270] *See id.* at 227.

necessary. And the dissent flatly rejected the limitations that the claim-specific approach to standing would impose on severability rulings. It relied on arguments that were, at bottom, arguments for a theory of supplemental standing that would always allow a severability ruling in the same case as a constitutional ruling.

Thus, the entire Court has effectively invited the adoption of supplemental standing for severability. This Article suggests that the Court should be taken up on that invitation. But it also suggests that severability is not merely a special case, and that supplemental standing should apply in other contexts as well. Indeed, as *NFIB* reflects, the concept of supplemental standing should ultimately have appeal for both proponents and skeptics of current standing doctrine. That is because supplemental standing would draw on the bedrock principles that motivate standing doctrine in the first place. Yet it would also have the virtues of making the doctrine more flexible, enabling courts to decide important questions that they could not otherwise reach, and advancing democratic principles by placing more responsibility with Congress to decide which claims belong in federal court.