SEVERABILITY DOCTRINE: HOW MUCH OF A STATUTE SHOULD FEDERAL COURTS INVALIDATE?

KENNETH A. KLUKOWSKI*

I. INTRODUCTION 3
II. DEVELOPMENT OF SEVERABILITY DOCTRINE 10
A. *Origins of Severability Doctrine* 11
B. *Evolution of Severability Doctrine* 18
1. Severability Milestones in Supreme Court Case Law 20
a. *Champlin* 21
b. *Alaska Airlines* 23
c. *Ayotte* 26
d. *Free Enterprise* 27
2. Related Doctrinal Developments: Overbreadth, Facial, and As-Applied Challenges 30
C. *Severability Consistent with Principled Judicial Inquiries* 35
III. SEVERABILITY DOCTRINE IS BASED ON THREE SEPARATION-OF-POWERS PRINCIPLES 39
A. *Principle 1: Preference for Practical Minimalism* 40
B. *Principle 2: Courts Cannot Rewrite Statutes* 43
C. *Principle 3: Remedies Should be Consistent with Legislative Intent* 47
IV. MODERN SEVERABILITY TEST IS A TWO-STEP ANALYSIS 52
A. *The Modern Test from* Free Enterprise 53

* Research Fellow, Liberty University School of Law. Fellow and Senior Legal Analyst, American Civil Rights Union. B.B.A. 1998, University of Notre Dame; J.D. 2008, George Mason University. The author would like to thank Christopher M. Gacek, William H. Hurd, Gregory G. Katsas, Amanda J. Klukowski, Nelson Lund, John C. Nagle, Hiram S. Sasser, III, and also the Alliance Defense Fund. Any insights are doubtless the result of their input. Any errors are the author's alone. Much of the research contained herein was presented in briefs authored on behalf of the Family Research Council and Members of the United States Congress in healthcare litigation. This Article is dedicated to Remington Xavier Klukowski.

1. *Free Enterprise* Step One: Functionality 54
2. *Free Enterprise* Step Two: Legislative Intent and the Legislative Bargain 56
   a. *Ascertaining Legislative Intent* 57
   b. *Adhering to the Legislative Bargain* 65
   c. *Provisions of Major Significance are Nonseverable*... 67

B. *Various Types of Severability* 68
1. Total Versus Partial Severability.......................... 68
   a. *Defining "Provision"*... 73
   b. *Definitional Challenge Endemic to All Human Communication in Reducing Thoughts to Words*... 79
2. Multiprovisional Severability............................... 80

V. SEVERABILITY CLAUSE DICTATES WHETHER PRESUMPTION OF SEVERABILITY EXISTS 82

A. *No Presumption of Severability without a Severability Clause* 85

B. *Extratextual Severability Clauses*.................................... 95

C. *Congruous with Other Areas of Law*.............................. 97
1. *Chevron* Deference Versus *Skidmore* Deference ... 97
2. Preemption Doctrine Considers Overall Legislative Scheme.. 100

VI. SEVERABILITY AS DOCTRINE OF JUDICIAL RESTRAINT 102

A. *Severability is Premised on Judicial Restraint* 103

B. *Justices Rehnquist and White: Example of Judicial Restraint Requiring Complete Invalidation*................... 105

VII. CONCLUSION 109

I. INTRODUCTION

After decades of being a backburner topic, severability doctrine has become a major issue in the federal courts. In 2010, the Supreme Court significantly revised governing doctrine when striking down part of the politically-charged Sarbanes-Oxley Act.[1] Among other current cases raising severability challenges to various statutes, none is more significant than the constitutional challenges to the Patient Protection and Affordable Care Act (PPACA or ACA).[2] As of the time of this writing, one of the federal courts invalidating a central provision of the ACA also held the provision nonseverable, striking down this massive statute in its entirety.[3] However the Supreme Court ends up ruling on these high-profile cases, the contest is of such public prominence—indeed, the healthcare litigation is nothing short of historic, with profound constitutional implications regardless of the outcome—that henceforth severability's importance may be significantly elevated. The existing doctrine is not quite as clear as it has seemed to many courts and commentators, and Congress is likely to become more conscious of the effects that severability clauses and their absence may have, and may even consider including nonseverability clauses in some statutes.

Each time a court strikes down a statutory provision, it must determine whether to invalidate only the unconstitutional provision, or instead whether to invalidate the statute in its entirety or in substantial part. Severability is the doctrine of determining whether part or all of a statute can survive without the invalid provision. Although courts confront on a routine

1. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151, 3161–64 (2010).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). This statute is often referred to as "Obamacare."

3. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1305–06 (N.D. Fla. 2011), *aff'd in part and rev'd in part*, 648 F.3d 1235, 1328 (11th Cir. 2011) (affirming the judgment regarding two provisions but reversing with regard to severability), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400). This litigation is ongoing as of this writing.

basis the decision of how much of a statute to nullify, the doctrine governing this intimidating exercise of judicial power is frequently misapplied.

Striking down an inherently invalid provision is the floor of judicial action, not the ceiling. The general rule is that a federal court should not invalidate more of a statute than necessary.[4] Yet the judiciary's proper role goes beyond simply identifying and neutralizing unconstitutional provisions. Courts must determine the impact of excising the defective provision on the remaining statute to determine whether a broader remedy is appropriate.

The question of severability is ubiquitous, arising whenever a court invalidates a single provision of a multiprovisional statute.[5] "Many laws are unconstitutional, but few are entirely so."[6] Few suggest that statutes should uniformly be stricken down entirely whenever a single clause is found constitutionally infirm. Such an approach would produce severe consequences as Congress passes increasingly large and complex statutes. Severability doctrine is the system showcasing the federal judiciary's ongoing attempts to grapple with this challenge.

The Supreme Court decided its first severability case in 1876,[7] which quickly evolved into asking if Congress would have enacted the challenged statute had it known the invalid provision at issue would be discarded.[8] The Court shortly thereafter added that provisions are nonseverable when retaining the statute without them would create effects not contemplated or intended by Congress.[9] After a half-century of developing the concepts explored in this Article, the Court declared the first clear severability test in 1932.[10] The Court then revised this test in 1987, where in *Alaska Airlines v. Brock* the Court added, "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner*

4. Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987) (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)).

5. *See* John C. Nagle, *Severability*, 72 N.C. L. REV. 203, 204 (1993).

6. Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 739 (2010).

7. *See* United States v. Reese, 92 U.S. 214, 221 (1876).

8. *See* Trade-Mark Cases, 100 U.S. 82, 98–99 (1879).

9. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902).

10. *See* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932) ("The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

consistent with the intent of Congress."[11] Then in 2006 the Supreme Court expounded three principles as an underlying rationale to inform severability inquiries.[12]

Most recently, the Supreme Court synthesized decades of cases to restate severability doctrine in the 2010 case *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[13] This case should be construed as creating a two-step test combining the previous test with various major severability cases. Under *Free Enterprise* Step One, a reviewing court must determine whether all of the remaining provisions of the statute are still fully functional without the constitutionally infirm provision.[14] If so, a court then asks under *Free Enterprise* Step Two whether Congress would be satisfied with the remaining statute, invoking a century of case law concerning whether Congress would have passed the abridged statute.[15]

The Court did not devote adequate space to explain this framework, although this lack of discussion may be partially due to the fact that the Court was not overruling prior precedent, so earlier cases could be studied at length for additional authority. Even so, it is unhelpful that Chief Justice Roberts did not specifically cite and reaffirm *Alaska Airlines*' seminal test of whether the statute still functions in the *manner* Congress intended, since as this Article demonstrates this holding of *Alaska Airlines* is still good law. But *Free Enterprise*'s synthesis is now the current framework, so a scholarly exploration of modern severability doctrine should prove useful.

It is ironic that *Free Enterprise*'s articulation is hardly new; perhaps the foremost law review article on severability—Robert Stern's 1937 Article in *Harvard Law Review*—framed the severability inquiry in precisely that fashion.[16] It just took the

11. 480 U.S. at 685 (emphasis in original).

12. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–30 (2006) ("First, we try not to nullify more of a legislature's work than is necessary . . . . Second . . . we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it. Third . . . a court cannot use its remedial powers to circumvent the intent of the legislature.") (internal citations and quotations omitted).

13. 130 S. Ct. 3138 (2010).

14. *Id.* at 3161–62.

15. *Id.*

16. *See* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 76 (1937) (stating that a provision is severable "(1) if the valid provisions or applications are capable of being given legal effect standing alone, and (2)

Supreme Court 73 years to catch up (without citing Stern, incidentally). But even Stern does not deserve too much credit, as part of the *Free Enterprise* Court's formulation merely revived a test the Court had previously invoked as far back as 1894.[17]

Conceptually, severability can become an issue in various types of constitutional challenges.[18] As the term is most commonly used it refers to instances in which one provision in a statute is found invalid.[19] As seen in this Article, although severability *per se* consists of determining which otherwise-valid provisions must be nullified alongside an invalid provision, the underlying concepts apply to related areas of remedial actions where courts are engaged in judicial review. It is an intrinsic element of

---

if the legislature would have intended them to stand with the invalid provisions stricken out").

17. *See*:

> It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out, if that which is left is fully operative as a law, unless it is evident, from a consideration of all the sections, that the legislature would not have enacted that which is within, independently of that beyond, its power.

Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395 (1894).

18. One author compiled these various types of issues, writing that:

> [S]everability becomes an issue when: (1) a party challenges an entire statute, arguing that if any provision of the statute is unconstitutional and nonseverable, the rest of the statute is ineffective; (2) a party argues that a statutory provision is invalid because it is nonseverable from another, purportedly unconstitutional provision of the statute; (3) a *party* contends that an application of a statutory provision is invalid because it is nonseverable from other, unconstitutional applications of the statute; (4) a party argues that a statute is nonseverable, and therefore, another party's constitutional challenge to a provision of the statute would preclude that party from receiving any relief from other provisions of the statute; and (5) a party challenges a statute as being either constitutionally underinclusive or overinclusive. This list is not exclusive, but it depicts some of the situations in which severability becomes an issue in a case.

Nagle, *supra* note 5, at 208–09 (emphasis added) (internal footnotes omitted).

19. This Article discusses severability in evaluating statutes because it is a doctrine of statutory interpretation. Nevertheless, courts also apply a version of this doctrine to substatutory positive law. Courts have conducted severability analyses of regulations. *See, e.g.*, K Mart Corp., v. Cartier, Inc., 486 U.S. 281, 294–95 (1988); Davis Cnty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA, 108 F.3d 1454, 1459–60 (D.C. Cir. 1997). Courts have also employed this doctrine in evaluating executive orders. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191–95 (1999); *In re* Reyes, 910 F.2d 611, 613–14 (9th Cir. 1990).

As seen throughout the Article, ascertaining Congress's purpose and intent is central to severability. Thus positive law inferior to statutes—such as regulations or executive orders—are categorically subordinate to congressional will, so the method of applying severability doctrine is substantially different than when examining a statute. Nonetheless, these cases show that courts on occasion find rules and principles used in severability analysis useful in evaluating these Executive Branch enactments.

judicial review that whenever a provision in a statute is found invalid, a court must fashion an appropriate remedy. A statutory provision is not an enactment; it is only one part of an enactment. Few would suggest that a court should invalidate an entire statute every time any aspect of the statute is unconstitutional.

Severability clauses in statutes began appearing late in the 1800s, and became commonplace by 1910.[20] Congress began including severability declarations as saving clauses in response to the judiciary's willingness since the 1870s to regularly invalidate statutes in their entirety due to a single faulty provision.[21] These clauses initially proved quite effective.[22] In 1914, after noting that part of a statute might be invalid, the Court rejected the argument that the entire statute should be struck down by noting Congress's intent expressed in the statute's severability clause, and holding that if the challenged provisions were void, they were nonetheless severable.[23]

Severability is often contested only when there is no severability clause. As the leading authority on severability in the early twentieth century explained, "separability clauses are thus now significant only because of their absence. Like articles of clothing, if they are present little attention is paid to them, but if they are absent they may be missed."[24] Still, the presence or absence of a severability clause is but one factor of the court's inquiry; it is not dispositive.[25]

Yet as explained in this Article, such a clause is significant. Including one creates a presumption of severability, but—contrary to what some scholars argue—without a severability

20. Nagle, *supra* note 5, at 222.

21. *See* Comment on Recent Cases, *Constitutional Law: Partial Invalidity of Statutes: Power of Legislature to Alter General Rules of Construction*, 2 CAL. L. REV. 319, 319–20 (1914) (noting the inclusion of severability clauses in several statutes).

22. *See* Nagle, *supra*, note 5, at 222 n.97 ("The earliest legislative statements that statutory provisions should be construed as being severable were taken at face value by the courts." (citing Ohio Tax Cases, 232 U.S. 576, 594 (1914); Yee Gee v. City & Cnty. of S.F., 235 F. 757, 768–69 (N.D. Cal. 1916); Standard Home Co. v. Davis, 217 F. 904, 916 (E.D. Ark. 1914); State *ex rel* Clarke v. Carter, 56 So. 974, 977 (Ala. 1911); *In re* Opinion of Justices, 123 P. 660, 662 (Colo. 1912) (en banc); Michigan Cent. R.R. v. Murphy, 120 N.W. 1073, 1078 (Mich. 1909); Saari v. Gleason, 148 N.W. 293, 295–96 (Minn. 1914); United N.J. R.R. & Canal Co. v. Parker, 69 A. 239, 245 (N.J. 1908); State v. Clausen, 117 P. 1101, 1114 (Wash. 1911); Borgnis v. Falk Co., 133 N.W. 209, 218 (Wis. 1911)).

23. *Ohio Tax Cases*, 232 U.S. at 594.

24. Stern, *supra* note 16, at 122.

25. United States v. Jackson, 390 U.S. 570, 585 n.27 (1968).

clause there is such a presumption only in the lower courts, not the Supreme Court. Absent an express clause, courts should instead freely search for indicia of congressional intent either for or against severing the invalid provision to salvage part or all of the remaining statute.

The synthesis that emerges from modern severability cases is that an invalid provision cannot be severed if it is a major component of the original legislative bargain Congress embodied in the statute. A provision is such an integral provision if, with an eye to the overall purposes of the statute, the truncated statute no longer serves its general purpose because it cannot function in the manner Congress intended without the unenforceable provision. If so, then a court is to conclude that Congress would likely not have enacted the remaining statute in its resulting condition and invalidate the statute in its entirety, as retaining the residual provisions would essentially rewrite the statute into something Congress did not contemplate. Severability ultimately turns on determining the significance of the invalid provision to the overall statutory scheme Congress intended to create; insignificant or incidental provisions are severable, but central provisions[26]—those of major significance—are not.

In previous years one professor noted that some authorities criticize severability doctrine as too malleable,[27] while others consider it too rigid.[28] Either way, some form of this doctrine is essential.[29] As a normative matter, if conceptualized as a two-step inquiry, after *Free Enterprise* it is possible that the new state of severability doctrine strikes the proper balance for a reliably

26. *See* Lars Noah, Essay, *The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference?*, 56 WASH. & LEE L. REV. 235, 237 (1999) ("In some instances, of course, a statute cannot or should not remain in force after a court has invalidated one of its central provisions . . . .").

27. Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 41 (2005) (citing Eugene D. Cross, Comment, *Legislative Veto Provisions and Severability Analysis: A Reexamination*, 30 ST. LOUIS U. L.J. 537, 550–51 (1986); Steven W. Pelak, Note, *The Severability of Legislative Veto Provisions: An Examination of the Congressional Budget and Impoundment Control Act of 1974*, 17 U. MICH. J.L. REFORM 743, 752–53 (1984); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1183 (1984)).

28. *Id.* (citing Glenn C. Smith, *From Unnecessary Surgery to Plastic Surgery: A New Approach to Legislative Veto Severability Cases*, 24 HARV. J. ON LEGIS. 397, 477 (1987)).

29. *See* Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007) ("[N]o workable system of judicial review could function without a large role for severability.").

predictable test that can be applied harmoniously with other interpretive theories.

It is important for constitutional government that courts have an effective severability doctrine to conduct judicial review in a fashion that does not absolve the political branches of their responsibilities. Severability should never provide political cover for Congress. As the Supreme Court explained in its very first severability case:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to [eliminate unconstitutional aspects]. This would, to some extent, substitute the judicial for the legislative department of government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.
>
> To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.[30]

An effective severability framework is thus one in which Congress skillfully crafts legislation that elected leaders are willing to stand by. This properly narrows the courts' role in judicial review, not routinely sorting through myriad provisions and striking down multiple sections, effectively rewriting statutes and changing the public policy approved by the people's representatives. Such a framework assigns significant force to a severability clause or its opposite, a nonseverability clause, while giving courts more discretion and latitude when Congress deigns not to include any provision expressing its intent on severing invalid provisions.

Part II of this Article surveys the origin and early development of severability doctrine, discussing its four watershed cases and demonstrating how their underlying concepts relate to other areas of remedying statutory invalidities. Part III explores the three principles underlying severability doctrine unanimously

30. United States v. Reese, 92 U.S. 214, 221 (1876).

embraced by the Supreme Court in 2006: minimalism, preserving statutes, and vindicating congressional intent. Part IV sets forth the modern restatement of the doctrine, the two-step test from *Free Enterprise* that first examines functionality and second determines whether a shortened statute would still fulfill congressional intent consistent with the legislative bargain. It also examines two types of severability (total and partial) and the antecedent challenge of how to define a statutory provision. Part V considers the role of a severability clause in dictating whether a presumption of severability exists for a given statute, and also of overcoming the presumption when it exists. Part V also discusses the applicability of a clause not found in the original enactment, and how the current approach to severability is congruent with other areas of statutory interpretation. Then, Part VI explains the proper use of severability as a doctrine of judicial restraint.

II. Development of Severability Doctrine

Severability has its roots in the case law of the nineteenth century. It is by necessity judge-made doctrine, as it is a system of statutory interpretation for devising judicial remedies when part of a statute is found constitutionally infirm. As such, it is an unavoidable aspect of the power to "say what the law is."[31] When part of a statute is invalid, what then remains of the law?

Like many legal doctrines, severability has had a long evolution. In part due to the fact that it does not carry any inherent political overtones—it is the same when the challenged statute is a gun-control law or an abortion restriction as it is when it is a petroleum extraction program or an airline regulatory measure—severability doctrine has developed in a logical and coherent fashion. Newer precedents smoothly build on prior precedents, and in those few instances where a later case displaces an earlier one, each has been a well-reasoned and noncontroversial modification.[32] Consequently, a chronological survey of severability case law provides a degree of clear and reliable direction on how and when to excise invalid provisions

31. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

32. Severability varies in federal court depending on whether the challenged statute is federal versus state, since a federal court exercising diversity jurisdiction applies the severability doctrine of the forum state. Stern, *supra* note 16, at 89–94. Thus severability is substantive—rather than procedural—law under the *Erie* doctrine. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938).

from statutes, despite the fact that severability is relatively esoteric as an interpretive tool.

A. *Origins of Severability Doctrine*

The doctrine governing severability in American statutory interpretation finds its roots in the nineteenth century. The first suggestions that a multiprovisional statute could be invalidated either partially or *in toto* were made in 1803 and 1829. Thereafter the Supreme Court began developing a doctrine effectuating this concept in a trio of cases in 1876, 1877, and 1879. A coherent inquiry emerged from these cases, though it would be twenty more years before severability became a fully developed doctrine capable of objective and predictable employment.

Courts seemed to assume *sub silentio* that unconstitutional provisions of statutes could be excised from the whole. "[E]very holding of partial unconstitutionality that does not lead to total invalidation necessarily rests on severability, implicitly if not explicitly."[33] It is unclear whether this was originally considered a general rule versus a categorical rule. It was more than sixty years after the adoption of the Constitution before any court is known to have invalidated an entire statute on account of a single provision, and even then it was a state court, not a federal court.[34]

Prior to that, the first instance of a federal court striking down a statute at all was in the iconic case of *Marbury v. Madison*.[35] The Supreme Court never discussed the issue of severability, instead striking down the provision of the Judiciary Act of 1789 authorizing William Marbury to file an original action in the Supreme Court.[36] Marbury sought a writ of mandamus to compel then-Secretary of State James Madison to deliver Marbury's judicial commission to effectuate John Adams's appointment of Marbury as a justice of the peace in the D.C. local courts.[37] The Court never discussed the possibility of

33. Walsh, *supra* note 6, at 741.
34. *See* Nagle, *supra* note 5, at 212.
35. 5 U.S. (1 Cranch) 137 (1803).
36. *Id.* at 173–76.
37. *See id.* at 167–68 (describing the facts of the case).

invalidating the entire statute.[38] In a modern case such a lack of discussion would not be surprising, since *Marbury* was decided on jurisdictional grounds by holding that the provision authorizing an original suit in the Supreme Court purported to confer jurisdiction where the Constitution denied such jurisdiction to the Court.[39] Subsequent Supreme Court precedent makes clear that jurisdictional issues must be resolved as threshold issues before addressing the merits of a case,[40] and where jurisdiction is lacking a court's power is limited to "announcing the fact and dismissing the cause."[41] A significant portion of *Marbury* is *dicta*,[42] such as Chief Justice John Marshall opining on executive privilege doctrine,[43] the canon against

38. This is fortuitous given that the Judiciary Act was the organizing statute of the entire federal judiciary at that point, so wholesale invalidation could have wrought chaos in the federal governmental system.

39. *Marbury,* 5 U.S. (1 Cranch) at 175–76. As seen in these pages of the opinion, the Judiciary Act of 1789 permitted an aggrieved person in William Marbury's situation to file an initial action with the Supreme Court, petitioning the Court to issue a writ of mandamus which under the facts of this case would have been a mandamus order issued to Secretary James Madison, requiring him to deliver Marbury's judicial commission to him so that Marbury could take his seat on the municipal bench.

40. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006). The reason jurisdiction must be addressed first is because federal courts are courts of limited jurisdiction, and so a court begins with the presumption that a lawsuit brought before it is beyond this limited jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288–89 (1938). It is for this reason that the party bringing an issue before a court bears the burden of establishing that the court has jurisdiction, *Cuno*, 547 U.S. at 342, as the presumption against jurisdiction must be overcome before a suit can proceed.

41. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869)).

42. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 6–8. Despite the fact that the authorities cited above indicate the Court should have confined its discussion to its lack of jurisdiction and the need to dismiss the case (invalidating the challenged statutory provision in the process), Chief Justice Marshall nonetheless opined on various constitutional matters that were not in any way necessary to reaching the conclusion that the Court must throw out William Marbury's suit.

43. *Marbury*, 5 U.S. (1 Cranch) at 144–45 (dictum). This doctrine allows for the executive branch to withhold specific information from Congress, even against congressional subpoenas. Congress is constitutionally entitled to information to correctly perform its legislative and oversight responsibilities. McGrain v. Daugherty, 273 U.S. 135, 175 (1927). However, the Constitution also recognizes that the President must be able to maintain secrecy regarding certain information to properly execute his duties as Commander-in-Chief and head of state. United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1974); *see also In re* Sealed Case, 121 F.3d 729, 570 (D.C. Cir. 1997); Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993). Executive privilege balances the tension between these two constitutional forces. *See* United States v. Nixon, 418 U.S. 683, 706–11 (1974). This doctrine remains an underdeveloped doctrine, due in part to the fact that it almost always arises only in politically-charged contexts, concerning conflicts between political actors that can change as a result of each congressional and presidential election. *See generally* Kenneth A. Klukowski, *Making*

superfluities,[44] and the political question doctrine.[45] Yet Marshall does not discuss how much of the statute needed to be invalidated as a result of the flawed provision that granted William Marbury his right of action, instead implicitly finding the flawed provision severable by striking down that provision while leaving the remainder intact. This implication was

---

Executive Privilege Work: A Multi-Factor Test in an Age of Czars and Congressional Oversight, 59 CLEV. ST. L. REV. 31 (2011).

44. *Marbury*, 5 U.S. (1 Cranch) at 174 (dictum). This rule that a law's text should be construed such that every word is given its own distinct meaning if possible may have originated as *dictum* involving constitutional interpretation, but has long since been elevated to a holding for both constitutional provisions and statutory provisions. *See* Hibbs v. Winn, 542 U.S. 88, 101 (2004); United States v. Menasche, 348 U.S. 528, 538–39 (1955). This general rule is also called the canon against surplusage, *see* Begay v. United States, 553 U.S. 137, 153 (2008); Lamie v. United States Tr., 540 U.S. 526, 536 (2004), the canon against superfluity, *see* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2248 (2011), or the canon of antisuperfluousness, *see* Corley v. United States, 129 S. Ct. 1558, 1566 & n.5 (2009).

Under this canon, a court has a "duty 'to give effect, if possible, to every clause and word of a statute.'" *Menasche*, 348 U.S. at 538–39 (quoting Montclair v. Ramsdell, 107 U.S. 147 (1883)); *accord* Moskal v. United States, 498 U.S. 103, 109 (1990). Even a single word must be given meaningful effect, as a failure to give it any effect, or even to assign an effect devoid of practical import, would render it "insignificant, if not wholly superfluous." Duncan v. Walker, 533 U.S. 167, 174 (2001). Thus, "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Mkt. Co. v. Hoffman, 101 U.S. 112, 115–16 (1879). Courts are "reluctan[t] to treat statutory terms as surplusage" in any context. Babbit v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995); *see also* Ratzlaf v. United States, 510 U.S. 135, 140 (1994). Courts still routinely employ this canon in everyday adjudication. *See, e.g.*, Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988) (cautioning "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"); Jones v. Astrue, 650 F.3d 772, 775 (D.C. Cir. 2011).

It should nonetheless also be noted that this rule is not absolute, in that courts can "reject words 'as surplusage' if 'inadvertently inserted or repugnant to the rest of the statute . . . .'" Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (quoting KARL N. LLEWELLYN, THE COMMON LAW TRADITION 525 (1960)). There is another caveat as well. "The rule applies only if verbosity and prolixity can be eliminated by giving the offending passage, or if the remainder of the text, a competing interpretation." Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1078 (2011). This *dictum* from *Marbury* has long since become a "cardinal principle of statutory construction." Williams v. Taylor, 529 U.S. 362, 404 (2000).

45. *Marbury*, 5 U.S. (1 Cranch) at 169–70 (dictum). The Supreme Court has subsequently developed the political question doctrine into a multifactor inquiry. *See*:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind for clearly nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . .

Baker v. Carr, 369 U.S. 186, 217 (1962); *but see* Nixon v. United States, 506 U.S. 224, 228 (1993) (suggesting that a textual commitment is the predominant factor in determining whether the political-question doctrine applies).

subsequently noted as significant both by the Supreme Court and by federal trial courts,[46] presaging development of an explicit rule.

The first Supreme Court statement beginning to expressly lay the foundation for severability doctrine came in 1829, also from Chief Justice Marshall.[47] In the conclusion of *Bank of Hamilton v. Lessee of Dudley*, Marshall wrote for the Court:

> If any part of [a statute] be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the [United States] . . . . The question of whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect.[48]

Bank of Hamilton pronounced what would subsequently become the general rule of severability, that unconstitutional provisions in statutes can be separated from the remainder while leaving the unoffending provisions to continue in effect. Contemporaneously, various state supreme courts began suggesting the negative corollary of *Bank of Hamilton*, that being the possibility of invalidating otherwise-constitutional statutory provisions because these provisions could not be uncoupled from an unconstitutional provision.[49]

The first known case to formally announce and employ the exception to the general rule was a Massachusetts case from 1854.[50] In it, the state's Supreme Judicial Court restated the general rule "that the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others."[51] The court then went on to explain:

46. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 201 (1819) (discussing removing a section of bankruptcy law); United States v. The William, 28 F. Cas. 614, 618 n.1 (D. Mass. 1808) (No. 16,700) (supporting the general doctrine of severability); Glenn v. Humphreys, 10 F. Cas. 471, 472 (C.C.E.D. Pa. 1823) (No. 5,480) (stating that an unconstitutional portion of law does not make the entire law unconstitutional). *Accord* Stern, *supra* note 16, at 79 n.9.

47. Nagle, *supra* note 5, at 212 & n.47.

48. 27 U.S. (2 Pet.) 492, 526 (1829).

49. *See* Clark v. Ellis, 2 Blackf. 8, 10 (Ind. 1826) (stating that an unconstitutionality of a provision does not affect the constitutional provisions of the act); Campbell v. Miss. Union Bank, 7 Miss. (6 Howard) 625, 677 (1842) (holding that an unconstitutional act of a bank's charter does not void the remainder of the charter); Exch. Bank v. Hines, 3 Ohio St. 1, 34 (1853) (stating that if an independent provision that is not essential is unconstitutional, it may be treated as void and the rest of the act is enforceable).

50. Nagle, *supra* note 5, at 211.

51. Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 98 (1854).

> Such act has all the forms of law, and has been passed and sanctioned by the duly constituted legislative department of the government; and if any part is unconstitutional, it is because it is not within the scope of legitimate legislative authority to pass it. Yet other parts of the same act may not be obnoxious to the same objection, and therefore have the full force of law, in the same manner as if these several enactments had been made by different statutes. But this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other . . . as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.[52]

This invocation and consideration of legislative intent in *Warren v. Mayor of Charlestown* became the basis of nascent severability doctrine,[53] and states began adopting this rule shortly thereafter.[54] The court then concluded that the nature of the law containing the challenged provision was of such a nature "that if this act be unconstitutional at all it is not in any separate and independent enactments, but in the entire scope and purpose of the act."[55] Holding one challenged provision invalid, the Massachusetts court then struck down the statute in its entirety.[56]

52. *Id.* at 98–99.

53. Nagle, *supra* note 5, at 213.

54. *See, e.g.*, Lathrop v. Mills, 19 Cal. 513, 530 (1861) (stating that if constitutional provisions are disconnected from the unconstitutional provisions of the act such that the legislature appears to have indented that the constitutional portions of the act be enforced despite the invalidity of the unconstitutional portions, the constitutional provisions are valid); Campau v. City of Detroit, 14 Mich. 276, 285 (1866) (invalidating an entire statute concerning jury duty due to an unconstitutional jury-composition provision); Gordon v. Cornes, 47 N.Y. 608, 616–17 (1872) (upholding an act regarding school funding because the connection between the constitutional and unconstitutional parts of an act are not so connected as to justify the assumption that the legislature did not intend for the constitutional parts of the act to go into effect without the unconstitutional parts of the act.); State *ex rel.* Huston v. Comm'rs of Perry Cnty., 5 Ohio St. 497, 506–07 (1856) (invalidating a local-government statute due to an unconstitutional provision penalizing a county for the location of its seat); Slauson v. City of Racine, 13 Wis. 398, 403–05 (1861) (invalidating an annexation statute due to an unconstitutional taxation provision).

55. *Warren*, 68 Mass. (2 Gray) at 99–100.

56. *See id.* at 101.

The first instance where the Supreme Court of the United States followed a similar approach in striking down a statute *in toto* due to one invalid part appears to be *United States v. Reese*,[57] marking the first in a trio of cases inaugurating severability case law from the High Court. The Court decided *Reese* in 1876, wherein the Court began by holding unconstitutional two sections of a federal statute making it a crime for an election official to refuse allowing a person who is entitled to vote from casting their ballot.[58] In an opinion written by Chief Justice Waite, the Court invalidated this provision because the Fifteenth Amendment—which this statute purportedly was pursuant to—only concerns disallowing discrimination on account of race or former slave status,[59] not any other reasons for which a person might be disenfranchised. The Court then went on to strike down the whole statute, holding that these two sections could not be separated from the other sections.[60] Thus the whole law fell on account of its two unconstitutional components.[61]

57. 92 U.S. 214 (1876).

58. *Id.* at 218–20.

59. *Id.* at 217–18; *see* U.S. CONST. amend. XV.

60. *Reese*, 92 U.S. at 221.

61. It should be noted that the Court's language here includes echoes of the rule of lenity. Under that rule, ambiguities and uncertainties in a criminal law are construed in favor of the defendant. United States v. Granderson, 511 U.S. 39, 54 (1994); Muscarello v. United States, 524 U.S. 125, 139 (1998); Bifulco v. United States, 447 U.S. 381, 387 (1980). This emanates from an overall principle of America as a free society, wherein the benefit of the doubt goes to individual liberty, and so laws entailing possible deprivation of liberty (i.e., criminal statutes by means of incarceration) are construed narrowly on the margins. This is especially true for federal criminal statutes, because whereas states are governments of general jurisdiction with police power to make laws involving public safety, morality, and social welfare, Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)), the federal government is a government of enumerated powers only, McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). This is part of the rationale under which there is no such thing as federal common law crimes; all federal crimes must arise from an express statutory enactment. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33–34 (1812). This principle surfaced as recently as 2011, where the Supreme Court held that there is no federal common law cause of action for states to sue for alleged injuries resulting from purportedly-manmade global warming. *See* Am. Elec. Power v. Connecticut, 131 S. Ct. 2527, 2539–40 (2011).

The statute in question in *Reese* was a criminal statute, and the Court's severability analysis suggests that the nature of the statute may have been factored into its analysis. *See Reese*, 92 U.S. at 221 ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightly detained, and who should be set at large."). Nonetheless, nothing in the Court's reasoning suggests it is limited to the criminal law, and thus the Court's import is a general part of severability case law when examining statutes of any nature.

Shortly thereafter the Court reinforced the line drawn by this doctrine by finding one statute severable and another nonseverable. One was an 1877 case involving a financial burden imposed by a town on ships accessing its wharf, in which the Court restated the rule as it then existed and then applied it to the case. "Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case."[62] The second case was an examination of a trademark law in 1879,[63] in which the Court reached the opposite result, reasoning "[i]f we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do . . . ."[64] Collectively these cases gave birth to severability doctrine in the federal system.

As seen below in Part II.B., it would be almost six decades before the Supreme Court finally developed severability doctrine in sufficient detail through a series of cases to the level of articulating a full-orbed analytical framework. The dearth of early (pre-1876) federal case law concerning severability need not raise concerns of illegitimacy, however, or of incompatibility with fidelity to constitutional principles consonant with the Framers' design (for those who are concerned with such things). Severability becomes more of an issue as legislation becomes increasingly long and complex, as courts must consider whether a particular invalid provision is a discrete proposition that can be cleanly separated, versus an integral aspect of the legislation. First, while federal courts have always parsed legal texts, federal judges have had an increasingly large role in statutory interpretation as federal enactments have proliferated.[65] Second, the more provisions in a statute, the greater the number of permutations of severability analyses. Recent years have seen legislative behemoths such as the Dodd-Frank Wall Street

62. Packet Co. v. Keokuk, 95 U.S. 80, 89 (1877). Of course, at this early stage of severability doctrine, it begged the question as to whether the "prohibited parts" were severable as that aspect of Supreme Court jurisprudence was not yet well-developed.

63. Trade-Mark Cases, 100 U.S. 82, 98–99 (1879).

64. *Id.* at 99.

65. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 409 (1989).

Reform and Consumer Protection Act,[66] which is over 2,300 pages,[67] and the Patient Protection and Affordable Care Act (PPACA or ACA),[68] which is over 2,700 pages.[69] The greater the number of provisions a statute contains, the greater the number of possible permutations of constitutional challenges for a severability analysis. Since such voluminous leviathans were unknown to the Early Republic[70]—indeed, statutes of any length comprised a much smaller portion of governing law in the eighteenth and nineteenth centuries[71]—there were fewer opportunities to consider whether or how invalidating one part of a statute required invalidating the remainder as well. But since the 1980s, statutory interpretation has been an increasingly important topic for the legal academy.[72]

B. *Evolution of Severability Doctrine*

The cases cited above formed the foundation of severability doctrine. They became so widely known and well-regarded that by 1881, the Supreme Court said in *Allen v. City of Louisiana*, "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that *if* the parts are *wholly* independent of each other, that which is constitutional may stand while that which is unconstitutional will

66. Pub. L. 111-203, 124 Stat. 1376 (2010).

67. MORTG. BANKERS ASS'N, SUMMARY OF MORTGAGE RELATED PROVISIONS OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 11 (2010) http://www.mbaa.org/files/ ResourceCenter/MIRA/MBASummaryofDoddFrank.pdf.

68. Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

69. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1300 (N.D. Fla. 2011) *order clarified,* 780 F. Supp. 2d 1307 (N.D. Fla. 2011) *aff'd in part and rev'd in part sub nom.* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400). On appeal the Eleventh Circuit stated that the statute was approximately 975 pages. 648 F.3d at 1241. The cause for the apparent discrepancy is that the district court was referring to the statute in legislative drafting form, in which the bill is printed in a double-spaced format with a broad font. The circuit court, by contrast, was referring to the statute as it appears in the Statutes at Large, which are single-spaced in a more compressed font.

70. Daniel A. Farber & Philip P. Frickney, Symposium, *In the Shadow of the Legislature: The Common Law in the Age of the New Republic*, 89 MICH. L. REV. 875, 875 (1991).

71. Movsesian, *supra* note 27, at 43 (citing Frank P. Grad, *The Ascendancy of Legislation: Legal Problem Solving in Our Time*, 9 DALHOUSIE L.J. 228, 251–52 (1985)). In fact, the size of the United States Code essentially tripled between the years of 1964 and 1988. *Id.* (citing W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 402 (1992)).

72. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990).

be rejected."[73] The Court then went on to clarify what standard applies if the challenged statutory provision is not "wholly independent" of the other parts, quoting *Warren* from the Massachusetts Supreme Judicial Court cited at length in Part II.A, *supra*, that when provisions are "so mutually connected" as to give rise to the "belief that the legislature intended them as a whole," then "all the provisions which are thus dependent, conditional, or connected must fall" with the invalid provision.[74] The Supreme Court then went on to declare its first version of the test governing severability, the standard being "whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."[75]

Thus began the Supreme Court's jurisprudence on severability. Looking retrospectively just two decades later, the Court declared the principles of severability "well settled,"[76] though unfortunately for his readers Justice John Marshall Harlan did not bother to cite to a single precedent in the Court's discussion of this issue.[77] Helpfully, though, Justice Harlan's opinion for the Court restated the rule as:

> If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.[78]

This case of *Connolly v. Union Sewer Pipe Co.* invalidated part of an Illinois commercial trust statute on equal protection grounds.[79]

73. 103 U.S. 80, 83–84 (1881) (both emphases added).

74. *Id.* at 84 (quoting Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 99 (1854)).

75. *Id.*

76. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902).

77. *See id.* at 564–65.

78. *Id.* at 565.

79. *Id.* at 558–60. The Court's analysis here is consistent with the much-maligned doctrine of Lochner v. New York, 198 U.S. 45 (1905), which was decided only three years thereafter. To the extent that the Court here applied heightened scrutiny in an equal-protection analysis that neither entailed a suspect or quasi-suspect class nor a fundamental right, the Court's holding in the Connolly case was overruled in *West Coast Hotel* and *Carolene Products*. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). *See also* Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963) (abandoning the *Lochner*-era doctrine).

The Court then held that the invalid provision could not be separated from the remainder of the statute because it would defeat the legislature's intent of granting agricultural companies' special protection, and thus struck down the entire law.[80]

From that day to the present, there have been several significant cases that have expanded and refined severability doctrine, though the approach already explored of examining each invalid provision through the prism of legislative intent to enact an overall scheme is consistently maintained throughout. Moreover, this doctrinal progression has been contemporaneous with the development of related doctrines concerning courts decreeing remedies short of total invalidation when some aspect or application of a statute is held to violate the Constitution.

1. Severability Milestones in Supreme Court Case Law

The Supreme Court's decisions in *Allen* and *Connolly* articulate severability doctrine in its nascent state. Although various subsequent cases have included a severability analysis—some having resulted in the offending provisions being severed and others holding that the invalid provisions cannot be severed—four cases in particular have marked significant milestones in this doctrine's evolution.[81]

These came after a series of cases that would have led one to believe that it was a routine matter for a court to invalidate an entire statute on account of a single constitutionally infirm provision. There were at least eleven cases (such as *Connolly*) subsequent to *Allen* in 1881, but prior to the first of these four landmark cases in 1932, in which the Supreme Court held unconstitutional provisions nonseverable, and struck down statutes in whole or substantial part.[82] A survey of case law during

80. *Connolly*, 184 U.S. at 565.

81. Other scholars may well disagree with this particular characterization. There are several cases cited elsewhere in this Article that could reasonably be considered major cases worthy of inclusion on this list of milestones. Conversely, one could reasonably believe two of the cases on this list—*Ayotte* and *Free Enterprise*—to be less important than *Champlin* and *Alaska Airlines*. But each of these four represents distinct developments that must be thoroughly considered in any modern severability analysis, and thus these four form the basis of Part II.B.1.

82. *See* Guinn v. United States, 238 U.S. 347, 366 (1915); Butts v. Merchs. & Miners' Transp. Co., 230 U.S. 126, 135 (1913); Weems v. United States, 217 U.S. 349, 381–82 (1910); Employers' Liability Cases, 207 U.S. 463, 501 (1908); Ill. Cent. R.R. Co. v.

this period shows that it was routine for the Court to strike down otherwise-valid provisions on account of their linkage to invalid provisions.[83] This practice became so widespread that the Court in 1929 held "the general rule is that the unobjectionable part of a statute *cannot* be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall.'"[84] Although presumptions concerning severability will be explored in Part V, case law from this era suggests a presumption *against* severability,[85] one that could only be overcome if a showing of contrary intent could be made. Other courts were more explicit, as illustrated by New Jersey's highest court saying:

> In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.[86]

This was the state of severability doctrine after its first five decades of development.

a. *Champlin*

The first landmark severability case is *Champlin Refining Co. v. Corp. Commission of Oklahoma*.[87] An oil refining company challenged several provisions of an Oklahoma statute, arguing that these provisions violated the Commerce Clause and the Fourteenth Amendment's Due Process and Equal Protection Clauses.[88] In determining whether one of these provisions could

McKendree, 203 U.S. 514, 529 (1906); James v. Bowman, 190 U.S. 127, 140–42 (1903); *Connolly*, 184 U.S. at 564–65; Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 636 (1895); Baldwin v. Franks, 120 U.S. 678, 688 (1887); Spraigue v. Thompson, 118 U.S. 90, 94–95 (1886); Poindexter v. Greenhow (*Virginia Coupon Cases*), 114 U.S. 270, 304 (1884).

83. Stern, *supra* note 16, at 107–08 nn. 138–40 (1937); Alfred Hayes, Jr., *Partial Unconstitutionality with Special Reference to the Corporation Tax*, 11 COLUM. L. REV. 120, 141 (1911).

84. Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929) (emphasis added) (quoting Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (dictum)).

85. *See, e.g.*, Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184–85 (1932) (noting that the common law presumption is that the Legislature intends their acts to be enforced in their entirety).

86. Riccio v. Hoboken, 69 N.J. L. 649, 662 (1903).

87. 286 U.S. 210 (1932).

88. *Id.* at 223–24.

be struck down and then separated from the residue of the oil and gas statute at issue, the Supreme Court declared a general rule of severability that continues to be invoked in 2011:

> The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.[89]

Observing that section 10 of the statute was a severability clause, the Court reasoned that the clause "discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the Legislature would have been satisfied with what remained and that the scheme of regulation derivable from the other provisions would have been enacted without [the invalid provision]."[90] A provision of the statute imposing penalties for violating the Act's section that prohibited committing waste was held void for vagueness under the Due Process Clause.[91] However, the Court severed the unconstitutional provision to preserve the remainder of the statute.

In *Champlin*, the Court promulgated two significant rules for severability inquiries. The first is to articulate severability in a single, albeit complex, sentence, by which to determine whether an invalid provision is severable. "Unless it is evident that the Legislature would not have enacted those provisions that are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[92] Second, *Champlin* represents a repudiation of part of the previous doctrine that there is a presumption against severability when a statute lacks a severability clause.[93]

89. *Id.* at 234–35 (citing Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395–96 (1894); Field v. Clark, 143 U.S. 649, 695–96 (1892)).

90. *Id.* at 235 (citing *Pfost*, 286 U.S. at 165; Crowell v. Benson, 285 U.S. 22, 63 (1932); Williams v. Standard Oil Co., 278 U.S 235, 242 (1929)).

91. *Id.* at 243.

92. *Id.* at 234 (citations omitted).

93. *See*:

> While [a severability clause] is but an aid to interpretation and not an inexorable command, it has the effect of reversing the common law presumption, that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this

b. *Alaska Airlines*

The next major case is *Alaska Airlines, Inc. v. Brock*.[94] This case is often cited as the modern rule on severability doctrine, though as shown later in this Article that statement is no longer completely accurate, insofar as the *Alaska Airlines* rule has subsequently been developed by later cases and now is the heart of the second part in a two-step inquiry. In *Alaska Airlines*, the Court considered whether a legislative-veto provision of the Airline Deregulation Act of 1978[95]—which was undisputedly invalid after *INS v. Chadha*[96]—was severable from the remaining provisions of the Employee Protection Program set up by the other subsections and paragraphs of section 43 of that Act.[97] In a unanimous opinion written by Justice Harry Blackmun, the Court touched upon various severability precedents[98] and attempted to distill a concise rule to control the question of whether a provision is separable.

Alaska Airlines made two significant changes to severability doctrine. First, it took what had been a two-part judicial inquiry and collapsed it into a single test involving legislative intent. The previous articulation was the test from *Champlin*: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[99] The *Alaska Airlines* Court reformulated the standard by holding that "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress."[100] This requires a

> presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part.

Pfost, 286 U.S. at 184–85 (internal citations omitted).

94. 480 U.S. 678 (1987).

95. Airline Deregulation Act of 1978, Pub. L. No. 95-504 § 43(f)(3), 92 Stat. 1705, 1752 (1978).

96. *Alaska Airlines*, 480 U.S. at 680–83 (citing INS v. Chadha, 462 U.S. 919 (1983)).

97. *Id.* at 680–82.

98. *Id.* at 684–86 (citing Regan v. Time, Inc., 468 U.S. 641, 652, 653 (1984) (plurality opinion); *Chadha*, 462 U.S. at 931–32; Buckley v. Valeo, 424 U.S. 1, 108 (1976); Tilton v. Richardson, 403 U.S. 672, 684 (1971); United States v. Jackson, 390 U.S. 570, 585 & n.27 (1968); Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234, 235 (1932); Hill v. Wallace, 259 U.S. 44, 70–72 (1922); El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 96 (1909)).

99. *Champlin*, 286 U.S. at 234.

100. *Alaska Airlines*, 480 U.S. at 685 (emphasis in the original).

court not only to determine whether the statute would function in some sense, but rather whether it can function in a manner consistent with achieving the purposes for which Congress enacted the statute according to the major dynamics or mechanisms Congress intended to accomplish those purposes. Courts must determine how important the invalid provision was as an element of "the original legislative bargain,"[101] as the terms of that bargain were codified in the statute. "The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."[102] (This test seems to be potentially inconsistent with the inquiry of whether the statute can still function in the manner Congress intended, since it is conceivable that Congress could still pass a statute that does not function in the manner originally intended. This Article shows in Part IV.A.2 how these statements can be reconciled.) The Supreme Court thus granted primacy to the objectives underlying the enactment of the statute, that the legitimizing impetus for codifying public policy in a statute was the lodestone for assessing whether a given provision could be removed from a statute without bereaving the enactment of its legitimizing character as the product of a legislative process consistent with the antecedent premises of a democratic republic.

The Court recast the *Champlin* test to ask whether the statute at bar could function in the manner Congress intended absent the challenged provision.[103] The refinement was necessary, as a legislative veto "by its very nature is separate from the operation of the substantive provisions of a statute,"[104] since all a legislative veto provides is that whatever Executive Branch action has taken place—this action being the manifestation of the statute's substantive provisions—the legislature can negate that action.

The *Alaska Airlines* Court accomplished this change by making statutory functionality part of legislative intent. The second development is the rationale by which the congressional-intent test subsumed the workability prong (which was the second prong) of *Champlin*. "Congress could not have intended a constitutionally flawed provision to be severed from the

101. *Id.*
102. *Id.*
103. *Id.* at 684–85.
104. Nagle, *supra* note 5, at 210.

remainder of the statute if the balance of the legislation is incapable of functioning independently."[105] The Court thereby made what had previously been a separate question—the question of functionality—infer congressional intent. If the issue of whether the residue of a statute is "fully operative as law" as required by *Champlin* factors into the premise that Congress could not have intended to create a dysfunctional statute, then the entire severability inquiry ultimately turns on ascertaining legislative intentions.[106]

The second change to severability doctrine is that the Court effectively abrogated previous cases on the effect of the absence of a severability clause, while also setting the bar to be applied when an express clause is present. As seen above, central to *Alaska Airlines* is determining whether the statute can function in the intended manner without the invalid provision, such that the statute may not have been passed without it:

> The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute.[107]

Contrast this standard that controls when a severability clause is present with the bar set when the legislature elects not to include a clause. "In the absence of a severability clause, however, Congress's silence is just that—silence—and does not raise a presumption against severability."[108]

It immediately became clear that *Alaska Airlines* was the new rule. In *New York v. United States*, the Court considered whether a provision of a federal statute concerning the disposal of radioactive waste that commandeered state legislatures in

105. *Alaska Airlines*, 480 U.S. at 684.

106. Ala. Power Co. v. U.S. Dep't of Energy, 307 F.3d 1300,1307 (11th Cir. 2002); New Haven v. United States, 809 F.2d 900, 907 (D.C. Cir. 1987).

107. *Alaska Airlines*, 480 U.S. at 686 (citations omitted).

108. *Id.* (citations omitted). This last statement is consistent with other aspects of statutory interpretation. *See* Kimbrough v. United States, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate" when "Congress has shown that it knows how to [declare its intent] in express terms.").

violation of the Tenth Amendment could be severed from the Act.[109] In her opinion for the Court, Justice Sandra Day O'Connor expressly noted that the statute contained no severability clause and invoked the rule from *Alaska Airlines* that congressional silence on the issue of severability does not raise a presumption against severance.[110]

c. *Ayotte*

The third landmark severability case is *Ayotte v. Planned Parenthood of Northern New England*.[111] The *Ayotte* Court was considering a New Hampshire statute involving parental notification before a minor could obtain an abortion, which the respondents alleged violated their civil rights under 42 U.S.C. § 1983.[112] This statute included an express severability clause.[113]

This opinion written by Justice Sandra Day O'Connor is especially useful for three reasons. First, it is of recent vintage, and therefore takes into account modern doctrinal developments in statutory interpretation and legislative theory. Second, *Ayotte* is helpful because like *Alaska Airlines*, it was a unanimous decision. Thus, this case expresses articulations regarding severability that at least six of the nine Justices sitting on the Court at the time of this writing claim to be willing to support.

The most useful aspect of *Ayotte*, however, is that it is the first detailed articulation of the underlying rationale for severability doctrine in Supreme Court case law. Justice O'Connor's opinion takes a step back from black-letter rules and discusses the judicial policies implicated by severability inquiries. Surveying various precedents, the Court declared the three following principles:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary . . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewriting state law to conform it to constitutional requirements' even as we strive to

109. 505 U.S. 144, 174–77 (1992).
110. *Id.* at 186 (quoting *Alaska Airlines*, 480 U.S. at 686).
111. 546 U.S. 320 (2006).
112. *Id.* at 323–24 (referencing N.H. REV. STAT. ANN. §§ 132:24–28 (Supp. 2004)).
113. *Id.* at 331 (quoting N.H. REV. STAT. ANN. § 132:28 (Supp. 2004)).

> salvage it. . . . Third, the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'[114]

These principles are explored in greater detail in Part III, *infra*. Each provides valuable assistance in fashioning remedies in a severability analysis.

This case has been significantly underutilized to date, although again it is an admittedly recent decision. As seen in various severability analyses and multiple tangentially-related cases from 1932 through 1987, courts tended to cite *Champlin* without much discussion.[115] (Prior to *Champlin*, there was no single test and so severability cases tended to cite to multiple cases to identify settled precedent.[116]) Likewise, since 1987 courts cite to *Alaska Airlines* without elaboration.[117] Yet, part of the impetus behind this Article is that severability doctrine is underdeveloped in some aspects. *Ayotte* helps remedy this deficiency by providing a reasoned approach to the purposes of this doctrine, and so the *Ayotte* Court's holding should provide significantly more guidance to lower courts than most—if not more than any one—of the previous cases.

d. *Free Enterprise*

The fourth landmark severability case is *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[118] Although legal briefs submitted in court cases contemporaneously with the writing of this Article continue to cite *Alaska Airlines* as the modern rule, it is in fact *Free Enterprise* that is the most recent restatement of severability doctrine.

In *Free Enterprise*, the Court was considering a challenge to the Sarbanes-Oxley Act of 2002,[119] a statute reforming the public accounting industry.[120] At issue was the appointment process and

114. *Id.* at 329–30 (alterations and citations omitted).

115. *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52, 83 (1976) (containing little explanatory discussion).

116. *See, e.g.,* Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 564–65 (1902) (citing various cases).

117. *See, e.g.,* New York v. United States, 505 U.S. 144, 186 (1992) (citing *Alaska Airlines*).

118. 130 S. Ct. 3138 (2010).

119. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C. (2006)).

120. *Free Enter.*, 130 S. Ct. at 3147.

tenure provisions for members of the Public Company Accounting Oversight Board (PCAOB)—a board that was created by Sarbanes-Oxley and is answerable to the Securities and Exchange Commission (SEC), and possesses regulatory authority over accounting firms.[121] Specifically, in this case the Court considered whether the provision relating to the removal of PCAOB members violates the Appointments Clause.[122] Although the power to remove is incidental to the power to appoint,[123] it has long been accepted since the inception of the New Deal in the early 1930s that for-cause restrictions on a President's ability to remove an appointee are constitutionally valid.[124] The five Commissioners of the SEC are presidential appointees confirmed by the U.S. Senate for five-year terms,[125] and are removable by the President only for cause.[126] And PCAOB members, in turn, were removable only for cause by a majority vote of the SEC.[127] The Court held that this double for-cause insulation of PCAOB members from the President rendered the board members sufficiently independent from presidential control so as to violate the Appointments Clause.[128] Although the Supreme Court has interpreted the Appointments Clause as allowing for some restrictions on removal, the executive power is vested in the President,[129] and thus presidential control over any executive-branch officers cannot be so attenuated that the President cannot maintain effective supervision over their activities.

121. *Id.* at 3147–48.

122. *Id.* at 3147.

123. *Id.* at 3161 (citing, *e.g.*, Sampson v. Murray, 415 U.S. 61, 70 n.17 (1974); Myers v. United States, 272 U.S. 52, 119 (1926); *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 259–60 (1839)).

124. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935) (upholding a for-cause dismissal restriction on the President's power to remove members of the Federal Trade Commission).

125. Securities Exchange Act of 1934, Pub. L. No. 73-291 § 4(a), 48 Stat. 881, 885 (1934) (codified at 15 U.S.C. § 78(d)(a) (2006)).

126. Although the 1934 statute is silent on any removal of Commissioners prior to the expiration of their term, *Free Enter.*, 130 S. Ct. at 3182–84 (Breyer, J., dissenting), the Court regarded such a for-cause caveat implicit in the Securities Exchange Act, *see id.* at 3151–54 (majority opinion) (quoting in part *Humphrey's Ex'r*, 295 U.S. at 620)). Courts have criticized reading such implicit for-cause protections into statutes creating independent executive agencies. *E.g.*, *In re* Aiken Cnty., 645 F.3d 428, 447 & n.7 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

127. *See Free Enter.*, 130 S. Ct. at 3146 (citing 15 U.S.C. § 7211(e)(6) (2006)).

128. *Id.* at 3151.

129. U.S. CONST. art. II, § 1, cl. 1.

Given that this invalid provision was only one clause in a lengthy and complex statute, the Court then considered whether the invalid provision could be severed from the remainder of the Act.[130] The Court held the double for-cause removal provision severable from the remainder of Sarbanes-Oxley.[131] The decision was correct, as even the challengers to Sarbanes-Oxley acknowledged that their challenge to the legality of the Board's appointment and removal provision was "collateral" to any orders or regulations promulgated by the Board to which the plaintiffs might object.[132] In so doing, the Court modified *Alaska Airlines*' severability inquiry.

The Court began by quoting *Ayotte*. "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem."[133] The Court in *Free Enterprise* then employed what amounts to a two-step inquiry: First, the remainder of the statute must continue to be "fully operative as a law" absent the invalid provisions.[134] If the remainder would be fully operative, the second step is to uphold the truncated statute "[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]."[135]

The Court's methodology in reviewing the Sarbanes-Oxley Act confirms this new two-step approach. After discussing how the functioning of the public board at issue in that case would continue unaffected by invalidating the removal mechanism of board members, the Court concluded that the "Act remains 'fully operative as a law' with these tenure restrictions excised."[136] Only then did the Court consider congressional intent, invoking the language from *New York* and *Alaska Airlines*.[137] Having articulated the framework, the Court then took each step in turn. The Court first held that the remainder of the statute was capable of functioning independently of the

130. *Free Enter.*, 130 S. Ct. at 3161–64.

131. *Id.* at 3161.

132. *Id.* at 3150.

133. *Id.* at 3161 (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328 (2006)).

134. *Id.* (quoting New York v. United States, 505 U.S. 144, 186 (1992) (quoting in turn Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987))).

135. *Id.* (quoting *New York*, 505 U.S. at 186) (ellipsis and alterations in the original).

136. *Id.*

137. *Id.* (quoting *New York*, 505 U.S. at 186).

invalid provision, and then added that the statutory text and legislative historical context did not indicate Congress would have preferred the entire statute to fail.[138] Thus the Court begins with a textual analysis by inquiring whether the abridged statute would still be fully operative. If operative, then the Court proceeds to the second step of determining legislative intent, an admittedly more difficult inquiry with greater potential for judicial error.

This modifies the *Alaska Airlines* test in two respects. First, whereas *Alaska Airlines* had collapsed *Champlin*'s two-part inquiry into a single test, *Free Enterprise* resegregates the inquiry into a functionality prong and an intent prong. Second, *Free Enterprise* inverts the order of the *Champlin* inquiry. A court now first considers whether the statute is still literally functional. If the statute can still function sans the invalid provision, only then does a court inquire into legislative intent, such as whether the statute can still fulfill Congress's purpose in a manner acceptable to Congress or whether Congress would still have enacted a bill without the invalid provision. This change reorients the judicial inquiry to focus on principles of statutory interpretation and construction when possible, rather than explore hypotheticals of how Congress would react under changed facts.

This new inquiry—and the practical consequences thereof—is explored further in greater detail in Part IV.A, *infra*.

2. Related Doctrinal Developments: Overbreadth, Facial, and As-Applied Challenges

One aspect in which activity in the judicial branch differs from the legislative branch is in the interconnectedness of legal principles. Statutes are stand-alone legislative enactments, each of which has self-contained force and only modifies the corpus of legislative and regulatory law, as found in the *United States Code* and the *Code of Federal Regulations*, respectively, insofar as it either adds to or amends specific statutory provisions of the U.S. Code (either explicitly or by implication) or supersedes inconsistent prior regulations. Similar to the concept that court decisions are supposed to be based on the application of neutral principles that should span the full spectrum of legal subject

138. *Id.* at 3162.

matters,[139] so too doctrinal developments have applications in other areas of judicial activity, as courts seek to harmonize rules of law.

Two aspects of severability doctrine suggest an underlying dynamic that points to other doctrines. First, broadly speaking, severability is a remedies question, as severability is triggered when judges deliberate on the appropriate remedy when a statutory provision is found unconstitutional. Second, and more narrowly defined, severability is a question of the breadth of invalidity. When an aspect of a statute is found unconstitutional, how broad should the Court's holding sweep in removing the unconstitutionality? In framing the issue in *Ayotte*, Sandra Day O'Connor began, "If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."[140] There are two doctrines under which courts consider similar questions, doctrines expressing a form of judicial modesty by not invalidating more of a statute than necessary.

The first involves facial versus as-applied challenges.[141] The seminal early law review Article on severability—Robert Stern's 1937 Article in *Harvard Law Review*—characterized judicial distinctions between facial and as-applied challenges as a form of severability inquiry.[142] Subsequent sources have made similar comparisons.[143] When the validity of a statute is challenged, courts often must determine whether to invalidate the statute under all circumstances versus only for certain types of plaintiffs or under specified circumstances. The former is a facial

139. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–9, 19, 35 (1971) (arguing that the Supreme Court's constitutional role is justified only if the Court applies principles that are neutrally derived, defined, and applied).

140. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. at 323.

141. Although these two types of challenges are distinct, it should be noted at the outset of this description that the Court recently reiterated as a caveat that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." Citizens United v. FEC, 130 S. Ct. 876, 893 (2010).

142. Stern, *supra* note 16, at 79; *accord* Walsh, *supra* note 6, at 739.

143. *See, e.g.*, Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 885 & n.52 (2005) (comparing "application severability" to "text severability").

challenge and the latter is an as-applied challenge.[144] The Court recognized even in the nineteenth century that a law could be valid in many applications—which in modern jurisprudential parlance is to say that the law is facially valid—while other applications would be unconstitutional. One such case, *Reagan v. Farmers' Loan & Trust Co.*, is especially illustrative here because it first distinguishes facial from as-applied challenges,[145] then goes on to also announce the basic rule of severability that invalid provisions can often be separated from valid ones.[146] Upholding a statute facially does not foreclose future challenges that the statute is invalid as applied to the particular challenger and facts of a future case.[147] Courts invalidate statutes facially "sparingly and only as a last resort."[148] This is because—similar to severability—facial challenges are disfavored relative to as-applied decisions as a policy of judicial restraint.[149] The Court has articulated two different standards to succeed in a facial challenge, one being "that no set of circumstances exists under which the Act would be valid,"[150] the other "that the statute lacks

144. *Compare* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."), *with* Tennessee v. Lane, 541 U.S. 509, 552 n.11 (2004) (referencing upholding the statute "as applied to respondents and declin[ing] to entertain the facial challenge"), *and* United States v. Playboy Entm't Grp., 529 U.S. 803, 834 n.3 (2000) (Scalia, J., dissenting) (noting that an as-applied challenge only applies to particular facts of the case, unlike a facial challenge).

145. 154 U.S. 362, 390 (1894) ("A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual.").

146. The Court continued:

> It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out, if that which is left is fully operative as law, unless it is evident, from a consideration of all the sections, that the legislature would not have enacted that which is within, independently of that beyond, its power.

Id. at 395.

147. *See* Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411–12 (2006) ("In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges.").

148. Nat'l Endowment of the Arts v. Finley, 524 U.S. 569, 580 (1998) (internal quotation marks omitted).

149. *See* FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored").

150. *Salerno*, 481 U.S. at 745; *but see* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 294 (1994) (arguing that in practice the Supreme Court's standard for facial versus as-applied challenges is different from what the Court held in *Salerno*).

any plainly legitimate sweep."[151] (Conveniently, "[w]hich standard applies in a typical case is a matter of dispute."[152]) Facially invalidating a statute subsumes all possible claims, necessarily holding that all conceivable as-applied challenges to the statute would succeed.[153]

The second is overbreadth doctrine. This doctrine is distinctive to challenges brought under the Free Speech Clause.[154] Under this doctrine, a law burdening free speech is invalid if in regulating speech that is properly regulable, it also restricts a substantial amount of protected speech.[155] Otherwise analogized to the points of law in the previous paragraph, it is a "type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional."[156] Such an enactment is impermissible because it is overly broad, and is facially invalidated. The Court has explained that overbreadth only applies where First Amendment violations are alleged because of the "chilling effect" that laws penalizing speech can have on those who are uncertain whether their contemplated speech is protected.[157] This is a *sui generis* anomaly to the normal rule of partial invalidation, whereby a court invalidates the Act only as applied to the challengers and reserves facial challenges to those where no valid applications can be conceived.[158]

151. United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgments)) (internal quotation marks omitted).

152. *Id.*

153. *See* Richard H. Fallon, Jr., *Commentary: As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339–40 (2000) (dicussing the binding effect of decisions on facial challenges).

154. *See* Schall v. Martin, 467 U.S. 253, 268 n.18 (1984) (noting that "outside the limited First Amendment context, a criminal statute may not be attacked as overbroad").

155. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

156. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) (internal citation omitted); *accord Stevens*, 130 S. Ct. at 1587.

157. Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855–56 (1991).

158. Interestingly in the context of this Article, however, the Supreme Court made clear that overbreadth does not trump severability. In *Brockett v. Spokane Arcades*, the Court held that an invalid provision of a statute that was severable could be separated from the remainder of the Act, and in doing so spared the residue from an overbreadth challenge. 472 U.S. 491, 506 (1985).

Although not expressly invoked, this approach sounds in the doctrine of constitutional avoidance. *See infra* note 160 and accompanying text. By severing the invalid provision the Court was able to excise the provision that could have invalidated

There are additional doctrines founded upon the same rationale of judicial respect for the political branches, such as the rule requiring courts to interpret a statute to avoid unreasonable results when practicable.[159] Another is the doctrine of constitutional avoidance, that a court should give a narrowing construction to a statute when possible to avoid potential constitutional problems,[160] if the statute is "readily susceptible" to such a construction.[161] Severability is of a piece with these commonly-invoked doctrines.[162] In fact, regarding this last doctrine, Chief Justice Charles Hughes invoked the rationale

---

the statute for violating the First Amendment as overbroad, thereby saving most of the statute.

159. Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

160. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1811 (2009); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979)); Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (positing that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the judiciary's] plain duty is to adopt that which will save the Act"). This doctrine has evolved slightly over the decades, as the early version "requires the court to determine that one possible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one possible reading *might* be unconstitutional." Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (emphasis in the original). Vermeule cites the following as the shift to modern doctrine:

> [U]nless [the early doctrine] be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909), *quoted in* Vermeule, *supra* note 160, at 1958.

161. Reno v. ACLU, 521 U.S. 844, 884 (1997); *accord* Machinists v. Street, 367 U.S. 740, 749–50 (1961) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided[,]" quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted). This doctrine is traced to Justice Louis Brandeis. *See* Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell*, 285 U.S. at 62).

162. *See* Vermeule, *supra* note 160, at 1945–46, 1952–55 (referring to the scholarly consensus that these two doctrines are related). Vermeule's discussion of severability is actually more focused on as-applied challenges, however, so though the discussion is entirely relevant to the issue at hand, the author's comparison of severability with the doctrine of constitutional avoidance is not fully consonant with the model set forth in this Article. It should also be noted that Vermeule then argues this consensus is incorrect, and that severability should be regarded as inconsistent with constitutional avoidance. *See id.* at 1955–63.

of the doctrine of constitutional avoidance in *Jones & Laughlin Steel* in terms that can be imported as a rationale for severability doctrine as a manifestation of judicial modesty.[163]

C. *Severability Consistent with Principled Judicial Inquiries*

These concepts of severability are also consistent with the full range of methodologies of judicial action, also referred to as schools of legal interpretation. While some of these methodologies rest on neutral principles regardless of outcome, and others focus increasingly on outcome regardless of antecedent rules, severability is not stereotyped into any one of them. Severability inquiries can be either neutral or teleological.

There are two such neutral inquiries, so called because they take no account (i.e., are "neutral") regarding the results they produce.[164] The first is textualism, which interprets a legal text according to the meaning of the precise words of the text, subordinating legislative history or other extrinsic or derivative material to the unambiguous meaning of its terms.[165] "One

163. NRLB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."); *see also* Stern, *supra* note 16, at 105 (citing Justice Hughes's argument against invalidating the National Labor Relations Act *in toto*).

164. This is not to say neutral inquiries are blind to ludicrous results. A *reductio ad absurdum* is a *reductio ad absurdum*. Principled legal interpretation need not produce such results. *See Patterson*, 456 U.S. at 71 (holding that interpretations resulting in unreasonable results and untenable distinctions should be avoided). Statutory interpretation is not an intellectual suicide pact. Of course, those focused on achieving particular outcomes can point to what they regard as the objectionable results of a neutral methodology, and hyperbolically refer to such results as irredeemably absurd. So characterizing this form of inquiry requires a measure of reasonable discretion and self-restraint on the part of those disagreeing with various outcomes.

165. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005). Less constrained than originalism (described *infra* note 167), textualism is not confined to the precise meaning of those words at the moment of their codification, but eschews common indicia of legislative intent such as floor statements by legislators. *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators . . . . 'The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . .'" (added emphasis omitted) (quoting Aldridge v. Williams, 44 U.S. (3 Howard) 9, 24 (1845))). Textualism is consistent with Justice Holmes's talismanic statement: "We do not inquire into what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

This is because some degree of speculation is inherent in proclaiming an intent for any organizational body comprised of many individuals. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994). However, it should also be noted that there are variations of textualism that permit consulting legislative history to resolve ambiguities if the legal text is anything short of

determines what Congress would have done by examining what it did."[166] The other is originalism, a form of textualism that requires interpreting legal text in accordance with the original meaning of those words.[167]

---

transparent. *See* Elliot M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 986–87, 991–93 (2007) (recounting Justice Alito's use of legislative history in statutory interpretation); *see also*, e.g., Zedner v. United States, 547 U.S. 489, 500–02 (2006) (using legislative history to interpret the Speedy Trial Act).

166. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting).

167. Originalism interprets words as they would have been understood at the moment of their adoption. An originalist inquiry assigns to each term what a person of ordinary intelligence and education who was reasonably aware of current events would believe them to mean. *See* Attorney General Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society Lawyers Chapter (Nov. 15, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE, at 71–82 (Stephen G. Calabresi ed., 2007). One scholar derisively referred to this as an "archaeological" approach. *See* T. Alexander Aleinokoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (citing Charles Curtis, *A Better Theory of Interpretation*, 3 VAND. L. REV. 407, 415 (1950)). Recent Supreme Court Terms have contained several quintessential examples of originalist analysis. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2751–61 (2011) (Thomas, J., dissenting) (asserting that the Constitution should be interpreted as it was understood at its adoption); McDonald v. City of Chi., 130 S. Ct. 3020, 3058–88 (2010) (Thomas, J., concurring in part and concurring in judgment) (arguing that constitutional interpretation should be based on original understanding even if that requires overturning precedential case law).

These two examples suggest a larger point that over the past decade Justice Clarence Thomas has emerged as a consistent originalist—and the only consistent originalist—currently on the Court. To the two cases referenced above—the former concerning the Free Speech Clause and the latter concerning the Second Amendment and the Fourteenth Amendment Privileges or Immunities Clause—Justice Thomas has also issued separate opinions expressing an originalist position on the Commerce Clause, *see* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring in judgment); United States v. Lopez, 514 U.S. 549, 584–602 (1995), and the Takings Clause, *see* Kelo v. City of New London, 545 U.S. 469, 505–523 (2003) (Thomas, J., dissenting). It is worth a comparative study of Thomas's approach to originalism to that of Justice Antonin Scalia, who might to some degree share Thomas's interpretive philosophy but regards stare decisis as protecting non-originalist doctrines that Thomas is unconstrained to overrule. *See, e.g.*, Dep't of Revenue v. Davis, 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part) ("I will apply our negative Commerce Clause doctrine only when stare decisis compels me to do so."). This material is noted because it is quite possible that these debates of textualism versus originalism and the proper role of stare decisis when considering longstanding doctrines will be increasingly prominent in legal debate.

On a related note, there is more potential for originalism to impact the jurisprudential development of constitutional provisions for which there are relatively few precedents, as stare decisis presents less of a barrier to interpreting and applying those provisions. The Second Amendment presents such an opportunity. *See, e.g.*, Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 234–52 (2009) (applying an originalist understanding of the Fourteenth Amendment to the Second Amendment right to keep and bear arms); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344–48, 1368–76 (2009) (discussing the original meaning of the right to keep and bear arms).

Under either of these, a court is still giving effect to the remaining terms of the statute in accordance with their meaning. If it is a *Free Enterprise* Step One inquiry (explained *infra* in Part IV.A), the examination is limited exclusively to the words of the statute regardless, and so there is no occasion to consult extraneous sources of contested value. If it is a Step Two inquiry under *Free Enterprise*, the question is still one that can be resolved from the statutory text. The court is not importing later meanings into the text. Nor is it absolutely necessary for a court to consider extraneous information, such as legislative history, despite the fact that judges commonly elect to consider such material in the past when deciding whether to sever a provision.[168] Although it is occasionally more challenging to discern legislative purpose from statutory text, there are often statements of intent for various parts or for the statute as a whole.[169]

Teleological methodologies are those focused on the results achieved as a result of their utilization. The first is legal realism, an approach that arose in the 1920s and 1930s wherein judges step back from the words of the text, to "look[] beyond ideals and appearances" so as to ascertain what is "really going on" as a way of interpreting a statute's meaning.[170] The second is legal process, an approach developed in the 1950s and 1960s, which posits that every statute has a purpose, and so judges should envision themselves in a legislative setting and isolate the purpose Congress was pursuing in the statute, then reason through the accompanying rationale of such a purpose and interpret the statute in such a way as to advance that purpose.[171] An alternative name for this latter approach (or debatably a variation thereof) is purposivism, where, in more recent years, legal process has evolved to where the intermediary considerations of the legislative process are *per se* deemphasized

168. *See, e.g.*, *Chadha*, 462 U.S. at 932 (stating that when Congress makes its intentions clear through its actions, legislative history need not be considered when dealing with severability).

169. *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 1501(a)(2)(D), 124 Stat. 119, 243 (2010), *as amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (providing that the purpose of the statute is to achieve "near-universal" health coverage).

170. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 190 (5th ed. 2009).

171. Diarmuid F. O'Scannlain, *The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit*, 33 HARV. J.L. & PUB. POL'Y 963, 967 (2010).

in favor of a direct examination of the public purpose supposedly served by the enactment at issue.[172]

Any of these approaches readily lend themselves to severability inquiries. As with the neutral inquiries, these teleological approaches are irrelevant in Step One of *Free Enterprise*, since courts are looking to the interdependency and interoperability of the statute's various provisions according to their textual terms. Under *Free Enterprise* Step Two, courts have myriad sources to consult under these teleological methods, from floor statements, to committee reports, to material from individual legislative offices. This enables a court to inquire into the reality of what (in the court's judgment) Congress was attempting to accomplish, and to invalidate a statute that does not achieve its objective without the discarded provision.

Thus severability can be applied regardless of the methodology any given jurist prefers. This is encouraging, in that often judgments vary as a result of conflicting approaches to statutory interpretation. A coherent doctrine governing severability can allow for that, and once a court reaches the stage of formulating a remedy, judges may at least be able to agree on how much of a statute to strike from the books. Such a statement may seem like the naïve optimism of one unaccustomed to jurisprudential reality, but hope springs eternal, no matter how counterfactual.[173]

---

172. *See* John F. Manning, *Exchange: What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–73 (2006). This approach is best summarized by arguing that when the text of a statute varies with what the court finds to be the statute's purpose, "(1) Congress must have expressed its true intentions imprecisely, and (2) a judicial faithful agent [of Congress] could properly adjust the enacted text to capture what Congress would have intended had it expressly confronted the apparent mismatch between text and purpose." *Id.* at 72. Purposivism often arises in First Amendment analyses in law review literature, *see, e.g.*, Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001), though its principles are not uniquely suited to any specific constitutional right, and this concentration may be a product of a scholarly debate that could also focus on other constitutional (or statutory) provisions.

173. Like any lawyer or scholar whose duties require reading many decisions of the Supreme Court and lower courts, I have no illusions that judges with contrary interpretive methodologies will often split in their judgments, with adherents of neutral schools often voting together against the conclusion agreed to by adherents of teleological schools. But my point here is that to the extent that there is a division of votes on the judgment, it will not stem from these schools, but rather from the judicial philosophy of the jurists. The philosophy held by a particular judge very often leads to adopting a particular school of interpretive thought. So while in theory different interpretive methodologies ought to be able to lead to the same conclusion regarding severing a given provision, the reality is that judges will still likely adjudicate statutes

III. Severability Doctrine is Based on Three Separation-of-Powers Principles

The Supreme Court declared in the recent case *Ayotte v. Planned Parenthood of Northern New England* that there are three principles underlying modern severability doctrine.[174] In a unanimous opinion by Justice Sandra Day O'Connor, the Court held:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary . . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting [a] law to conform it to constitutional requirements even as we strive to salvage it. . . . Third, the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.[175]

The Court then reiterated and reaffirmed these three principles in *Free Enterprise*.[176] We will explore each of these principles in detail below.

Ayotte was extremely helpful. Until 2006, only the Supreme Judicial Court of Massachusetts had provided a detailed explanation of how it formulated rules for severing invalid provisions from statutes.[177] Aside from that examination by a state court in 1854—in a decision subsequently adopted in substantial part by the U.S. Supreme Court in 1881[178]—case law provided dim illumination for the various severability rules employed. With *Ayotte*, the High Court has at long last provided a coherent rationale whereby lower courts and legal scholars can begin formulating a predictable framework. The Court's unanimity in *Ayotte* reflects an agreement spanning the full

---

based on each judge's conception of the proper judicial role in assessing public policy decisions within our tripartite constitutional framework.

174. 546 U.S. 320, 329–30 (2006). The facts and details in *Ayotte* are discussed in Part II.B.1.c, *supra*.

175. *Id.* (alterations and citations omitted).

176. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161–62 (2010).

177. Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 98–99 (1854). This Article quotes the relevant passage in its entirety and discussed in Part II.A, *supra*. *See supra* notes 50–56 and accompanying text.

178. *See* Allen v. City of Louisiana, 103 U.S. 80, 83–84 (1881) (quoting *Warren*, 68 Mass. (2 Gray) at 99) (stating that if unconstitutional provisions are so connected with the general scope of the law, it may be impossible to strike them and still give effect to the intent of the legislature). *Allen* is likewise discussed in Part II.A.

spectrum of legal thought, and fortunately for the long-term development of severability doctrine it was also mercifully correct in its reasoning.[179] Beyond informing judicial decisionmaking, such a framework can also inform legislative efforts to design statutes that more easily lend themselves to resolving severability questions when provisions are found invalid.

A. *Principle 1: Preference for Practical Minimalism*

The first severability principle from *Ayotte* is that the Court will "try not to nullify more of a legislature's work than is necessary . . . ."[180] The two operative words in this statement are "try" and "necessary." The first connotes that a court understands that severability is not an exact science, in that the court is deconstructing a document that was enacted as an integrated whole, and most often the ideas encapsulated by the invalid words have some bearing or connection with the words found in other provisions, which the court is attempting to salvage. The second does more than recognize the necessity for courts to strike down provisions that violate the Constitution. It also allows that this list of necessarily-rejected provisions includes more than the stand-alone unconstitutional provision. The Court is stating a preference for not striking down more of the statute than necessary, but does not limit that necessity to a provision that in isolation transgresses the Constitution. In carrying out its duty to nullify the inherently invalid provision—as it must—the task for a court becomes determining which companion provisions should fall with it, while acknowledging that this invalidating orbit extends beyond that which is intrinsically necessary. Otherwise stated, it goes beyond a judge inquiring, "What must I strike down?" to also include, "What else should I strike down with it?"

179. It also might be a tribute to Chief Justice John Roberts. Abortion is one of the most hotly-contested issues in American political life, and has dominated Supreme Court confirmations for more than a quarter-century. Roberts had only been Chief Justice for two months when *Ayotte* was argued on November 30, 2005. Yet when the Court's decision came down in January 2006, immediately before the retiring Sandra Day O'Connor was replaced by Samuel Alito, the Court handed down a unanimous decision on abortion written by O'Connor. This is either a testament to Roberts's ability to form consensus, or to O'Connor wanting to leave on a strong and unified note, or both.

180. *Ayotte*, 546 U.S. at 329.

The Court immediately explained the impetus for this first principle, "for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"[181] As the Court has said in reference to other juridical doctrines, the third branch's power must be limited in a democratic republic.[182] When invalidating programs created by statute, a "court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance."[183] As with the other doctrines referenced in Part II.B.2, *supra*, a consistent theme in juridical doctrines is recognition that unelected, life-tenured jurists are fundamentally unaccountable to the people,[184] and as such their power should be limited as an antidemocratic, countermajoritarian institution in a governmental system otherwise premised on the consent of the governed expressed through the political process.[185]

This severability principle arises from the limited role of unelected, unaccountable judges assigned to the courts by the Constitution in our democratic republic. Laws are the codification of public policy and are created through a process

181. *Id.* (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)).

182. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting THE FEDERALIST NO. 48 (J. Madison)) (describing the uncertain boundaries of the judiciary's power); Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) ("The judicial power of the United States . . . is not an unconditioned authority to determine the constitutionality of legislative or executive acts.").

183. Ill. Bell Tel. Co. v. Worldcom Techs., Inc., 157 F.3d 500, 503 (7th Cir. 1998); *accord* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 22 (2d ed. 1986) (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 103–04, 106–07 (1901)); *see also* Michael D. Schumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 278 (2004) (stating that the increasing willingness of the lawmaking branches to leave constitutional inquiries to the courts raises a serious concern of undermining the democratic process).

184. This is in reference to the fact that Article III federal judges hold their offices during "good behavior," U.S. CONST. art. III, § 1, cl. 2, which is generally understood to mean for life, absent some sort of felony or other notorious act that could realistically subject them to impeachment and removal by the U.S. House and Senate, respectively, *id.* art. I, § 2, cl. 5; *id.* § 3, cl. 6. Such occasions are rare, in that in the 222 years that judges have sat on the federal bench under Article III of the Constitution, only fifteen federal judges have been impeached, and only eight of those impeached judges have been removed. *See* FED. JUDICIAL CTR., HISTORY OF THE FEDERAL JUDICIARY, IMPEACHMENT OF FEDERAL JUDGES, http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html (last visited July 9, 2011).

185. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (explaining that government is only established through the consent of the governed); ABRAHAM LINCOLN, GETTYSBURG ADDRESS, para. 3 (U.S. Nov. 19, 1863) (noting that there will government "by the people, for the people").

whereby the will of the American people can be expressed in a more direct fashion than is possible—or optimal—from the judiciary. A corollary of this democratic ideal is that when legislation is faulty, it is often preferable for the people's elected leaders to cure these deficiencies through the transparency and accountability of the political process. Consequently, the judiciary's role is to be the branch of last resort.[186] Beyond meaning that courts exercise judicial review only when other options to vindicate the rule of law have been exhausted, it also means that courts need to prefer using a scalpel to a sledgehammer when a situation presents multiple remedial options.[187]

An example of this first severability principle comes from the Supreme Court's most recent restatement of severability in *Free Enterprise*.[188] Having found an Appointments Clause violation in the tenure protections of Members of the new oversight board created by the Sarbanes-Oxley Act, the Court had to choose between two remedies to cure the constitutional infirmity. The first was to strike down the statute's provision creating the double for-cause tenure protections of the Board Members. The other was to strike down the words of enough of the provisions granting various powers to the Board to downgrade its Members until they would no longer have sufficient authority to be officers of the United States under the Appointments Clause. Between striking down one provision versus striking down dozens of provisions, Chief Justice John Roberts rejected the latter approach, reasoning that the Court cannot "blue-pencil" numerous, disjointed provisions of Sarbanes-Oxley because "such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward."[189]

186. Nat'l Treasury Emps. Union v United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996).

187. Justice Cardozo expressed this sentiment well while serving on the New York Court of Appeals. *See* People *ex rel.* Alpha Portland Cement Co. v. Knapp, 129 N.E. 202, 208 (N.Y. 1920) (Cardozo, J.) ("Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert.").

188. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (noting that the key to severability is legislative intent); *see also supra* Part II.B.1.d. (discussing the facts of *Free Enterprise*), *infra* Part IV.A (exploring the modern test for severability inquiries set forth by the Court in *Free Enterprise*).

189. *Id.* at 3162.

Professor Laurence Tribe raises the possibility that courts cannot sever an unconstitutional statute, as it would violate the Constitution's Bicameralism and Presentment Clauses.[190] Under the Constitution, that which becomes federal law must have been passed by both houses in identical form, then either signed by the President or re-passed by a two-thirds vote in both chambers of Congress in the event of a presidential veto.[191] The formalism required by these clauses has been reinforced by the Court as recently as 1998.[192] But this argument proves too much, as it categorically forecloses any possibility of severability in any instance, a premise that the judiciary has obviously categorically rejected. Assuming that the Court is unwilling to reverse course and completely jettison severability doctrine, Tribe's argument cannot gain much traction. It can serve as support for holdings of nonseverability, however, by providing a supplemental rationale encouraging courts to invalidate legislation in its entirety, as opposed to altering the statute so as to pass constitutional muster.

Another author objects that Tribe's argument fails because the statute in question was duly enacted pursuant to the Bicameralism and Presentment Clauses,[193] but that argument misses the point. Conceptually, a statutory enactment is a codification of a legislative bargain reduced to writing. Thus, this bargain is what Congress conceptually agreed to; this bargain is analogous to the "meeting of the minds" in contract law. Tribe thus makes a valid point. It just happens to be one that the Supreme Court has rightly concluded is inconsistent with the properly circumspect role of the judiciary in our tripartite form of government.

B. *Principle 2: Courts Cannot Rewrite Statutes*

The Court in *Ayotte* explained its second principle of severability thus:

190. Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 21–23 (1984); *See* New York *ex rel.* Hatch v. Reardon, 204 U.S. 152, 160 (1907). But it is critical to note that Holmes wrote during the era before the Supreme Court had articulated its first severability test, and before the Court set forth the presumptions that are central to the modern doctrine. *See supra* Part II.A & B. Recent decisions involving bicameralism and presentment include no language casting doubt on modern severability. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 438 (1998).

191. U.S. CONST. art. I, § 7, cl. 2.

192. *See Clinton*, 524 U.S. at 427 n.12 (invalidating the Line Item Veto Act).

193. Nagle, *supra* note 5, at 228–29 & nn.129–30.

> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] [a] law to conform it to constitutional requirements" even as we strive to salvage it. Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue. . . . But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake.[194]

Simply restated, the second principle is that courts must refrain from effectively rewriting legislation under the rubric of judicial modesty. If an invalid provision cannot be severed without *de facto* rewriting a statute, then the statute should be entirely invalidated. Likewise a court cannot infer additional limiting language in a statute to confine it to constitutional boundaries, as a court cannot "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court."[195]

This principle includes several relevant components. The first is a reasoned admission of the limits the Constitution imposes on the judiciary. The limit is that a court's constitutional mandate does not extend to lawmaking. This limit is eminently reasonable, given the Court's accompanying admission that as an institution it has limited ability to write statutes competently. (Congress provides cynics with plenty of fodder to offer a snide remark that Congress evidently likewise has limited competence

194. *Ayotte*, 546 U.S. at 329–30 (quoting first Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988), then United States v. Treasury Emps., 513 U.S. 454, 479 n.26 (1995)). Federal courts should apply this doctrine not only when examining federal enactments, but also when reviewing state statutes (illustrated by the fact that *Ayotte* was reviewing a New Hampshire statute). *See* Eubanks v. Wilkinson, 937 F.2d 1118, 1122–24 (6th Cir. 1991); Hill v. City of Hous., 789 F.2d 1103, 1112 (5th Cir. 1986), *aff'd*, 482 U.S. 451 (1987); Consumer Party v. Davis, 778 F.2d 140, 147 (3d Cir. 1985); *see also* Hynes v. Mayor of Oradell, 425 U.S. 610, 622 (1976). This rule may not apply, however, if there is a state court interpretation of the statute that narrows its scope to constitutional limits. *See* Smith v. Goguen, 415 U.S. 566, 575 (1974). This rule also extends to substatutory state authorities. *See Hill*, 789 F.2d at 1112, *aff'd*, 482 U.S. 451 (1987) ("The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance.").

195. Hill v. Wallace, 259 U.S. 44, 70 (1922). This is inconsistent with the doctrine of constitutional avoidance. *See supra* note 160 and accompanying text. Evidently just as severability trumps overbreadth doctrine, *see supra* note 158 and accompanying text, so too severability doctrine trumps constitutional avoidance.

when it comes to formulating statutes, but at least it is Congress's job to write laws, regardless of those statutes' effectiveness.) In explicating this principle, the Court expressly cited to one case, *American Booksellers*,[196] involving facial and overbreadth challenges to a law burdening the First Amendment, reinforcing as discussed in Part II.B.2 that severability doctrine shares a jurisprudential root with several other interpretive doctrines.

The second—and most important—component is that a court cannot engage in "quintessentially legislative work." The clear implication of this language is that it is possible for a court to usurp Congress's exclusive power under Article I to create legislation. To engage in such activity under the aegis of devising a remedy violates the separation of powers.[197] Since it cannot be denied that any judicial interpretation or construction imposed on a statute—or invalidating any one aspect of a statute—effectively reformulates a statute to some degree by imposing a new meaning upon a preexisting legal text, it becomes unavoidable that courts must draw the line at some point. This is, thus, a balancing requiring careful judicial reasoning and a degree of modesty.

This principle thereby explicitly states that it is possible for a court, under a facially-plausible claim of attempting to salvage a statute by severing an invalid provision, to essentially create a new statute. Such an activity is a "serious invasion of the legislative domain." The Framers understood the legislative power vested in Congress by Article I to be the means whereby legal duties would be imposed upon citizens, organizations, and governmental units, and legal rights declared and defined through the creation of statutes.[198] The judiciary would be

196. *Am. Booksellers*, 484 U.S. at 388–89.

197. This potential for interbranch conflict is unsurprising, given that whenever one branch of government is acting on the edge of the envelope on the purview of another branch, self-interest on the part of governmental actors in both implicated branches can create a result reminiscent of the reaction when one dog being walked down a street passes the yard of another dog. Growling and barking ensues, sometimes becoming sufficiently raucous as to become manifestly annoying to those unfortunate enough to be nearby at the moment. *Cf.* C. Vered Jona, *Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 GEO. WASH. L. REV. 698, 700 (2008) ("Throughout American history, the question of severability has reappeared repeatedly, reflecting an underlying tension between the courts and legislatures.").

198. 1 THE FOUNDERS' CONSTITUTION 382–87 (Philip B. Kurland & Ralph Lerner eds., 1987); *see also* INS v. Chadha, 462 U.S. 919, 952, 954 (1983); *see also, e.g.*, 1 RECORDS

invading Congress's domain, if severing invalid provisions from statutes would significantly alter any of these legal relationships.

The Supreme Court began developing this principle in severability as early as 1879, directing that:

> [W]hile it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that [the abridged statute is] within the constitutional power of that body . . . .[199]

This narrowing language sounds in the doctrine of constitutional avoidance, as discussed above, under which, when possible, a court declines to interpret statutes in a manner that would raise doubts regarding its constitutionality, thereby requiring a court unnecessarily to pronounce a constitutional holding.[200] By the aforementioned language, the *Ayotte* Court makes clear this narrowing track is not to be applied in cases where doing so would circumscribe severability, inserting a significant qualification into an otherwise generally-applicable doctrine of imposing narrowing constructions on statutes, which appears in a great many judicial inquiries.

Judicially rewriting a statute is the practical consequence of changing the import of a statute from a holistic perspective, with a court taking a gestalt of the statute's overall governing dynamics and with an eye to whether removing the invalid provision alters this quasi-artistic impression. "The presumption in favor of separability does not authorize the court to give the statute 'an effect altogether different from that sought by the measure viewed as a whole.'"[201] The reasoning for this principle

---

OF THE CONSTITUTIONAL CONVENTION (James Madison, June 21, 1787), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra*, at 29–32; 2 RECORDS, *supra*, at 25 (Madison, July 17, 1787), *id.* at 131, 151 (Committee of Detail), *id.* at 321 (Journal, Aug. 18, 1787), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra*, at 34–36; 1 JAMES KENT, COMMENTARIES 207–10 (1826), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra*, at 39–40. This characterization of the Framers' understanding of Congress's legislative role is also found in other accounts of the Constitution's adoption. *See, e.g.*, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20, 45–46, 48, 54, 55, 57, 60, 61, 334, 349–50 (Max Farrand ed., rev. ed. 1966).

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

200. *See supra* notes 160–63 and accompanying text.

201. Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936) (quoting R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935)).

also overlaps with the third and final principle, which is discussed below. "So here, to give the sections in question the effect suggested, it would be necessary to reject" Congress's intent for this statute.[202] "To do this would be to introduce a limitation where Congress intended none, and thereby to make a new . . . statute, which, of course, [courts] may not do."[203]

One law student articulated this principle well, writing:

> [S]triking down a bill instead of redrafting it protects the separation of powers contemplated by the Constitution and preserves a court's role as an adjudicatory rather than a legislative body.
>
> This is particularly important in cases where a court finds legislative knowledge of constitutional infirmities prior to enacting the law. If the legislature intended to pass a statute knowing it to be unconstitutional, a court would be overstepping its reactive role by proactively reshaping the statute, and possibly rewriting it, to cure the constitutional defect.[204]

The Court in *Free Enterprise* provided a classic illustration of this principle. Acknowledging that the Court could theoretically order different remedies to cure Sarbanes-Oxley's constitutional infirmity, Chief Justice Roberts wrote that the Court:

> [M]ight blue-pencil a sufficient number of the [Public Company Accounting Oversight Board]'s responsibilities so that its members would no longer be "Officers of the United States." Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary.[205]

C. *Principle 3: Remedies Should Be Consistent with Legislative Intent*

This proscription on rewriting statutes relates to the third principle in *Ayotte*, which the Court expounded as follows:

---

202. Butts v. Merchs.' & Miners' Transp. Co., 230 U.S. 126, 135 (1913).

203. *Id.*

204. Jona, *supra* note 197, at 712.

205. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010).

> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." 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? All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. "This would, to some extent, substitute the judicial for the legislative department of the government."[206]

In synthesizing this principle, the Court cited eight cases spanning 126 years wherefrom this proposition could be inferred.[207]

With its language that "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts"[208] to determine which transgressors can validly be sanctioned, the Court here cautioned Congress not to paint with strokes that are too broad when legislating. Congress cannot throw a legislative net covering vast areas—some of which are constitutional and others not—and essentially task the courts with determining which parts of the law can stand and which parts cannot. Congress must provide more definitive indications of its intent for a given statute—analogous perhaps in some way to the nondelegation doctrine[209]—to provide a baseline from which courts can begin judicial inquiries.

---

206. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. at 330 (quoting first Califano v. Westcott, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part); third and second quotations United States v. Reese, 92 U.S. 214, 221 (1876)) (other citations omitted); *accord* INS v. Chadha, 462 U.S. 919, 931–32 (1983) (noting that the invalid portions of a statue are to be severed unless the Legislature would not have enacted those provisions which are within its power).

207. *Id.* (citing United States v. Booker, 543 U.S. 220, 227–29 (2005); Minnesota v. Mille Lacs, Band of Chippewa Indians, 526 U.S. 172, 191 (1999); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932); Dorchy v. Kansas, 264 U.S. 286, 289–90 (1924); Employers' Liability Cases, 207 U.S. 463, 501 (1908); Allen v. City of Louisiana, 103 U.S. 80, 83–84 (1881); Trade-Mark Cases, 100 U.S. 82, 97–98 (1879)).

208. *Id.* (quoting United States v. Reese, 92 U.S. 214, 221 (1876)).

209. Congress cannot delegate legislative power to administrative agencies of the executive branch. Loving v. United States, 517 U.S. 748, 771 (1996). Under the nondelegation doctrine, Congress at minimum must therefore articulate some "intelligible principle" in a statute, and the actions of the implementing agency must be consistent therewith by only promulgating regulations consistent with that principle.

For the same reasons as the principle involving rewriting statutes, ascertaining intent is an inexact science. (Recall that the Court forthrightly noted these principles are interrelated.) Nonetheless, as Judge Richard Posner explains, "[I]nstitutions act purposively, therefore they have purposes. A document can manifest a single purpose even though those who drafted and approved it had a variety of private motives and expectations."[210] While individual floor statements or committee statements of rank-and-file members of Congress may be the least imputable to the whole body, statements of committee or party leaders may reflect more broadly-held views. The best such indicia of intent would be clear statements of purpose written into the text of the statute. Regardless of the specific sources cited as revelatory of purpose, this third principle requires some methodology for discovering this intent.

Context matters in legal interpretation as it does in so many other endeavors. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute . . . ."[211] The Court has held that "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a

---

Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). According to the Court, this is because Congress's legislative role is fulfilled by articulating an intelligible principle in a statute, and agency regulations that are not pursuant to such a principle or derived from a statutory mandate thereby usurp Congress's constitutional role by becoming *de facto* statutes. *See* Field v. Clark, 143 U.S. 649, 192 (1892). The Supreme Court invoked this doctrine a couple times in the 1930s to invalidate parts of Franklin Delano Roosevelt's New Deal, *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421, 430 (1935), but has not subsequently used it to strike down any statutes. The Court has since used the nondelegation doctrine as a rule of statutory construction, one that sounds in the doctrine of constitutional avoidance, *see supra* note 160. As an interpretative canon, a court will construe statutes if possible in such a way as to be pursuant to a statutory intelligible principle, if at all possible. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–76.

The practical consequence of the current state of the law is that agency regulations can go beyond procedural requirements implementing statutes to actually enact public policy, so long as those policies to do amount to "major policies." *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 675–83 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). It should also be noted that some Justices regard the current state of the law as empowering executive agencies with more latitude than the Constitution allows. *See Whitman*, 531 U.S. 487–88 (Thomas, J., concurring).

210. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 196 (1987). *But see* Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 547 (1983) ("It turns out to be difficult, sometimes impossible, to aggregate" the goals of individual legislators "into a coherent collective choice. Every system of voting has its flaws. The one used by legislatures is particularly dependent on the order in which decisions are made.").

211. Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006).

statute must be read in their context and with a view to their place in the overall statutory scheme."[212]

This resurfaces repeatedly in severability case law. For example, when the Court severed the legislative veto provision in *INS v. Chadha*, Members of Congress complained that they would never have delegated the authority in question to the President or his subordinate Attorney General without that power being checked by Congress's power to veto that authority.[213]

Specifically, the Supreme Court has instructed that interpreting terms in a statute "must, to the extent possible, ensure that the statutory scheme is coherent and consistent."[214] This does not mean that jurists must agree with the policies Congress is pursuing in the statute. "It is not [the Supreme] Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre."[215] When examining statutes—especially long and/or complex statutes—readers must get a gestalt of the statute and derive a sense of the overall scheme created by the statute. When a provision is found invalid and the court is devising a remedy, one that violates the legislature's intent will often be inconsistent with the legislative bargain embodied in the statute. This creates serious doubt as to whether the legislature would have passed such a statute.

The second and third principles from *Ayotte* overlap to such an extent that they sometimes seem to collapse into one inquiry. Some parts of judicial opinions seem to reflect both principles to such an extent that a reader could just as easily label it as arising from one as from the other. For example, which principle did the Supreme Court employ in setting forth the following method for making a severability inquiry? "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do . . . ."[216] It implicates rewriting the statute as much as it does the statute's intent. Yet *Ayotte*

212. Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989).

213. Nagle, *supra* note 5, at 226.

214. Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 222 (2008).

215. Cuomo v. Clearing House Ass'n, L.L.C., 129 S.Ct. 2710, 2733 (2009) (Thomas, J., concurring in part and dissenting in part) (internal quotation marks and alterationss omitted).

216. Trade-Mark Cases, 100 U.S. 82, 99 (1879).

situates this "what-if" scenario in the context of the third severability principle, and so lawyers should argue such a hypothetical under the rubric of legislative intent. While this designation is questionable, it is where the Supreme Court has placed it, so the designation need not make sense. As others have said in various ways, the Supreme Court is not last because it is always right; we treat the Court as right because it is always last.[217]

Courts apply this third principle from *Ayotte* by engaging in an admittedly problematic creative exercise. As Justice George Sutherland wrote for the Court decades ago:

> The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another. Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the [invalid provision] had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the [remaining statute].[218]

While the mutual dependence in the first part of this passage is well within the realm of judicial discovery, some level of speculation is inextricable from the latter part of this sort of inquiry. While the exploration need not be fraught with peril in all circumstances—one can hypothesize scenarios under which a particular invalid provision appears central to the statutory scheme and thus a court would effectively rewrite the statute by retaining the statute without the provision, thereby contravening legislative intent—at minimum such hypothesizing requires cautious circumspection.

Yet such determinations are essential in severability inquiries, and so courts must venture where textualists fear to tread.[219] Many pieces of legislation are carefully-balanced packages, for

217. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in judgment) ("We are not final because we are infallible, but we are infallible only because we are final.").

218. Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936).

219. R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935) (citing as a factor rejecting the severability of a statute that "it is 'unthinkable' and 'impossible' that the Congress would have created the" challenged program without the unconstitutional provisions).

which various provisions may be incidental or insignificant, but others may be vital. But for this third principle from *Ayotte* (and the second principle as well), courts could routinely excise central or even indispensible provisions from statutes, thereby rebalancing the legislation into something the legislature neither intended nor desired.

IV. MODERN SEVERABILITY TEST IS A TWO-STEP ANALYSIS

The foregoing material provides the context and foundation for the modern test for severability. As explained in Part II.B, *supra*, the Supreme Court is now on its third version of the proper test for determining whether an invalid provision can be separated from the remainder of a statute to preserve the residuary. After 56 years of severance cases, the Court in 1932 developed its first clearly-adopted test in *Champlin*.[220] This test was then supplanted (but not overruled) by *Alaska Airlines* in 1987,[221] giving us the test that some authorities continue to erroneously regard as the current test. Instead, it is only part of the current test.

However, as explained in Part II.B.1.d, the Supreme Court recently modified severability doctrine in 2010 in the case *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[222] The Court thereby resegregated the *Alaska Airlines* test into what should henceforth be regarded as a two-prong test (as had previously the case with *Champlin*), wisely reversing the *Champlin* order to consider functionality before considering legislative intent.[223] Such a revised approach is especially advisable from

220. *See* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932); *see also supra* Part II.B.1. I use the term "clearly adopted" because there were test-like articulations from previous cases, *see, e.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 564–65 (1902); Allen v. City of Louisiana, 103 U.S. 80, 83–84 (1881), subsequent courts would typically cite to one or more of these cases, but did not consistently cite to the same passage from the same case. By contrast, the cited page from *Champlin* became the commonly-cited provision in severability cases for more than half a century. *See, e.g.*, Buckely v. Valeo, 424 U.S. 1, 108–09 (1976).

221. *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987); *see also supra* Part II.B.2.

222. 130 S. Ct. 3138 (2010).

223. *See id.* 3161–62 (discussing a two-step approach to severability). The U.S. Supreme Court should formally announce that severability is now a two-step test. However, it is also worth noting the Court hardly pioneered this approach in *Free Enterprise*. When a federal court is examining a state law under diversity jurisdiction, *see* 28 U.S.C. § 1332, severability is a question determined under state law, Burlington N. & Santa Fe Ry. Co. v. Doyle, 186 F.3d 790, 804 (7th Cir. 1999); *but see* Randall v. Sorrell, 548 U.S. 230, 262 (2006) (plurality opinion) (holding invalid provisions of a Vermont

the vantage point of those adhering to a textualist or originalist perspective,[224] as it reduces the significance of extratextual methodologies preferred by proponents of purposivism.[225] Although standing alone *Alaska Airlines* was by no means a failed test, making it central to the second step of the Court's revised two-step method is immensely superior.

One oft-cited case in severability analyses is *Hill v. Wallace*, wherein the Supreme Court invalidated a provision of the Future Trading Act pertaining to commodities trading as exceeding Congress's power under the Commerce Clause.[226] Writing for the Court, Chief Justice William Howard Taft expressly noted that there was a severability clause in the statute, then proceeded to say that the inherently invalid provision of the statute "is so interwoven with those regulations that they can not be separated. None of them can stand."[227] The Chief Justice went on to explain the rationale of such a conclusion, in saying of the severability clause, "Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court."[228]

A. *The Modern Test from* Free Enterprise

Without rehashing the discussion of the facts of *Free Enterprise* from Part II.B.1.d, recall that the *Free Enterprise* case was a challenge to the Sarbanes-Oxley Act, in which the Court held a tenure-protection provision of the statute unconstitutional, and then proceeded to determine whether the offending provision

---

campaign finance law nonseverable, but giving no indication that the Court was applying Vermont severability doctrine). The evolution of severability into a two-step inquiry in which functionality is examined before legislative intent is also seen in at least some state courts. For example, the Indiana Supreme Court held six years prior to *Free Enterprise* that:

> A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.

State v. Barker, 809 N.E.2d 312, 317 (Ind. 2004) (quoting Dorchy v. Kansas, 264 U.S. 286, 289–90 (1924)).

224. *See supra* notes 165–67 and accompanying text.

225. *See supra* notes 170–72 and accompanying text.

226. 259 U.S. 44, 66–70 (1922).

227. *Id.* at 70.

228. *Id.*

could be severed from the remainder of this lengthy statute. Writing for the Court, Chief Justice John Roberts restated the framework governing severability as follows:

> Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact. Because the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course . . . .
>
> The Sarbanes-Oxley Act remains fully operative as a law with these tenure restrictions excised. We therefore must sustain its remaining provisions unless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is invalid.[229]

This should be understood as creating a sequential two-step framework for conducting severability inquiries, and severability analyses should follow what they explicitly label as a two-step approach.

1. *Free Enterprise* Step One: Functionality

The first step in a severability inquiry is determining whether the statute is still literally functional without the invalid provision.[230] Specifically, the statute must continue to be "*fully* operative as a law,"[231] as opposed to merely functioning partially or haltingly. Thus this prong goes beyond asking if the abridged statute is effectively dead, instead asking if severing the invalid provision renders the remaining statute lame.

The statute must be fully functional, not merely substantially functional or mostly functional. Elsewhere this Article shows aspects of severability doctrine relevant to contract law. To imperfectly analogize to the law of contracts, the functionality step requires the U.C.C. standard of strict compliance for the

229. *Free Enter.*, 130 S. Ct. at 3161 (internal quotation marks and citations omitted) (second ellipsis in the original).

230. *Id.*

231. *Id.* (quoting New York v. United States, 505 U.S. 144, 186 (1992)) (emphasis added).

sale of goods, not the common-law rule of substantial performance.[232]

This requirement has fortunately been expounded over time. The Supreme Court long ago instructed that a court is not permitted "to reject a part which is unconstitutional and retain the remainder, [if] it is not possible to separate that which is unconstitutional . . . from that which is not."[233] By itself, such a rule begs the question of how a judge determines if it is possible to separate the offending provision. A century of cases since that 1906 command have subsequently elaborated on this statement, enabling courts to specifically consider whether any other provisions of a statute are incapacitated by the excision of the invalid provision, as examined throughout this Article.

The *Free Enterprise* Court significantly improved severability doctrine by asserting functionality before intent.[234] It allows a court to use a four-corners approach of looking to the various remaining sections, asking for *each* provision whether it can *fully* function without the invalid provision. In exploring possible answers, a judge has the full range of rules and cannons of statutory construction that courts employ on a daily basis. This doctrinal modification answers the criticism of some scholars that severability doctrine requires leaning too heavily on debatable indicia of legislative intent,[235] enabling courts to employ a more text-centric approach consistent with modern judicial trends.[236] Consequently, it should never be necessary to consult any extraneous sources in finding whether Step One is

232. *See, e.g.*, Pomerantz Paper Corp. v. New Cmty. Corp., 25 A.3d 221, 231–32 (N.J. 2011); Astor v. Boulos Co., 451 A.2d 903, 906 (Me. 1982); T.W. Oil, Inc. v. Consol. Edison Co., 443 N.E.2d 932, 937 (N.Y. 1982) (discussing U.C.C. § 2-508).

233. Ill. Cent. R.R. Co. v. McKendree, 203 U.S. 514, 529 (1906).

234. Although this is the Court's first holding to that effect, the Court had suggested such an ordering of questions even before *Champlin*. *See* Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (dictum) (stating that "a provision, inherently unobjectionable, cannot be deemed separable unless it appears *both* that, standing alone, legal effect can be given it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall") (emphasis added).

Professor Cass Sunstein commented in 1989 that text-centric interpretive methods were experiencing a renaissance. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 410 n.16 (1989). Increasing focus on text in the 1980s notwithstanding, his statement was premature in 1989, and in 2011 it still remains to be seen whether these approaches are ascendant.

235. *See* Movsesian, *supra* note 27, at 42; Dorf, *Facial Challenges*, *supra* note 150, at 291; Nagle, *supra* note 5, at 206 (discussing the difficulties of determining legislative intent).

236. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24, 656–67 (1990) (discussing Justice Scalia's originalist approach of statute interpretation and its influence on the court).

satisfied, as the court only considers whether Provision A is somehow dependent by reference or inference on an invalid Provision B, such that some aspect of Provision A is linguistically or logically incapacitated or rendered nonsensical—or functionally incapacitated—without Provision B.

One major severability case from decades past illustrates how Step One should be applied. A 1922 case marked one of the rare occasions that the Supreme Court struck down an entire statute on account of a single invalid provision despite the statute containing a severability clause.[237] In *Hill v. Wallace*, the Court invalidated the entirety of the Future Trading Act, holding that notwithstanding its severability clause,[238] the statute's other operative provisions were so interwoven with the invalid provision that they could not functionally be separated.[239]

At least one prominent scholar suggests that a lack of functionality should be the only grounds for finding an unconstitutional provision nonseverable.[240] But the Supreme Court rejects this argument, as well it should. The judicial role under such circumstances is not merely a mechanistic analysis of grammar and syntax. Rather, the Supreme Court's explication of the judicial power also assigns the judiciary the role of considering whether Congress's will is being frustrated when the court removes an invalid provision.

2. *Free Enterprise* Step Two: Legislative Intent and the Legislative Bargain

If the individual provisions of the statute are still operable without the invalid provision, then the court turns to the question of legislative intent. The court "must sustain its remaining provisions '[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid].'"[241] Courts are to imagine that Congress was faced with a bill containing the statute minus the invalid provision, and determine whether Congress would still have

237. Jona, *supra* note 197, at 702.
238. *See* 259 U.S. 44, 70 (1922).
239. *Id.* at 70–72.
240. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 142 n.11 (3d ed. 2000).
241. Free Enter. Fund v. Pub Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151, 3161 (2010) (quoting New York v. United States, 505 U.S. 144, 186 (1992)) (alterations in the original).

voted in favor of the bill.[242] The Supreme Court explained in 1909:

> "It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to" [its effect without the invalid provision] . . . . If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall.[243]

In 1936 the Court added to this reasoning, holding that several presumably-valid statutory provisions are "so related to and dependent upon the [invalid] provisions . . . as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former."[244]

a. *Ascertaining Legislative Intent*

The question cannot be whether the statute sans the invalid provision fully effectuates legislative intent, since by definition the invalidation of any provision which Congress adopted thwarts some aspect of legislative intent.[245] In answering this hypothetical inquiry, the test is "whether the statute will function in a *manner* consistent with the intent of Congress."[246] This requires a court to find Congress's intent in enacting the statute, which cannot be an exact science but which nonetheless must be attempted and then applied to the case. Determining intent requires interpreting any provision in the context of the statute as a whole,[247] which means that the principles invoked in Step Two overlap to some degree with those relevant to Step One.

Subsequent severability cases showcase this caveat. The *New York* Court opined that "where Congress has enacted a statutory

242. Carter v. Carter Coal Co., 298 U.S. 238, 312–13 (1936). A severability clause "provides that in the event that the original law is held partly invalid, a fallback of the original law minus the invalid provision or application will take effect." Dorf, *Fallback Law*, *supra* note 29, at 305.

243. El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 97 (1909).

244. *Carter*, 298 U.S. at 316 (citing Int'l Textbook Co. v. Pigg, 217 U.S. 91, 113 (1910); Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 98–99 (1854)).

245. Hayes, *supra* note 83, at 141.

246. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis in original).

247. Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (holding that interpreting statutory language "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis").

scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress's overall intent to be frustrated."[248]

Judges are not to make this requirement insuperable. Jurists must not say, "We do not see overwhelming evidence that Congress would have voted for this bill without the invalid provision, so we will sever it."[249] Such a standard would almost require challengers to disprove a negative, since unless Congress includes an express *nonseverability* provision, or concurrently passes a joint resolution proclaiming that it would not have enacted the preceding legislation without every provision in the bill (even suggesting such a thing would be fanciful), it would be almost impossible to present irrefutable proof that the invalid provision was intended to be fatal. Instead, courts must instead determine whether, "eliminating invalid parts, the Legislature would have been *satisfied* with what remained."[250]

A court must "seek to determine what 'Congress would have intended' in light of the Court's constitutional holding."[251] Heading off any ambiguity in this holding, the *Booker* Court quoted a plurality opinion from 1996, asking the question: Would Congress still have passed the remainder of the statute if Congress had known the invalid provision would be struck down?[252] This reconciles the *Booker* holding with existing severability case law, making it evident that the Court was not modifying the rule for severability.

The Supreme Court in *Booker* held that in choosing between options, a court must select the severability remedy that is "more compatible with the Legislature's intent as embodied" in the statute,[253] the one that "would deviate less radically from

248. New York v. United States, 505 U.S. 144, 186 (1992).

249. Ironically (and surprisingly) as this Article was being edited, the Eleventh Circuit severed a provision of controversial legislation with an opinion that applied this unworkable and incorrect standard. *See* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1322–23 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

250. Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 235 (1932) (emphasis added).

251. United States v. Booker, 543 U.S. 220, 246 (2005) (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996) (plurality opinion)).

252. *Id.* (quoting *Denver Area Telecomms. Consortium*, 518 U.S. at 767).

253. *Booker*, 543 U.S. at 246.

Congress's intended system."[254] Justice Stephen Breyer wrote this part of the opinion for the Court,[255] and limited the Court's holding with the caveat, "In [this] context—a highly complex statute, interrelated provisions, and a constitutional requirement that creates fundamental change—we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible."[256] Although decided five years prior to *Free Enterprise*, Breyer made clear that this reasoning applied in what this article labels *Free Enterprise* Step Two, adding, "Neither can we determine likely congressional intent mechanically. We cannot simply approach the problem grammatically, say, by looking to see whether the constitutional requirement and the words of the Act are linguistically compatible."[257] (Such an approach would instead fall within *Free Enterprise* Step One.) Breyer also adds the caveat that remaining independent provisions are to be severed if they are also "consistent with Congress's basic objectives in enacting the statute."[258]

Free Enterprise also contains additional language suggesting courts are not to set a dauntingly-high bar when examining legislative intent. Chief Justice Roberts specifically reasoned, "Because the unconstitutionality of a part of an Act does not necessarily defeat *or affect* the validity of its remaining provisions, the normal rule is that partial . . . invalidation is the required course . . . ."[259] Two points relevant to this discussion must be gleaned from this passage. First, the Court is broadening the orbit of severability beyond those provisions that would be substantially *defeated* by removing the unconstitutional provision to also include those that would be *affected*.

---

254. *Id.* at 247.

255. *Id.* at 248. Breyer wrote the second part of the majority opinion, and was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg. The first part of the majority opinion was written by Justice John Paul Stevens, joined by Justices Scalia, Souter, Thomas, and (again) Ginsburg. *See id.* at 226.

256. *Id.* at 248.

257. *Id.*

258. *Id.* at 259 (citing Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion)). Although *Free Enterprise* formally recast the severability test by building upon *Alaska Airlines*, *Booker* presaged the resegregation of severability analyses, enumerating three elements that must be met for an invalid provision to be severable. A court "must retain those portions of [an] Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enabling the statute." *Id.* at 258–59 (internal quotation marks and citations omitted).

259. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (emphasis added) (internal quotation marks and citations omitted).

This latter language is what is necessary to reconcile *Free Enterprise* with cases from throughout the previous 156 years. The language in the first severability case from a state court, which as we have seen was later substantially adopted by the Supreme Court, is that between a valid and an invalid provision, they cannot be "connected with and dependent on each other."[260] The provisions are severable "*if* the parts are *wholly* independent of each other,"[261] adding that "all the provisions which are thus dependent, conditional, or connected" must fall with the invalid provision.[262] This trio of words indicates an intent to include any form of significant relationship between statutory provisions. It is what the Court meant when it held that if an invalid provision "is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative."[263] "To do this would be to introduce a limitation where Congress intended none, and thereby to make a new . . . statute, which, of course, [courts] may not do."[264] After all, even a severability clause "in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another."[265] Otherwise stated, courts are to use this standard to determine "whether the statute will function in a *manner* consistent with the intent of Congress."[266] To do so would be to "rewrite [a] law to conform it to constitutional requirements" and thereby "to circumvent the intent of the legislature."[267]

Roberts's use of the word "validity" in the phrase "defeat or affect the validity of its remaining provisions" must be defined, because it does not refer to the inherent unconstitutionality of those remaining provisions. It was not the best choices of words (which is rare for a Chief Justice who has consistently demonstrated clear and unambiguous language in his opinions), and must be read in context. In a severability inquiry,

260. Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 99 (1854).
261. Allen v. City of Louisiana, 103 U.S. 80, 84 (1881) (emphasis added).
262. *Id.* at 84 (quoting *Warren*, 68 Mass. (2 Gray) at 99).
263. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902).
264. Butts v. Merchs.' & Miners' Transp. Co., 230 U.S. 126, 135 (1913).
265. Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936).
266. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis in original).
267. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–30 (2006) (alterations and citations omitted).

once a constitutionally invalid provision is identified, the question becomes whether that provision can be separated from constitutionally valid provisions. So in the sense of constitutionality, all the remaining provisions are "valid" and this intrinsic validity cannot be altered by the invalid provision.

Instead, "valid" in this passage should be understood as referring to two things. The first would be the continued functionality of those statutes under Step One. The second arises if a court is in *Free Enterprise* Step Two, and would be whether those provisions still impact the overall statutory scheme in a manner consistent with Congress's intent—that its "validity" in this sense is its continuing to occupy the space Congress assigned to it and fulfill the role that Congress envisioned for it as a component of the legislative bargain. Such a reading is necessary to harmonize this *Free Enterprise* passage with the core holding of *Alaska Airlines*,[268] a holding which the *Free Enterprise* Court gave no indication it wished to disturb.

At least one scholar—Professor Larry Tribe—is critical of an intent-centric approach to severability,[269] which is central to a court's inquiry when in Step Two. And a plausible argument for judicial modesty and self-restraint can be made that courts should confine severability inquiries to accessing the ongoing functionality of the shortened statute without musing about collective legislative intent. But as discussed throughout this Article, courts and other scholars have instructed how legislative intent should be discerned, and equally-plausible arguments can be made that there is no modesty in insisting on applying only part of an enactment when the modified legislation no longer serves the goals driving its adoption, and may in fact now work against those goals.

The Supreme Court's most recent application of this inquiry is at least somewhat helpful. When proceeding to Step Two in *Free Enterprise*, Chief Justice Roberts first noted that the answer to the question of whether Congress would have passed the

268. *See Alaska Airlines*, 480 U.S. at 685 ("The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress.") (emphasis omitted).

269. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 79–83 (1985) (noting that intent-based approaches raise questions as to how courts can enforce laws that were never duly enacted).

abridged statute can be "elusive,"[270] quoting *INS v. Chadha*, though the Court in *Chadha* expanded upon that point to clarify that the inquiry is elusive only in cases where there is no severability clause in the statute,[271] (as was the case with Sarbanes-Oxley),[272] and also suggested this proposition four years later in *Alaska Airlines*.[273] This elusiveness should thus only attend statues lacking a severability clause. The final part of the *Free Enterprise* Court's reasoning illustrates this approach, as the Court then observed that "nothing in the statute's text or historical context makes it 'evident' that Congress" would rather have no statute than the truncated statute.[274] On this reasoning, the Court concluded that the intent prong was satisfied.

The Court's reasoning in those passages amply demonstrates the value of a severability clause for ascertaining legislative intent. In *Chadha*, the Court determined that "we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in § 406 of the Immigration and Nationality Act" by including a severability clause.[275] Legislative wrangling between various politicians, each with a different agenda, creates a morass that must be waded through for those intrepid lawyers seeking to divine an intelligible institutional intent from Congress's actions. Chief Justice Warren Burger was being quite charitable to Congress when he said that finding Congress's intent is "elusive" without such a clause, a charity perhaps augmented by his adherence to the ideal that when a Chief Justice writes for the Court, he should be particularly gracious when speaking critically of a

270. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (quoting INS v. Chadha, 462 U.S. 919, 932 (1983)).

271. *Chadha*, 462 U.S. at 932.

272. Hans Bader, Free Enterprise Fund v. PCAOB*: Narrow Separation-of-Powers Ruling Illustrates That the Supreme Court Is Not "Pro-Business"*, 2009–2010 CATO SUP. CT. REV. 269, 279 (2010); *see also* Plaintiffs' Reply Memorandum Supporting Motion for Summary Judgment at 27–28 (Dkt. 47), *Free Enter.*, 2007 U.S. Dist. LEXIS 24310 (D.D.C. Mar. 21, 2007) (No. 1:06-cv-217-RMU); *cf.* Brief for Respondent Pub. Co. Accounting Oversight Bd. at 48–49, *Free Enter.*, 130 S. Ct. 3138 (No. 08-861).

273. *See Alaska Airlines*, 480 U.S. at 686.

274. *Free Enter.*, 130 S. Ct. at 3162 (quoting *Alaska Airlines*, 480 U.S. at 684).

275. *Chadha*, 462 U.S. at 932. That provision reads, "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." *Id.* (quoting note following 8 U.S.C. § 1101).

coequal branch of the federal government.[276] Severability clauses are so helpful in regard to assessing Congress's intent that it would be beneficial if Congress would make it a requisite part of legislation to include either an express severability clause or (here is a thought to take to heart, not that Congress would do so frequently) an express nonseverability clause in much of its legislation.[277]

This intent aspect of a severability inquiry has important implications for formulating national policy in legislation. Consider the result in the context of legislative theory. Legislation is proposed, codified in a bill. The bill is introduced by its sponsor. It is referred to a committee. There are hearings with testimony, following which the committee issues reports. After hearings the committee has a mark-up session, where amendments are proposed. The bill is debated, then voted out of committee. It goes to the floor of the full chamber, where there is additional debate and further opportunities to offer amendments. It then passes the chamber. This entire process is then repeated in the counterpart legislative chamber. For those few bills that make it through the entire process, the President either signs the bill into law, or vetoes it.

Every stage of this process involves negotiation and discussions between the political actors. Each of these is an expression of

---

276. One shudders to think what sort of adjective Justice Antonin Scalia would substitute for "elusive," and perhaps we will have occasion to find out, likely to the amusement of legal media commentators and the consternation of Members of Congress. Justice Scalia has a habit of using sarcasm and acerbic verbiage in his opinions. For example, in a 2006 habeas corpus case, a fractured Court invalidated the President's system for processing terrorist detainee suspects without statutory authority. In his opinion, Justice Stephen Breyer says: "Nothing prevents the President from returning to Congress to seek the authority he believes necessary." Hamdan v. Rumsfeld, 548 U.S. 557, 636 (Breyer, J., concurring). When Congress subsequently passed such legislation and then the Court struck it down, Justice Scalia said of his colleagues: "Turns out they were just kidding." Boumediene v. Bush, 553 U.S. 723, 831 (2008) (Scalia, J., dissenting). Other times he can respond to arguments he rejects with a single provocative word. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 587 (2008) ("Grotesque.").

Such statements routinely amuse his admirers and irritate his critics. Those of us in the legal community whose duties require us to frequently attend Supreme Court arguments can attest that Scalia is equally entertaining during oral argument, with exchanges closely resembling the way a tough law professor conducts a classroom discussion.

277. Recent literature includes several discussions of nonseverability clauses. *E.g.*, Noah, *supra* note 26, at 238–39; *see also* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 167–68 (1997) (stating that nonseverability clauses which tie certain provisions of legislation to one another may help protect against the undermining of legislative compromises); Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 903 & n.4, 907 (1997).

individual intent, which is aggregated into what we conceptualize as "legislative intent." Negotiated bargains are ubiquitous throughout this entire narrative, and it is a common occurrence that any particular provision that results from one of these bargains is a *sine qua non* but for which the legislation would not have progressed toward final enactment.

Without the intent prong in severability analysis—the second step of *Free Enterprise*—legislation could be retained that no longer worked the people's will as expressed by their elected political representatives through the democratic process. Legislation is, after all, formulated to deliberately serve a particular public purpose, and so removing part of a statute should cast the statute's continuance in doubt unless a court is satisfied that its overarching purpose is still advanced. This explains why various courts have stated that severability is ultimately a question of legislative intent.[278] As one treatise states, when the "purpose of [a] statute is defeated by the invalidity of part of the act, the entire act is void."[279] This hearkens back to the Supreme Court's first severability test from 1881, asking "whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."[280]

While indicia of legislative intent is less precise than rules of statutory interpretation, and practices that consult extraneous material do not enjoy the same universal acceptance as principles of textual construction, plumbing the depths of legislative intent need not always be a fool's errand or one that will inexorably lead a judge to the conclusion he was already predisposed to reach. There are various principles for finding such intent. Moreover, in ascertaining legislative intent, courts can employ the various rules utilized in contract law to find the intent of the parties.[281] This is all the more appropriate because severance in statutory remedies is similar to the severability rule in contracts, where a court can sever a term if the parties would

278. *See, e.g.*, Ala. Power Co. v. United States Dep't of Energy, 307 F.3d 1300, 1307 (11th Cir. 2002); New Haven v. United States, 809 F.2d 900, 907 (D.C. Cir. 1987).

279. NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 44.07 (4th ed. 1986).

280. *Id.*

281. Movsesian, *supra* note 27, at 43.

still have formed the contract without the invalid provision,[282] as explained in the *Restatement*.[283]

b. *Adhering to the Legislative Bargain*

Courts have been authoritatively declaring congressional intent and then formulating holdings pursuant to those declarations throughout severability case law. When examining a claim under the Civil Rights Act of 1875, the Supreme Court in 1913 began its severability analysis by noting Congress's "manifest purpose was to enact a law which would have a uniform operation wherever the jurisdiction of the United States extended."[284] When the Court held an invalid provision severable in 1984, Justice Byron White wrote for a plurality of the Court in *Regan v. Time* that the "policies Congress sought to advance" would still be effectuated by the remaining statute, thus achieving "the main purposes" of the statute.[285]

The many examples found in case law provide a considerable amount of guidance on how courts are to find whether Congress's intent for a statute can be preserved without the invalid provision, and if so a court can sever that provision and retain the residuary. Statutes are bundles of legislative concerns and priorities. Some have primacy, but for which the quintessence of the statute would be modified. Others are of secondary or even tertiary significance, the diminution of which does not subvert Congress's overarching design for the statute.

The Court in *New York* signaled that severability is more likely when the invalid provision is merely an aid to the "main purpose" of a statute,[286] suggesting that a court should refrain from severing in situations where excising the offensive

282. *Id.* at 43–44. In this respect, to analogize a severable provision from a nonseverable one, a nonseverable statutory provision is likely a condition (a necessary provision) in a contract, while a severable provision is just a term (an unnecessary provision). Conditions are provisions the violation of which constitutes a breach of the contract—a "deal breaker"—which cancels the obligations of the other party and so the contract is thereby undone. So too, the invalidity of a nonseverable provision nullifies the entire statute.

283. *See* RESTATEMENT (SECOND) OF CONTRACTS § 184(1) (1981).

284. Butts v. Merchs.' & Miners' Transp. Co., 230 U.S. 126, 133 (1913).

285. 468 U.S. 641, 653–55 (1984) (plurality opinion).

286. New York v. United States, 505 U.S. 144, 186–87 (1992) (quoting Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 396 (1894) (holding of penalties that are "simply in aid of the main purpose of the statute" that "[t]hey may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment")).

provision would undermine the statute's manifest purpose. Applying *Alaska Airlines* as an example of severing an unconstitutional provision which was unshielded by a severability clause, the *New York* Court held that the invalid provision could be severed both because the remainder of the statute "is still operative *and* it still serves Congress'[s] objective . . . ."[287] Thus post-*Alaska Airlines*, courts place revived the judiciary's early emphasis on considering the purpose of the statutory scheme in assessing whether a given provision is separable. The Court reinforced this aspect of its holding by concluding, "The purpose of the Act is not defeated by the invalidation of the [unconstitutional provision], so we may leave the remainder of the Act in force."[288] Conversely, the closer the proximity of the invalid provision to the statute's center of gravity, the more likely a court should not preserve the remaining statute. Various lower federal courts have likewise understood severability doctrine in this fashion, such as assessing whether the invalid provision is "central" to the "core mission" of the statute.[289]

The presumption of severability can also be included in this framework, at least when a challenged statute contains a severability clause. If severability is presumed, an invalid provision is presumed severable because it is presumed to be of minor significance to the legislative bargain. The burden often rests on the challenger to persuade the court that this particular unconstitutional provision is instead of major significance. Such provisions are critical to Congress's legislative bargain, going to the heart of the statutory scheme created by the enactment. Few provisions can be shown to be so integral to Congress's plan. This will keep instances of total invalidation rare, preserving the norm of partial invalidation.

287. *Id.* at 187 (emphasis added).

288. *Id.*

289. *See, e.g.*, McConnell v. FEC, 251 F. Supp. 2d 176, 435 (D.D.C. 2003) ("The provisions I have found unconstitutional are all provisions . . . that are not central to [the statute's] core mission and are entirely severable without doing injustice to the remainder of the law."); *id.* at 776 (asserting that a severability clause "does not relieve this Court of its obligation to determine if the [remaining provisions] can stand alone, and if Congress would have enacted [the statute] knowing [these provisions] would be held unconstitutional").

c. *Provisions of Major Significance are Nonseverable*

In sum, under *Free Enterprise* Step Two courts must properly conceptualize Congress's legislative bargain embodied in the enacted legislation, and then hold nonseverable any invalid provision significant to that deal—reaching to its core, because the statute cannot function in the manner Congress intended without that provision.

Nonseverable provisions are those that are so significant that they upset the legislative bargain discussed above. They need not render other provisions incoherent or nonsensical, as such matters fall within Step One. Moreover, they need not even be literally essential to fail under Step Two. But they must be more than simply noteworthy. Courts must make a judgment as to whether the individual provision is of major significance to the statute, versus only minor significance. If the invalid provision is important to the entire statute or to a significant portion of the statute, then courts should infer that Congress would not have wanted the provisions connected with it to continue without it, and hold it either totally nonseverable or partially severable, respectively. As discussed below, Congress can heavily tilt the scale in favor of severability by including an express severability clause; however, absent such a clause, a provision is nonseverable if it is a prominent aspect of Congress's overall plan.

This has been implicit in severability doctrine since 1894, where the Court reasoned a statutory provision was severable because it was "simply in aid," as opposed to being an integral element "of the main purpose of the statute."[290] The Massachusetts high court explained why this is so several years after deciding *Warren*, when one provision "may have been the motive, inducement or consideration on which the other was founded, . . . they must stand or fall together."[291] Thus, the statutory scheme created by the statute would not be frustrated by the lack of the provision in question. The Justices unanimously restated this rule explicitly in 1987, holding that a court must discover "the original legislative bargain" codified in the statute,[292] and then determine whether the balance struck in

290. Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 396 (1894).

291. Jones v. Robbins, 74 Mass. (8 Gray) 329, 339 (1857) (citing Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 99 (1854)).

292. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987).

the statute is upset by the excision of the constitutionally-infirm provision. [293] If not, the abridged statute remains. But if that deal has become unbalanced, then the statute must fall.[294]

B. *Various Types of Severability*

There are three possible outcomes to a severability inquiry whenever a provision is invalidated. The first is to strike down only the invalid provision. The second is to strike down all of the statute. And the third is an intermediate remedy to strike down more of the statute than just the invalid provision, but still retain a portion of the statute. Exploring these provisions at the theoretical level also requires the academy to answer an antecedent question that courts consider implicitly but rarely if ever expressly discuss: Of the words contained in a statute, precisely which words constitute a "provision?"

In answering these questions we must realize that statutes come in two forms. One option is that a statute is in a sense a grouping of legislative enactments—a series of short laws, sometimes related but other times not—that, for the sake of convenience, expediency, and avoiding redundancy are bundled together into a single bill. The other option is that an enacted statute represents a carefully balanced legislative deal, as shown in Part IV.A.2.b. It is much more likely that severance is possible under the first option, as the remaining provisions may be completely autonomous. It is much less likely that severance is possible under the second option, as the judge would have to explain why the original legislative bargain is not being undone by removing an invalid provision. (Even then, severability is possible when a court can show the invalid provision is incidental and insignificant to the legislative bargain.) As explained below, partial severability is sometimes possible with both types of statutes.

1. Total Versus Partial Severability

When a court determines that an invalid provision cannot be severed, the court must then determine whether any part of the statute can be salvaged. If the unconstitutional provision can be

293. *See id.*

294. Various scholars have likewise seen this part of a severability inquiry as determining whether the invalid provision is essential to Congress's bargain. *See* Movsesian, *supra* note 27, at 62; *cf.* Walsh, *supra* note 6, at 770–71.

completely separated from the residuary of the statute, then it is said to be totally severable. Alternatively, if there are various other provisions that are so bound up with the invalid provision that they cannot be separated, while still other provisions are separable under the *Free Enterprise* test explained above, then the invalid provision is said to be partially severable. As the Eleventh Circuit explained it, "The fact that an invalid portion of a statute is not self-contained in separate sections does not prohibit the court from applying the severability rule to strike the invalid portion and to preserve the rest of the enactment."[295] Courts have more choices than a President does when evaluating legislation. To suggest that a court must either strike down only the invalid provision or strike down the entire statute is analogous to the choice a President faces of either signing an entire bill into law or vetoing the entire bill.[296] Courts are not so limited in their choices.

In fact, under modern doctrine, invalidating a statute *in toto* due to one invalid provision is the exception, not the rule. The most common remedy when a court invalidates a provision is to completely sever the unconstitutional provision from the rest of the statute, saving the rest of the Act. The Supreme Court has on occasion found statutes partially severable,[297] striking down provisions in addition to the unconstitutional provision, but still retaining much of the statute at issue. By contrast, the last significant case in which the Court held a provision completely nonseverable was when it invalidated an entire statute due to one faulty provision was in 1922—a case made all the more significant by the fact that the statute at issue included a severability clause.[298]

Often a court's severability analysis will be framed *ab initio* as a partial severability inquiry. This is seen when the court phrases the issue as whether the invalid provision can be severed from anything less than the entire statute. Consider this in formulaic terms, when X is the invalidated provision, Y is the portion of the statute containing the invalid provision, and Z is the entire statute. In such a scenario, X is a subset of Y, and Y in turn is a

295. Frazier v. Winn, 535 F.3d 1279, 1283 (11th Cir. 2008).

296. *See* Jona, *supra* note 197, at 712.

297. *E.g.*, R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 361 (1935) (holding several provisions of Railroad Retirement Act nonseverable).

298. Hill v. Wallace, 259 U.S. 44, 70–72 (1922).

subset of Z. Syllogistically, X is therefore a subset of Z. When a court asks whether X can be severed from Y, instead of whether X can be severed from Z, then the court's inquiry is a partial severability analysis. When a court thus defines its task as determining whether a provision is separable from a part of a statute and never even raises the question of total nonseverance, it implicitly holds *sub silentio* that at minimum a substantial part of the statute can be severed from the provision. In so doing, the court takes the possibility of total nonseverability entirely off the table.

In the seminal campaign finance case *Buckley v. Valeo*, the Court considered whether the two provisions at issue were severable from the remainder of Subtitle H of the Internal Revenue Code.[299] The Court held that the provisions were severable under the *Champlin* test,[300] only considering the question of whether the provisions were severable from the parts of the Federal Election Campaign Act (FECA) impacting Title 26 U.S.C., thus being a consideration of partial severability, without ever contemplating the question of total nonseverability which could potentially have also invalidated other provisions of FECA codified in Title 2 U.S.C.[301]

Even clearer, in *Planned Parenthood v. Danforth*, the severability inquiry was limited to whether one invalid provision within a single statutory section was severable from the remainder of that single statutory section.[302] The Court held it was not severable, concluding "that § 6(1) must stand or fall as a unit."[303] The Court invalidated that specific section, but never contemplated or discussed the possibility of nullifying the entire enactment.

One of the Supreme Court's watershed severability cases provides yet another example. In *Alaska Airlines* the Court was considering whether an invalid legislative-veto provision—which was one paragraph of a statute—could be severed from the Employee Protection Program which was created by section 43

299. 424 U.S. 1, 108 (1976).

300. *Id.* at 109. Recall that the *Champlin* test was the standard test for severability inquiries during this time, as *Buckley* predated *Alaska Airlines* and *Free Enterprise*. *See supra* Part II.B.

301. *See id.* at 108–09 (discussing whether the Federal Election Commission can exercise the powers conferred upon it). Title 26 U.S.C. is the Internal Revenue Code.

302. 428 U.S. 52, 83 (1976).

303. *Id.*

of a statute,[304] rather than the entire statute.[305] Justice Blackmun's opinion revolves around whether the statutory section at issue could function in the manner Congress intended without the invalid legislative-veto provision. Although, as already shown, *Alaska Airlines* specifically inquires whether the entire statute—not merely the statutory provision—can function as intended, a significant portion of the discussion nonetheless revolved around specifically how the implicated section would function without the invalid provision.

This suggests that the scope of severability inquiries—whether encompassing the whole statute or only part of a statute—is determined in *Free Enterprise* Step One by the provision's contextual setting in the court's opinion. That is to say, if part of the statute is rendered inoperable by the invalidation of one of that portion's provisions, but the remaining portions of the statute are still functional, then the provision is partially severable.

It is unclear how this approach translates to *Free Enterprise* Step Two. The Court's instructions are explicit to examine whether the *statute*—which would mean the whole of the statute—can function in the manner Congress intended. The Court never *explicitly* asks if the relevant *portion* of the challenged statute can function in its intended manner. It is not clear if this distinction in the case law means that answering the test's question in the negative must result in the statute's complete invalidation, or instead if it could result in excising only the infected part of a multi-part statute. At least one major authority from the early years of severability doctrine seemed to suggest the latter approach.[306] Which approach proves easier for a court to apply

304. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 683 (1987).

305. Justice Harry Blackmun begins his opinion for the Court by saying the Court was "consider[ing] whether [the] legislative-veto provision is severable from the remainder of the Act." *Id.* at 680. However, this language proves unhelpfully imprecise. That provision is found in section 43(f)(3) of the statute in question. *Id.* at 682. Justice Blackmun later clarifies that in *Alaska Airlines* the plaintiffs are making a constitutional challenge to the Employee Protection Program (EPP) that is created exclusively by section 43 of the statute, *see id.* at 680–82, and the Court is specifically affirming the judgment of the D.C. Circuit "that the legislative-veto clause is severable from the remainder of the EPP program." *Id.* at 683.

306. *See*:

> When neither the statute itself nor its legislative history afford any clue to the intention of the legislative body, the Court should look to the policy sought to be effectuated by the statute and decide whether that policy will be more nearly attained by partial application or by complete nullification of the law.

would likely depend on the specific facts of the statute in each case. If it is difficult to determine the intent underlying a statute as a whole, it stands to reason that it could sometimes be more difficult to determine whether a single section or subsection will function in the intended manner, but other times might be easier to assess the impact on only that implicated section.

Though there is an argument to the contrary. At first thought it is difficult to conjure a hypothetical statute in which excising a single provision results in the statute not functioning in Congress's intended manner, but going further to eradicate the entire section wherein the invalid provision is situated would restore that intended effect. While such an outcome seems unlikely, however, it is possible. You can imagine a section governing some aspect of the statute that Congress intends to play a secondary role, such as extraordinary powers that are only triggered under very unlikely circumstances as a contingency measure. Now imagine that the invalid provision is the provision containing the trigger, which is intended to severely limit the frequency with which these extraordinary powers are triggered. Under this hypothetical, to strike down the limiting provision would allow these reserve powers to be effectuated regularly or perhaps even be continuously in effect, rather than as powers that are rarely if ever invoked. A similar hypothetical would be if the invalid provision severely restricted the scope of extraordinary powers, but for which the President would wield tremendous authority. Under either hypothetical, removing one provision in the section would clearly upset Congress's "original legislative bargain" referenced in *Alaska Airlines*,[307] which is central to assessing severability under *Free Enterprise* Step Two. Under these facts, a court might be able to preserve Congress's intended functioning of the statute by holding the invalid provision partially severable, and invalidate the section in question but sever the entire section from the remainder of the statute. In terms of our earlier equation, it would be to say that X could not be severed from Y, but all of Y could be severed from Z. Courts will need to consider such hypotheticals in resolving this question, should such a case arise.

The idea of partial severability under myriad circumstances is consistent with the principles and rationale underlying

Stern, *supra* note 16, at 101.

307. 480 U.S. at 685.

severability doctrine examined in Part III, *supra*. A court assigns itself a limited role when it defines the judicial task as determining whether to invalidate only a single provision versus a small number of provisions (those surrounding the invalid provision, such as the remainder of a single section or even a single paragraph). It showcases severability as a doctrine of judicial restraint, leaving much of the public policy adopted by the people's elected representatives in force. This is consistent with the three *Ayotte* principles explored in Part III of minimalism, refraining from rewriting statutes, and vindicating congressional intent.[308]

But there can be no bright line rule, because under other circumstances partial severability would violate these principles. Courts must eschew partial severability whenever such an action—even when cloaked by an invocation of judicial restraint—essentially rewrites a statute or rebalances the statutory scheme embodied in the enactment. Severability remedies must be consistent with *all three* of the *Ayotte* principles; the first principle of minimalism cannot be utilized in such a way as to violate the principles of not rewriting a statute or subverting Congress's intent. This is reminiscent of the Court's reasoning (on a different severability matter) in *Free Enterprise*, where Chief Justice Roberts noted that the Court could excise a number of provisions of Sarbanes-Oxley as an alternative route to a constitutionalizing result, but rejected such a "blue-pencil" editorial approach as usurping Congress's role.[309] Whether a court strikes down only the invalid provision, versus part of the statute, versus all the statute, must be determined in consultation with not upsetting Congress's balancing of policy priorities, as such a rebalancing of a statute *de facto* rewrites the statute by substituting judges' policy preferences in derogation of Congress's prerogatives.

a. *Defining "Provision"*

One question yet to be answered is how to define a statutory "provision." One prerequisite to determining whether to strike

308. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–30 (identifying the three principles that guide the remedy for constitutional flaws in statutes).

309. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010).

down one or more provisions of a statute is to understand the term "provision" as the unit of analysis. This task is not as simple as some might guess, as case law reveals a broad diversity of combinations of words that together form a "provision" in any given statute.

"A text is clear if all or most persons, having the linguistic and cultural competence assumed by the authors of the text, would agree on its meaning."[310] The purpose of statutory text is to convey a particular meaning, declaring rights or imposing obligations and conditions, carrying the force of law. "If a message is unclear we ask the sender to repeat or amplify it until we no longer doubt what he meant to say."[311] This is true not only of statutory language, but indeed of all written language through which one person seeks to communicate to another.

Cases over the past forty years show the elasticity in length that can attend what the law denominates as a "provision." The Court in *Buckley* invalidated two provisions of the Federal Election Campaign Act of 1971.[312] The first of these, codified at 18 U.S.C. § 608(a) when *Buckley* was decided in 1976, consisted of nine sentence-length items, and the second, codified at that time at 18 U.S.C. § 608(c), consisted of eighteen sentence-length items.[313] That same year the Court in *Danforth* was considering whether the first sentence of section 6(1) of the Missouri statute at issue could be severed from the second sentence of section 6(1).[314] The Court in *Chadha* specifically found the one-chamber

310. Posner, *supra* note 210, at 187.

311. *Id.* at 188.

312. Buckley v. Valeo, 424 U.S. 1, 54, 58 (1976) (invalidating parts of Pub. L. No. 92-225, 86 Stat. 3 (1971), amended by Pub. L. No. 93-443, 88 Stat. 1263 (1974), codified in relevant part at 18 U.S.C. § 608(a), (c) (1970 Supp. IV)).

313. Space considerations make imprudent the full reproduction of those subsections here. Given that those invalidated provisions are no longer found in the current United States Code, subsection 608(a) can be found in the *Buckley* Court's appendix, *id.* at 187–89, and subsection 608(c) can be found in the same appendix, *id.* at 190–92.

314. Planned Parenthood v. Danforth, 428 U.S. 52, 83 (1976). The Missouri statute is reproduced in the Court's appendix. Although the severability inquiry concerned the first and second sentences of section 6(1), it contains a third sentence as well, and the entire section reads as follows:

> Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction

veto provision to be a "particular provision" of the statute.[315] That provision was section 244(c)(2) of the Immigration and Nationality Act.[316] So "provision" there referred to one subpart of one subsection of a statute, which was a full paragraph.[317] In *Regan v. Time* the Court invalidated an anti-counterfeiting provision then found at 18 U.S.C. § 504(1),[318] which is one statutory paragraph the length of multiple normal paragraphs,[319]

> shall be punished as provided in section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in section 537.080, RSMo.

Id. at 85–86.

315. INS v. Chadha, 462 U.S. 919, 932 (1983).

316. *See id.* at 923, 932, 934 (referencing Immigration and Nationality Act of 1952, Pub. L. No. 414 § 244(c)(2), 66 Stat. 163, 214, codified at 8 U.S.C. § 1254(c)(2) (1980)).

317. The paragraph reads:

> (2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—
>
> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

Pub. L. No. 414 § 244(c)(2).

318. Regan v. Time, Inc., 468 U.S. 641, 659 (1984) (plurality opinion).

319. Section 504(1) allowed certain exceptions to general anti-counterfeiting requirements barring the reproduction of U.S. currency by providing:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;
>
> (ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths and more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that

and held this provision severable from the remainder of the Act.[320] In *Brockett* the Court invalidated part of a public morality statute involving sexually obscene material, and in so doing considered whether it would invalidate the entire statute.[321] In *Brockett*, the provision severed by the Court was a single clause of six words.[322] In *Alaska Airlines*, the Court severed a legislative veto in a statute deregulating airlines.[323] This provision was one paragraph of an otherwise-valid section of a statute.[324] In *New York*, the Court invalidated the take-title provision of a radioactive waste statute, a provision that was a lengthy sentence in one paragraph.[325] In *Booker*, the Court severed two separate

> black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and
>
> (iii) the negatives and plates used in making illustrations shall be destroyed after their final use in accordance with this section.

Id. at 646 n.3 (quoting Act of Mar. 3, 1923, ch. 218, 42 Stat. 1437, as amended by Pub. L. No. 85-921, 72 Stat. 1771 (1958) (codified at 18 U.S.C. § 504(1) (1952))).

320. *Id.* at 653–54 (plurality opinion).

321. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504–07 (1985).

322. *Id.* at 494 (quoting WASH. REV. CODE § 7.48A.010(8) (defining the term "prurient" as "that which incites lasciviousness or lust")).

323. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 697 (1987).

324. The legislative veto provision reads:

> (3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

Airline Deregulation Act of 1978, Pub. L. No. 95-504 § 43(f)(3), 92 Stat. 1705, 1752 (codified at 49 U.S.C. App. § 1552(f)(3) (1982)). This was one paragraph in section 43 of the statute, found at 92 Stat. 1750–53.

325. New York v. United States, 505 U.S. 144, 174–77 (1992). The provision reads:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

provisions of the Sentencing Reform Act, both of which were subsections, one of which is a single paragraph and the other which can be characterized as either one or two paragraphs.[326] In *Ayotte*, the challenged aspect of the statute was that it did not

---

Low Level Radioactive Waste Policy Act, Amended, Pub. L. No. 99-240 § 5(d)(2)(C), 99 Stat. 1842, 1851 (1986) (codified at 42 U.S.C. § 2021e(d)(2)(C) (1982)).

326. United States v. Booker, 543 U.S. 220, 270–71 (2005). The first provision invalidated by the Court read:

> Application of guidelines in imposing sentence.—(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. § 3553(b)(1) (2000 Supp. IV)). The second provision read:

> Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> (3) is outside the applicable guideline range, and
>
> (A) the district court failed to provide the written statement of reasons required by section 3553(c);
>
> (B) the sentence departs from the applicable guideline range based on a factor that—
>
> (i) does not advance the objectives set forth in section 3553(a)(2); or
>
> (ii) is not authorized under section 3553(b); or
>
> (iii) is not justified by the facts of the case; or
>
> (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
>
> (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.
>
> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

Id. (codified at 18 U.S.C. § 3742(e) (2000 and Supp. IV)).

provide an exception to parental notification of a minor's abortion in the event of a medical emergency.[327] Thus, this challenge of a *lack* of a provision was essentially a challenge to the statute's existing medical provision, arguing that this medical provision was not broad enough to cover emergencies that were not deadly. This provision was a single compound sentence.[328] Most recently, in *Free Enterprise* the Court considered whether invalidating the tenure provision of the Sarbanes-Oxley Act was unconstitutional, wherein the challenged provision was actually two different clauses of the statute.[329] Thus, a "provision" can range in length from several words the length of a single simple clause to oversized paragraphs exceeding a page in size. A provision can be in the form of one group of words, or disjointed groups of words, or even the lack of certain words. And a single provision in these examples from recent cases can range anywhere from six words to 281.[330]

327. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 324 (2006).

328. *See id.* This provision allowed for an abortion if the provider deemed the minor's life in danger. The provision states as one exception to notifying a parent of an impending abortion: "The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." N.H. REV. STAT. ANN. § 132:26(I)(a) (Supp. 2004) (repealed 2007).

329. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3148, 3161 (2010) Of these two provisions, the primary invalidity is found in provision that allows for Board members to be removed, "in accordance with [§ 7217(d)(3)], for good cause shown." 15 U.S.C. § 7211(e)(6) (2010). In invalidating these seven words, the Court also invalidated the provision incorporated by reference, which reads that a member can be removed once the Securities and Exchange commission finds, "on the record" and "after notice and opportunity for a hearing," that a Board member:

> (A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;
>
> (B) has willfully abused the authority of that member, or
>
> (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

Id. § 7217(d)(3).

330. *Compare* provision in *supra* note 322 (six words in length), *with* provision in *supra* note 319 (281 words in length). Also the word counts from the two invalidated provisions in *Booker* are 271 and 148, with a combined total of 419 words. *See supra* note 326. Another case during this time frame briefly discussing severability is *Randall v. Sorrell*, 548 U.S. 230 (2006). However, the Court's application of severability in *Randall* did not make entirely clear which provisions it found valid versus invalid, summarily holding that some of the campaign contribution limit provisions which might be constitutional in the Vermont campaign-finance statute at issue could not be severed from those limits that were unconstitutional, invalidating them all. *Id.* at 262. Thus it is not easy or necessarily useful to provide an exact word count on the invalid provisions at issue in that case.

Not only that, but *Randall* was evaluating a Vermont statute. When federal courts consider state statutes, severability is a question of state law. *See* Leavitt v. Jane L., 518

b. *Definitional Challenge Endemic to All Human Communication in Reducing Thoughts into Words*

Although this topic deserves extensive discussion beyond the scope of this Article, it should be noted that the problem in defining "provision" is not unique to severability doctrine, but rather endemic to all written communication.

The problems attending communication are more pronounced with the written word. Writings are often one-way communications, in which the writer is "speaking" and the reader is "listening," and for which the reader has no ability to respond in a way that the writer can immediately perceive.[331]

Whether spoken or written, the value of the use of language is measured by the effectiveness in which ideas are being successfully perceived and comprehended by the intended audience. The most eloquent speech or treatise on the most important issue is of no value if the intended audience is unable to understand the message being conveyed.

Thus the purpose of language is to reduce human thought to words.[332] However, completely effective and efficient communication is impossible.[333] There are always slight nuances of intended meaning that are not picked up in language, either

---

U.S. 137, 139 (1996). So this case is not especially helpful in understanding federal severability doctrine, and should not be invoked in evaluating federal statutes.

331. The written word is typically a monologue, not a dialogue. This fact is one of the reasons clarity is of paramount importance in writing, since there is no opportunity for the writer to realize that his audience does not understand what is being conveyed, and thus to attempt to remedy the situation via restatement or analogy.

332. Those words are then transmitted to a recipient via a medium accessible by one of the recipient's five senses, either through audible communication—typically speech—or visual communication, such writing, and sometimes images. (Alternatively, transmission of ideas can be through a kinesthetic or tactile sense, such as Braille for the blind. It is also theoretically possible that communication could be achieved through the olfactory or gustatory senses (smell and taste, respectively), though I am unfamiliar with any successful attempts to do so with a system sufficiently sophisticated to constitute a "language" that can communicate complex ideas.) If the recipient is able to receive a message through being conscious and aware, and able to decipher the message by an adequate mastery of the language in which the message is codified, then to the extent that the recipient accurately processes the sender's thoughts, communication has been achieved.

333. No series of words can encapsulate a human thought in perfect detail. Whenever thought is reduced to words—either spoken or written—there is always some variance between the thought and the words, because words themselves are merely a human construct; every language is a cumulative attempt by a collection of fallible human beings to devise a medium of communication, designed to approximate as closely as possible an accurate encapsulation of human thought. But even the slightest misuse of a word—either because the speaker is misusing it, or because the audience does not correctly understand its definition—results in some degradation of the message en route from origin to final destination.

because no word exists that perfectly portrays the concept in the speaker's mind, or because the speaker's primary thought is accompanied by a relevant secondary or even tertiary thought for which the speaker does not attempt to find accompanying words to add to the message sent to the listener.

The application here is that one of the fundamental challenges with severability inquiries is that a provision is a legislative "thought" or "idea" reduced to writing. Each statutory "provision" is thus a "thought" of Congress communicated through the written word. What is the relationship between thoughts? Where does one "thought" end and a completely separate "thought" begin? Such a termination of one thought and initiation of the following thought could be after the next comma, or semicolon, or period, or paragraph break, or section break, or chapter break. Such breakpoints can be difficult to demarcate. Or more complicated yet, as just discussed regarding *Free Enterprise*, the provision at issue was actually contained in two separate, nonconsecutive sections of the Sarbanes-Oxley Act, demonstrating that a single thought can be embodied in part in a disjointed fashion through nonconsecutive statutory texts.

This is the quandary courts face with severability inquiries. It is determining at what level of specificity to define a "provision," and then determining the proximity in thought, purpose, and intent, between an invalid provision and the other provisions in the statute. Whether an invalid provision can be severed either from all of the remaining statute or part of the remaining statute is predicated on this conceptual exercise.

2. Multiprovisional Severability

Another issue that the Supreme Court has not directly confronted is multiprovisional severability. There may be instances in which a statute could survive the invalidation of one provision that is not so important to the statutory scheme so as to justify erasing the legislation, but in which a second and perhaps a third provision is also invalid. Even if none of these provisions would be fatal to the statute, invalidating multiple provisions can reach a tipping point after which a court must invalidate *in toto* to prompt Congress to reconsider how to address the policies impacted by the statute.

Multiprovisional severability can arise either in a partial severability context or in a total severability context. In the

former, a court examines the impact of multiple invalid provisions on a single part of a statute. In the latter, a court examines the impact on the entire statute.

Visualize the unit of analysis—whether the entire statute or part of a statute such as a chapter—as the hull of a ship. Ships have watertight hatches and bulkheads to contain damage in the event of a hull breach.[334] According to experts, amongst other causes, the famous *Titanic* sank in the Atlantic Ocean not because of a single massive hull breach, but rather because of a series of smaller breaches in different compartments of the ship.[335] While the *Titanic* could have survived one such breach, the aggregate impact of multiple breaches is what doomed the storied ship.[336] One can imagine statutes with two invalid provisions, where the statute can still function in the manner Congress intended without any one of those provisions. Perhaps one of the provisions can partially achieve the effects primarily expected to arise from the other. However, without both provisions, the functioning of the statute would be so impaired that the entire statute becomes unsalvageable. By punching enough holes in the hull, eventually the *Titanic* will sink.

Partial severability can also become self-perpetuating, such that it becomes a form of multiprovisional severability. With each additional provision a court finds nonseverable from the invalid provision, the judge must then ask whether these additional provisions are fatally wounded by the implicated provision, in addition to the inherently-invalid provision. Begin with a scenario where Section A is invalid. Section B is so intertwined with Section A as to be nonseverable, hence Section B is also invalidated. Section C is not directly dependent on Section A, and so at first blush is severed. But while Section C can still function without Section A, it can no longer function in the manner Congress intended without Section B. As a result, Section C must also be struck down, despite its lack of functional proximity to Section A. So invalidity radiates from the unconstitutional provision, not only carrying down provisions sufficiently impacted by invalidating the unconstitutional

334. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 251 (3d ed. 1996).

335. THE ENCYCLOPEDIA BRITANNICA, "Navy Architecture: Buoyancy," in *Titanic*, *available at* http://www.britannica.com/titanic/buoyancy.html (last visited Nov. 9, 2011).

336. *See id.*

provision, but also carrying down provisions not directly tied to the infirm provision.

V. SEVERABILITY CLAUSE DICTATES WHETHER PRESUMPTION OF SEVERABILITY EXISTS

Many statutes—like many contracts—contain a severability clause. Typically, such a provision reads, "If any provision of this statute is found invalid or otherwise unenforceable, the remainder shall continue in full force in effect," or words of the nature. A severability clause—alternatively designated as a severance clause, separability clause, or saving clause—has two components regarding the overall written document, whether the document is an enrolled statute or some form of contractual instrument. The first of those clauses is a condition precedent, announcing the clause as a contingency provision in the event that one or more of the other provisions in the document cannot be given full or partial effect. The second is the operative clause, providing that notwithstanding the faulty provision, the remainder of the document should still be effectual. Such a severability clause is a clear statement of congressional intent, just as a severability clause in a contract is a clear statement of the parties' intent.

Severability clauses have provided varying roles over the decades. They became common around the turn of the twentieth century and into the 1930s in an effort to counteract courts' growing tendency to strike down statutes entirely on account of a single invalid provision.[337] What one scholar labels *dicta* in Supreme Court cases circa 1900 suggested a presumption against severability when a statutory provision was found invalid,[338] consistent with both lesser judicial and scholarly authorities.[339]

337. *See* Nagle, *supra* note 5, at 218.

338. *Id.* at 218 (citing El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 97 (1909); Employers' Liability Cases, 207 U.S. 463, 501 (1908)). It is doubtful that these statements are *dicta*. Even if they are, however, the Supreme Court's statements by the 1930s were clearly part of the Court's holding, and no mere *dicta*. *See, e.g.*, Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184–85 (1932).

339. *Id.* at 218 n.79 (citing Skagit Cnty. v. Stiles, 39 P. 116, 116 (Wash. 1894); THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 248 n.1 (Victor H. Lane ed., 7th ed. 1903)).

Whether or not it was ever *dicta*, the Supreme Court reaffirmed this presumption of nonseverability as part of the Court's holding in 1935,[340] and then added in 1936:

> In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability and create the opposite one of separability. Under the nonstatutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test—namely, What is the intent of the law-makers?[341]

With so much riding on the presence or absence of a severability clause, legislatures had a strong incentive to include such a clause if severability was intended.

The impetus behind careful legislative drafting increased once the Supreme Court clearly held in 1932 and again in 1936 that severability clauses created a presumption of severability for statutes containing one.[342] If a severability clause is included, "when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration."[343]

While still prudent, the advisability of severability clauses became less important when the Supreme Court held in *Alaska Airlines* that the lack of a severability clause did not result in a

340. R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330, 361–62 (1935).

341. Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936); *accord* Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184–85 (1932).

342. *Carter*, 298 U.S. at 312; *see also* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 235 (1932) (noting that the invalidity of a portion of an act does not render the entire act invalid, unless it is clear that the legislature would not have enacted the legislation without the invalid portion).

343. Elec. Bond & Share Co. v. Sec. & Exch. Comm'n, 303 U.S. 419, 434 (1938). This principle endured until as recently as 1983, as can be seen from the *INS* Court's holding that an unambiguous severability clause "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid." INS v. Chadha, 462 U.S. 919, 932 (1983).

presumption against severability,[344] overruling the principle discussed above that had governed in the late nineteenth and early twentieth century. Since 1987 it has been indisputable that no statute is presumed nonseverable, regardless of whether there is a severability clause in the challenged statute. Nevertheless, lawyers are well-advised not to rely on the absence of a contrary presumption or even on favorable extraneous sources such as legislative history, since the general rule in statutory construction for ascertaining legislative intent is that "the authoritative statement is the statutory text, not the legislative history . . . ."[345]

A severability clause is not a panacea which neutralizes every attempt to nullify an entire statute. One authority argues that the presence of a severability clause should always be conclusive in favor of severability,[346] but the courts refuse to adopt that theory. Severability clauses in statutes are an aid in construction,[347] as previously noted similar to such clauses' effects in contracts.[348] "Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid."[349]

344. *Alaska Airlines*, 480 U.S. at 686. This idea had been evolving for some time. The D.C. Circuit held that *Chadha* was the case in which the Supreme Court created a presumption of severability both when the truncated statute remains operative and also when a severability clause was present. *See* City of New Haven v. United States, 809 F.2d 900, 905 & n.15 (D.C. Cir. 1986). While Judge Douglas Ginsburg in his opinion for the circuit court presaged the Supreme Court's *Alaska Airlines* decision the following year, it would be more accurate to state that *Champlin* first held a severability clause creates a presumption of severability, and that *Chadha* strongly suggested this presumption should apply even without a severability clause. But it was not until *Alaska Airlines* that the Supreme Court elevated this suggestion to a holding.

345. Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005); *see also* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149–50 n.4 (2002). Those considering such extratextual sources must also keep in mind that the Supreme Court has held that "extrinsic aids to construction may be used to solve, but not to create, an ambiguity." Chamber of Commerce of U.S.A. v. Whiting, 131 S. Ct. 1968, 1980 (2011) (quoting United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932)) (internal citation marks omitted).

346. *See* Schumsky, *supra* note 183, at 246–52 (arguing that severability clauses do not infringe upon the Article III powers of judges).

347. *See* Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (dictum).

348. *E.g.*, Eckles v. Sharman, 548 F.2d 905, 909 (10th Cir. 1977) (quoting Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry., 45 F.2d 715, 731 (10th Cir. 1930)); Zerbetz v. Alaska Energy Ctr., 708 P.2d 1270, 1283 (Alaska 1985); *see also* RESTATEMENT *supra* note 283, at § 184 cmt. a; Movsesian, *supra* note 27, at 46–56.

349. Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936).

But while severability clauses are rightly described as an aid, rather than a dispositive declaration, they are extremely valuable if a legislature truly prefers part of its new statute to no statute at all. Under modern doctrine, a severability clause establishes a strong presumption of severability.[350] And the strength of this presumption is sufficient to save most of the provisions of a statute in the vast majority of cases wherein a single provision is found invalid.

Although no federal court has yet had occasion to either follow or set at naught a nonseverability clause, on rare occasions state courts have severed a provision when the state legislature included a nonseverability clause.[351] While sovereign states are free to develop their own theory of severability to govern judicial review of their own laws, this should never happen in federal courts concerning federal statutes, as it is utterly indisputable that Congress's fundamental intent for the statute is subverted by retaining the residual statute when Congress expressly declares that it does not wish the statute to endure if part of it is removed.

A. *No Presumption of Severability Without a Severability Clause*

One area of severability where confusion seems especially significant centers on whether statutes are presumed severable. Presumptions allow one litigant to prove one fact and presume another, shifting the burden of production to the other party.[352] A presumption is where, as a matter of judicial policy, a court infers something to be true because there is some likelihood that the presumed fact is true.[353] A presumption occurs when "finding [a] predicate fact . . . produces a required conclusion in the absence of explanation."[354] Presumptions discussed in the

350. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). This rule from *Alaska Airlines* is consistent with decades of previous severability precedents. *See* Elec. Bond & Share Co. v. Sec. & Exch. Comm'n, 303 U.S. 419, 434 (1938); Williams v. Standard Oil Co., 278 U.S. 235, 242 (1929); Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 235 (1932); Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184 (1932).

351. Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 907–08 (1997).

352. David F. Johnson, *The Use of Presumptions in Summary Judgment Procedure in Texas and Federal Courts*, 54 BAYLOR L. REV. 605, 605 (2002).

353. 9 JOHN H. WIGMORE, EVIDENCE § 2491 (3d ed. 1940). Some scholars believe that the benefits theoretically conferred by presumptions are often outweighed by the confusion or uncertainty such presumptions create. Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. 255, 280 (1937). But that topic is beyond the scope of this Article.

354. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

context of litigation are specifically rebuttable presumptions,[355] since irrebuttable presumptions are *per se* true as a legal matter because by definition there is nothing the opposing side can say to overcome the court's presumption.

Although presumptions often exist for questions of fact (hence the prevalence of presumptions in evidentiary issues in trial-level proceedings),[356] there are also presumptions in questions of law. Congress is "free to adopt presumptions for policy reasons."[357] Courts do the same. While presumptions are often facts presumed true as evidentiary matters, the same logic governs court presumptions on rules of law.

Such presumptions are ubiquitous in judicial review.[358] For example, statutes burdening fundamental rights are presumed invalid.[359] The same is true for statutes discriminating on the basis of suspect classifications.[360] Apparently statutes differentiating on the basis of quasi-suspect classifications also trigger a presumption of invalidity, as the burden seems to shift to the government to defend the statute's constitutionality under even the intermediate form of heightened scrutiny.[361]

355. "A rebuttable presumption is a rule of evidence under which, once a basic fact or a group of basic facts (Facts A) have been established, the fact finder also must accept the presumed fact (Fact B) that follows from the basic fact unless the presumption is rebutted." Yen P. Hoang, Note, *Assessing Environmental Damages After Oil Spill Disasters: How Courts Should Construe the Rebuttable Presumption Under the Oil Pollution Act*, 96 CORNELL L. REV. 1469, 1480 (2011) (citing 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 301.02[1] (2d ed. 2000)).

356. *See, e.g.*, JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336–43 (Boston, Little, Brown & Co. 1898); David W. Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, *passim* (1977); Morgan, *supra* note 353, at *passim*.

357. Gen. Elec. Co. v. U.S. Dep't of Commerce, 128 F.3d 767, 772 (D.C. Cir. 1997) (quoting Chem. Mfrs. Ass'n v. Dep't of Transp., 105 F.3d 702, 705 (D.C. Cir. 1997)).

358. State courts are presumed to have concurrent jurisdiction with federal courts over federal claims, absent Congress expressing a contrary intent. Tafflin v. Levitt, 493 U.S. 455, 459 (1990). Federal statutes are presumed not to have extraterritorial reach unless Congress manifests a clear intent to the contrary. Sale v. Haitian Ctrs. Council, 509 U.S. 155, 173 (1993) (citations omitted). Words identically used in multiple parts of the same statute are generally presumed to have the same meaning throughout. IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005).

359. *E.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 235 (2003) (holding burdens on free speech are presumed invalid).

360. *E.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (applying strict scrutiny to a racial-preference program).

361. *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 744 (1984) ("[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing . . . that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.") (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25

Others laws—such as those subject to rational-basis review—carry a presumption of validity.[362] Such presumptions form a significant part of federal courts' function in performing judicial review.

Invalidating individually-valid provisions because they are so connected to an invalid provision—sometimes even in the face of a severability clause expressing Congress's intent—is another aspect of courts' power of judicial review.[363] Although some authors suggest statutes are presumed severable with or without a severability clause, the strength of that presumption decreases significantly when Congress does not write an express clause into the enactment. The Supreme Court has also not given any detailed instruction on what the standard of proof is when a clause is present or when it is absent; all that can be definitively asserted is that, when the presumption favors severability, the burden falls on the challenger to make the case for nonseverability to overcome the presumption.

But the Supreme Court has never even adopted such a presumption when a statute lacks a severability clause. Various scholars claim a presumption of implied severability exists.[364] But as Professor John Nagle observes in his seminal Article in *North Carolina Law Review*, the High Court has declined to adopt such a presumption.[365] Four Justices applied a presumption of severability in *Regan v. Time*.[366] But none of the other Justices in that case supported this position, so it is not controlling authority under the *Marks* rule.[367] Nonetheless, at least four federal circuit courts subsequently adopted this presumption.[368]

(1982)) (internal quotation marks omitted). Such gender-based statutes are subject to intermediate scrutiny in judicial review. Clark v. Jeter, 486 U.S. 456, 461 (1988).

362. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

363. *See* Patrick O. Gudridge, Marbury *at 200: Judicial Supremacy Today: The Office of the Oath*, 20 CONST. COMMENT. 387, 401–02 (2003).

364. *See, e.g.*, Jona, *supra* note 197, at 704–05; Schumsky, *supra* note 183, at 243.

365. Nagle, *supra* note 5, at 220–21.

366. 468 U.S. 641, 652–53 (1984) (plurality opinion).

367. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted).

368. Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1321 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400); United States v. Ameline, 376 F.3d 967, 981 (9th Cir. 2004); Nat'l Treas. Emp. Union v. United States,

Although the Supreme Court has issued no clear holding on whether such a presumption exists, the Court has suggested it does not. The Court said nothing to elevate the *Regan* plurality's position to a holding three years later in *Alaska Airlines* or its subsequent severability case law. Instead, the *Alaska Airlines* Court held "that the inclusion of [a severability] clause *creates* a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision."[369] The word "create" means to "bring into being" or "to give rise to" or "produce."[370] Thus to say a severability clause creates a presumption of severability implicitly presupposes that no such presumption exists without a clause. To bring something into being presupposes it was not already in being. To produce something presupposes that it did not exist before it was produced.

This is also the most logical position that reconciles modern severability doctrine with early severability doctrine. As previously discussed, in the first five decades of the Supreme Court's severability jurisprudence—an era in which severability clauses were rare—the Court routinely struck down entire statutes due to a single invalid provision.[371] Once severability clauses became common the typical result was only to strike down the invalid provision and salvage the remaining statute.[372] These later cases illustrate the judiciary giving effect when possible to Congress's intent as expressed in the text of the statute at issue in each case.

Without such a clause, courts must resort to extrinsic factors to determine legislative intent and are free to invalidate all of a statute when the court concludes there is significant doubt as to whether Congress would have enacted the remaining statute. The most recent restatement of severability doctrine is fully consistent with this approach; when the *Free Enterprise* Court severed the tenure-restriction provisions of the Board members in Sarbanes-Oxley it found that "*nothing* in the statute's text or historical context makes it evident that Congress, faced with the

---

990 F.2d 1271, 1278 (D.C. Cir. 1993); Cmty. For Creative Non-Violence v. Turner, 893 F.2d 1387, 1394 (D.C. Cir. 1990); News Am. Pub., Inc. v. FCC, 844 F.2d 800, 802 n.1 (D.C. Cir. 1988); Doyle v. Suffolk Cnty., 786 F.2d 523, 528 (2d Cir. 1986).

369. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) (emphasis added).

370. AMERICAN HERITAGE DICTIONARY, *supra* note 334, at 438.

371. *See, e.g.*, cases cited *supra* notes 56–64, 76–84 and accompanying text.

372. *See, e.g.*, cases cited *supra* notes 87–93 and accompanying text.

limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will."[373] Finding absolutely no intrinsic or extrinsic evidence of Congress's intent that the statute should fall due to the tenure protections on Board members, the Court concluded the unconstitutional part severable.

When a statute includes a severability clause, the language by which the Supreme Court describes the showing that must be made to overcome the presumption of severability looks like clear and convincing evidence. As the Court held in *Carter*:

> Under the statutory rule, the presumption must be overcome by the considerations which establish 'the clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains,' or . . . 'the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part.'[374]

By invoking the term "*clear* probability"—as opposed to "probability" without an augmenting adjective—not just once, but twice, the Court is signaling a standard well beyond a mere preponderance of the evidence.

Case law elaborates on one other aspect of the burden challengers must satisfy to defeat severability. The Supreme Court described the effect of a severability clause as one that:

> furnishes assurances to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.[375]

Prior to *Alaska Airlines*, the D.C. Circuit held that the presumption is overcome only by "strong evidence" that Congress would not have enacted the statute if it knew that the invalid provision could not be a component of the legislation.[376] Then in *Alaska Airlines* the Supreme Court held that when

373. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010) (emphasis added) (internal quotation marks omitted).

374. Carter v. Carter Coal Co., 298 U.S. 238, 312–13 (1936) (quoting Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929) and Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184–85 (1932)).

375. Hill v. Wallace, 259 U.S. 44, 71 (1922).

376. City of New Haven v. United States, 809 F.2d 900, 905 (D.C. Cir. 1987).

considering the burden to be met to overcome a presumption of severability:

> The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. In the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability.[377]

This is because a severability clause "serves to assure the courts that separate sections or provisions of a partly invalid act may be properly sustained 'without hesitation or doubt as to whether they would have been adopted, even if the Legislature had been advised of the invalidity of part.'"[378]

As discussed above, even in the absence of a severability clause, some lower courts will apply a presumption of implied severability.[379] But since severability under *Free Enterprise* Step

377. Alaska Airlines Inc., v. Brock, 480 U.S. 678, 686 (1987).

378. *Williams*, 278 U.S. at 241 (quoting Hill v. Wallace, 259 U.S. 44, 71 (1922)).

379. It should also be noted that there is a circuit split on whether a court should factor removal of a severability clause during legislative debate into a severability analysis. Very rarely, there are statutes for which early versions of the bill contain a severability clause, but the legislature removes the clause before final passage. The Ninth Circuit briefly held on another matter:

> When Congress deliberately makes a decision to omit a particular provision from a statute—a decision that it is aware may well result in the statute's wholesale invalidation . . . we would not be faithful to its legislative intent were we to devise a remedy that in effect inserts the provision into the statute contrary to its wishes. Such an action would be inconsistent with our proper judicial role.

Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163, 1187 (9th Cir. 2006), *rev'd sub nom. on other grounds* Gonzales v. Carhart, 550 U.S. 124 (2007). This analogy is not precise, in that there the circuit court was considering an abortion statute where Congress expressly declined to include a health exception to an abortion restriction, when Supreme Court precedent clearly required such a provision. But aspects of the Ninth Circuit's reasoning is analogous to Congress opting not to include a severability clause in a statute that Congress suspects will be challenged in court.

But on that same issue, the Eleventh Circuit noted that the district court in the case before it considered removal of the clause "strong evidence that Congress recognized the Act could not operate as intended without the" invalid provision, but concluded that the "district court pushes this inference too far." Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1322 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400). Although the reference to *strong* evidence in such a statement in isolation

Two turns on congressional intent, the question becomes determining not only to what degree the presumption of severability is diminished without a statutory clause in which Congress explicitly declares its intent, but whether such a presumption even exists.

One author points to the apparent absurdity of an instance in which an entire omnibus spending statute could have been invalidated for the sake of a single invalid provision.[380] Such an instance is a textbook example of where severability is appropriate. The Constitution requires that money from the federal treasury can only be spent as a result of Congress enacting an appropriations bill.[381] Congress normally funds the government through thirteen separate appropriations bills every year, each covering certain departments and agencies.[382] An omnibus appropriations bill is one that combines what would normally be multiple annual spending bills into a single bill.[383] Appropriations bills typically include "riders," which are instructions on the spending, such as a prohibition on the

---

could allow for the possibility that the legislative act of removing the clause could still be considered weak evidence of intent, the court of appeals seems to be saying that it was not evidential to any extent. The circuit court went on to make the shocking statement that only an express nonseverability clause in the final version of the bill should impact a severability analysis. *See id.* at 1322–23. Although this aspect of the court's holding is manifestly wrong under current severability doctrine, as demonstrated throughout this Article, its flawed analysis aside, the fact remains that removal of a severability clause does not factor into severability analyses in that circuit.

Requiring an express nonseverability clause is unrealistic as a political matter, so if courts require such a clause to hold a statute nonseverable then very few statutes will be nonseverable. Opponents of controversial legislation might occasionally attempt to insert such a clause, but it is unlikely such attempts will ever succeed, since if there are sufficient votes to insert the clause, there should often be sufficient votes to defeat the legislation. *See, e.g.*, Schumsky, *supra* note 183, at 229–30 (citing, inter alia, 147 CONG. REC. S3084, S3088–90 (daily ed. Mar. 29, 2001) (statement of Sen. Frist)). Although there are federal statutes with nonseverability clauses, *e.g.*, Mobile Telecommunications Sourcing Act, Pub. L. No. 106-252 § 125, 114 Stat. 626, 632 (2000) (codified at 4 U.S.C. § 125 (2006)); Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116 § 15, 107 Stat. 1118, 1136 (1993) (codified at 25 U.S.C. § 941(m) (2006)), such clauses are rare. *See* Schumsky, *supra* note 183, at 243–44.

380. *See* Nagle, *supra* note 5, at 204 & n.1.

381. U.S. CONST. art. I, § 9, cl. 7.

382. *See generally* Sandy Streeter, The Congressional Appropriations Process: An Introduction, Congressional Research Service (Dec. 2, 2008), *available at* http://assets.opencrs.com/rpts/97-684_20081202.pdf (indicating that the House and Senate usually consider twelve regular appropriations bills and one omnibus appropriations bill).

383. *Id.* at 5–10. This usually occurs when Congress fails to fulfill its constitutional duty to pass appropriations bills in a timely manner, and as a result pass an all-encompassing measure to provide all remaining spending for the fiscal year.

appropriated funds being spent for a particular purpose.[384] In 1988, the D.C. Circuit considered the constitutionality of such a rider provision in an omnibus appropriations bill.[385] The court invalidated one provision in the rider (not even the whole rider),[386] but in doing so severed it from the remainder of the statute,[387] upholding the vast majority of the legislation.

This is an instance where one could argue the proper judicial remedy is implied severability. The omnibus legislation (styled as a continuing resolution) was a 471-page statute.[388] Appropriations bills are to fund all the operations and programs of the federal government. The D.C. Circuit ruled that:

> The question of whether one part of a statute is severable from another is primarily one of legislative intent, informed by a general presumption of severability. Although the two parts of the [challenged appropriations rider] are tangentially related, we see no indication that Congress would not have enacted the first part of the amendment without the second.[389]

Despite occasional brinksmanship, rarely would Congress rather shut down the entire United States government than pass an omnibus sans one-half of one rider in a lengthy bill.

Thus, the absence of a severability clause lowers the burden that must be met to hold the entire statute severable, and the question becomes the proper conceptualization of these standards. The *Alaska Airlines* Court held that a severability clause means a provision is severable unless there is "strong evidence" that Congress intended otherwise.[390] By negative inference, this suggests that the evidence need not be "strong" in the absence of a severability clause. The challenge becomes

384. *Cf.* BLACK'S LAW DICTIONARY 1342 (8th ed. 2004) (defining "rider" as "[a]n attachment to some document, such as a legislative bill or an insurance policy, that amends or supplements the document. A rider to a legislative bill often addresses subject matter unrelated to the main purpose of the bill").

385. News Am. Pub., Inc. v. FCC, 844 F.2d 800, 801 (D.C. Cir. 1988).

386. *See id.* at 815–16.

387. *Id.* at 802 n.1, 815.

388. *Id.* at 801.

389. *Id.* at 802 n.1 (citing Regan v. Time, Inc., 468 U.S. 641, 653 (1984); Buckley v. Valeo, 424 U.S. 1, 108 (1976)). This citation to *Buckley* is puzzling, however. There is nothing in the cited portion of *Buckley* supporting the D.C. Circuit's holding on this point, nor does Judge Stephen Williams quote any relevant language in this citation.

390. 480 U.S. 678, 686 (1987). This invites cynical comments about Congress not meaning what it said.

how to codify that suggestion in a standard of proof that courts can reliably apply.

The Court's language in *Alaska Airlines* raises two possibilities. The first is that the law is still presumed severable, but with the presumption weakened. As previously discussed, this is the position adopted by several circuits but never by the Supreme Court. Under this theory, less persuasive evidence is required to establish that the provision is nonseverable. This would be analogous to different burdens of proof for triers of fact. Proof by a preponderance of the evidence merely means that one possibility is more likely than the other. Otherwise put, it means that the probability of a particular outcome in a binary inquiry is greater than 50%, rendering the probability of the opposite outcome less than 50%.

The second is that there is no presumption either for or against severability. This is the better position. This would mean that the judicial predisposition of two opposing possibilities to a binary question stand in precise equipoise. Simply put, the court presumes nothing.[391] The burden remains on the challenger to argue nonseverability merely by virtue of the fact that there is no presumption against the government, and so as a matter of inertia the *status quo ante* (of an enacted statute being implemented) continues unless the challenger provides the court with an argument that alters the situation. The burden of persuasion is different from the burden of proof, in that the former asks who must make the argument, and the latter asks how strong of a showing the arguer must make.[392] Therefore

391. This appears to be the position suggested by the D.C. Circuit in an opinion by Judge Douglas Ginsburg, *see* Bismullah v. Gates, 551 F.3d 1068, 1073 (D.C. Cir. 2009) ("Congress's failure to include a non-severability clause does not create a presumption of severability, any more than the absence of a severability clause implies non-severability."), despite precedent to the contrary, City of New Haven v. United States, 809 F.2d 900, 905 (D.C. Cir. 1987).

392. As these two burdens are often confused, it bears noting that there are issues wherein the party that bears the burden of proof need not show that the evidence supports the bearer's position, whereby the bearer can prevail even when the evidence weighs against the bearer. For example, several areas of law require a showing of substantial evidence—which is considerably less than a preponderance of the evidence—as sufficient for certain issues. In administrative law, on questions of fact or policy challenging agency action, substantial evidence is the standard required under the Administrative Procedure Act (APA), s*ee* Pub. L. No. 79-404 § 10(e), 60 Stat. 237, 243 (1946) (codified at 5 U.S.C. § 706(2)(E) (2006)). It does not require the weight of the evidence to support the matter asserted. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), *cited in* Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 367 (1998). *See also* FED. R. EVID.

without the burden shifting onto the defendant, it remains where it originally was.

It is possible that the most reasonable standard of proof under *Free Enterprise* Step Two when a severability clause is missing is a preponderance of the evidence. The standard must be less rigorous than clear and convincing evidence, since as shown above clear and convincing evidence is the requirement when a severability clause is present, and the Supreme Court has made clear that the burden is lessened without the clause. It is improbable—though still possible—that the standard cannot merely be substantial evidence or any other threshold less than fifty percent probability, because the Court had more recently indicated it must be "likely" that Congress would not want the abridged statute to remain in force, not merely plausible or possible that Congress might accept the shortened statute.[393]

A preponderance standard might strike this balance, though earlier Supreme Court cases antedating *Alaska Airlines* (and also *Champlin*, for that matter) suggest something akin to a "substantial evidence" standard. Beyond being less demanding than a preponderance of the evidence, this earlier standard merely required significant doubt about whether Congress would have passed the truncated statute.[394] It would also ironically assign the judiciary a more modest role if the standard was something akin to substantial evidence, as courts would send statutes back to Congress whenever there is significant evidence that Congress might not be pleased with the remaining statute when Congress does not declare any intent in the statute's text. The proper standard thus seems a bit uncertain, so Supreme Court elaboration on this point would be quite helpful.

It is possible that a court need not decide which of two possibilities (weakened presumption versus no presumption)

104(b); *cf.* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252 (1986) (defining a genuine issue of material fact sufficient to defeat a motion for summary judgment as one in which there is more than a scintilla of evidence favoring the nonmoving party, such that a jury could reasonably find for the nonmoving party). So the evidence must be more than insubstantial, but nevertheless can be far less than a preponderance.

393. *See* United States v. Booker, 543 U.S. 220, 249 (2005) (requiring courts to inquire if "the scheme that Congress created" would be "so transform[ed]" without the invalid provision "that Congress *likely* would not have intended the Act as so modified to stand") (emphasis added).

394. *See* El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 97 (1909) ("If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall.").

accurately describes a situation involving a statute without a severability clause, because there is little practical difference between conceptualizing the inquiry as the former, rather than the latter. If the challenger must carry the burden of proof, and that burden is not satisfied by carrying the requisite burden of proof (whether a preponderance of the evidence, or substantial evidence) then, regardless of what the presumption was, the *status quo ante* endures, and so only the invalid portion would be stricken from the statute. Nevertheless, the Supreme Court should clarify this matter to provide guidance to lower courts and to allow lawyers and scholars to correctly frame legal arguments.

Presuming a statute to be severable and tasking the challenger with rebutting that assumption shows due respect for the democratic lawmaking process. However, courts must be careful not to set too high a bar for challengers to meet, as this would directly run afoul of the Supreme Court's contrary indications that legislatures cannot simply cast a large net of legislation containing constitutionally dubious provisions, and task the judiciary with separating the wheat from the chaff.[395] Then again, presuming a statute nonseverable can also be cited as judicial modesty, since a court removes itself from the business of second-guessing how much of a statute Congress would be satisfied to retain. This caveat of not giving legislatures too much leeway is also reinforced by the fact that many state courts still apply a presumption of nonseverability to state statutes lacking a severability clause.[396]

B. *Extratextual Severability Clauses*

It is also an unsettled question as to whether a severability clause can only be effective if contained within the four corners of a statute as enacted, meaning in the precise form that it was enrolled in Congress, presented to the President, and signed by the President as required by the Constitution (or re-passed by a two-thirds congressional vote to override a presidential veto).[397] If a court holds part of a statute invalid, and that statute lacks a

395. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006) (quoting United States v. Reese, 92 U.S. 214, 221 (1876)).

396. Nagle, *supra* note 5, at 220 n.86 (citing as an example State v. Aldrich, 231 N.W.2d 890, 895 (Iowa 1975)).

397. U.S. CONST. art. I, § 7, cl. 2.

severability clause, but the statute amends a previous statute which did contain a severability clause, can the court credit this earlier clause to also cover the later amending statute? The Court in *Alaska Airlines* expressly disclaimed this question, as the Court was examining a challenge to a statute lacking a severability clause, but which in turn amended a prior statute that did contain such a clause.[398] The Court seemed skeptical of this approach, but nonetheless did not foreclose the possibility.[399] A corollary theory would be whether a subsequent enactment containing a severability clause could retroactively insert severability into a prior statute, where the later statute expressly announces that it amends the previous Act.

Such a possibility is both counterintuitive and exceedingly ill-advised under separation-of-powers principles. The enactment of a statute is a singular event, wherein both Houses of Congress pass a measure and the President signs it. The moment of the House vote is the moment wherein the will of the American people is expressed. The moment of the Senate vote is the moment wherein the will of the states is expressed. And the moment of the President's signature is the moment wherein the will of the head of state is expressed. There is no way to perfectly reconstruct the precise combination of thoughts and intentions of 435 Representatives, 100 Senators, and one President in determining whether the overall legislative bargain embodied in the bill before them was deserving of their acceptance or their rejection. Severability does not apply to the *United States Code*, into which all of these statutes flow; it is found in the *Statutes at Large*, and rather applies to each discrete enactment which is the tangible result of the democratic process. If the legislature at the moment of enactment expresses a wish that the provisions of the particular bill currently before it are severable, then so be it; but if not, then the legislature declined to make such a declaration, and instead decided to pass the measure without expressing any such wish. As the field of ascertaining legislative intent is already fraught with uncertainty, it injects an unacceptable level of potential revisionism to empower courts to depart from the text

398. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686–87 & n.8 (1987) (noting that the Airline Deregulation Act of 1978, then at bar, amended the Federal Aviation Act of 1958, which contained a severability clause. *See* Pub. L. No. 85-726 § 1504, 72 Stat. 731, 811 (1958) (codified at 49 U.S.C. § 1301 note)).

399. *Id.* at 687 n.8.

of an enactment, and import language from a subsequent enactment which—although concerning the same subject matter—is nonetheless not a recreation of the legislative will at the moment of the adoption of the original statute.

C. *Congruous with Other Areas of Law*

Two other areas of law have direct application to severability. Together, these two areas show a methodological consistency which reflects a common conceptual approach in statutory interpretation.

1. *Chevron* Deference Versus *Skidmore* Deference

Setting the bar in severability inquiries in two different places—one for statutes with a severability clause and one for those without—is analogous to judges' approach in other areas of law. Administrative law contains an excellent example of employing two different rules in statutory interpretation. Under *Chevron* deference, when an administrative agency has fulfilled a specific rigorous fact-finding and policy-making process, courts defer to the agency's interpretation of ambiguities or filling in a gap on interstitial issues where the statute is silent so long as the agency's construction is reasonable.[400]

But the Supreme Court held in 2001 that *Chevron* deference does not attend all agency interpretations of statutes.[401] Instead, the Court held *Chevron* only applies if Congress has "delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[402] Thus *Chevron* deference attaches only if certain criteria are met, such as when the agency's interpretation is the result of notice-and-comment rulemaking or formal administrative adjudication.[403] The Court has enumerated various agency pronouncements that fall short of this standard.[404]

400. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). An agency can also change its policy position so long as the agency presents a reasoned analysis. Nat'l Cable & Telecomms. Ass'n v. FCC, 567 F.3d 659, 667 (D.C. Cir. 2009) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 57 (1983)).

401. *See* United States v. Mead Corp., 533 U.S. 218, 227–31 (2001).

402. *Id.* at 226–27.

403. *Id.* at 227; *accord* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1444–45 (2005). The Court has not yet issued an exhaustive list of when *Chevron* applies. It is not necessarily limited to formal rulemaking,

Even when *Chevron* deference does not apply, however, agency interpretations are still given an inferior level of deference.[405] Agency interpretations that do not satisfy requirements analogous to the rigorous standards involved in notice-and-comment rulemaking or quasi-judicial adjudications are still afforded *Skidmore* deference,[406] under which interpretations are adopted if they are persuasive.[407]

There are three parallels to severability doctrine as portrayed in this Article. The first is that *Chevron* is a two-step framework, explicitly articulated and applied in that fashion.[408] With Step One applying when statutes clearly speak to the question at issue and a court proceeding to Step Two only when the statute is silent or ambiguous. This was actually my inspiration for characterizing *Free Enterprise* as creating a two-step analysis for severability, under which Step One examines whether the statute's remaining provisions are still operable, and, only if they

---

Pub. Citizen, Inc. v. HHS, 323 F.3d 654, 660 (D.C. Cir. 2003) (citing Barnhart v. Walton, 535 U.S. 212, 221 (2002); *Mead*, 533 U.S. at 231)), and at least three scholars argue that *Chevron* should be limited to the two examples thus far authorized (i.e., formal rulemaking and adjudications), *see* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 884–85 (2001); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541–44 (2003).

404. *Mead*, 533 U.S. at 234 (policy statements, agency manuals, and enforcement guidelines); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (same); *see also* Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) (holding that *Chevron* does not apply to Social Security Act interpretations contained in that agency's operational manual).

405. *Chevron* deference is not to be confused with *Auer* deference. An agency is given significance deference when it issues definitions of its own regulations (that is, issues arising from legally-binding interpretations of regulations formerly promulgated by that same agency). Such a regulatory interpretation is "controlling unless plainly erroneous or inconsistent with the regulation" or if there is any reason to doubt that the agency's views reflect a fair and considered judgment. Auer v. Robbins, 519 U.S. 452, 461, 462 (1997) (internal quotation marks omitted). The former (*Chevron* deference) concerns an agency's interpretation of statutes. The latter (*Auer* deference) concerns an agency's interpretation of regulations.

406. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (noting that agency decisions that do not have the power to control may still be persuasive).

407. *Mead*, 533 U.S. at 221 (holding that *Skidmore* deference renders an agency interpretation "eligible to claim respect according to its persuasiveness); *see also Christensen*, 529 U.S. at 587 (holding that when *Chevron* deference is unjustified statutory interpretations are still "entitled to respect . . . but only to the extent that those interpretations have the power to persuade" (quoting *Skidmore*, 323 U.S. at 140) (internal quotation marks omitted)).

408. *See, e.g.*, Sherley v. Sebelius, 644 F.3d 388, 399 (D.C. Cir. 2011) (reversing the district court's grant of a preliminary injunction on a stem-cell funding program); Anna Jaques Hosp. v. Sebelius, 583 F.3d 1, 2 (D.C. Cir. 2009) (sustaining an agency interpretation of the Medicare reimbursement statute under *Chevron* Step Two); *Pub. Citizen*, 323 F.3d at 658–59 (declining to apply either *Chevron* Step One or Step Two to the agency interpretation at issue).

are, does a court proceed to Step Two to consider whether the statute still functions in the manner Congress intended.[409]

The second parallel is the role of textual interpretation. The first step of each is exclusively based on the text of the statute at issue. Under *Free Enterprise*, the question is whether the statutory provisions can still functionally interact according to their text. Under *Chevron*, the question is whether the statute's text is unambiguous on the issue at bar. If this textual approach is insufficient, the court must then move on to a step that is less objective and relies more heavily on judicial reasoning. Under *Free Enterprise*, Step Two asks whether Congress's purposes are still fulfilled by the statute functioning in the manner Congress intended. Under *Chevron*, Step Two is whether the agency interpretation is reasonable.

The third parallel is that both determine which of two analytical frameworks applies based on one threshold question. For agency interpretations, whether *Chevron* deference applies versus *Skidmore* deference depends on one criterion (i.e., whether certain procedural formalities have been satisfied). For severability, the criterion is whether the words of the statute are still coherent without the invalid provision. So for both, a court begins with one standard setting a particular bar for court action, and based on whether one threshold criterion is satisfied a court may then conduct its analysis on a separate track. And in both instances, the second track sets a less rigorous standard that must be satisfied before the court can trump the decision of a coequal branch (overcoming Executive Branch interpretations under *Chevron* and *Skidmore*, and overcoming Congress's statutory enactments under *Free Enterprise*).

This deferential framework approach has worked reasonably well for administrative law, criticisms and contrary predictions notwithstanding.[410] It also reflects an understanding that while a single rule works for many areas of law, a two-tier approach works better in other areas. This is true for courts evaluating

409. Frameworks wherein clear statutory text trumps all extrinsic factors are also consistent with the textualist and originalist schools of thoughts examined in Part II.C, *supra*. *See also* Eskridge, *New Textualism*, *supra* note 236, at 622–23.

410. Justice Antonin Scalia was the sole dissent in the Supreme Court's 8–1 decision in *Mead*, in which he predicted that introducing an alternative standard to the two-step *Chevron* inquiry would create disastrous problems for the judiciary. *See Mead*, 533 U.S. at 241 (Scalia, J., dissenting). Some scholars have subsequently echoed those concerns to one extent or another. *See, e.g.*, Bressman, *Agency Action*, *supra* note 403, at 1444.

agency interpretations of the statutes they implement, and it is true for courts determining how much of a statute to throw out with an unconstitutional provision.

2. Preemption Doctrine Considers Overall Legislative Scheme

The other doctrine characterized by congruencies with severability is preemption doctrine, arising from the Supremacy Clause of the Constitution,[411] under which federal law trumps conflicting state laws.[412] Preemption issues exist between the federal government and a state when the laws of the former clash with those of the latter. "Where state and federal law directly conflict, state law must give way."[413] In such situations, courts try to take care in navigating confrontations between these dual sovereigns by finding preemption when Congress clearly expresses its intent to override state law, especially when the subject matter at issue is one traditionally managed by the states.[414] In one form of conflict preemption—called obstacle preemption—such a conflict exists between the two forms of government when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[415] Another form of conflict

411. U.S. CONST. art. VI, cl. 2.

412. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

413. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2577 (2011) (internal quotation marks omitted). The Court has also made clear what constitutes federal and state law directly conflicting. The Court has held "that state and federal law conflict where it is impossible for a private party to comply with both state and federal requirements." *Id.* (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)) (internal quotation marks omitted).

414. Federal courts:

> must be guided by two cornerstones of [Supreme Court] pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, [i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [federal courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks and citations omitted).

This preemption can take one of two forms, field preemption and conflict preemption. "When Congress intends federal law to occupy" a particular subject matter, "state law in that area is preempted." *Crosby*, 530 U.S. at 372 (quoting California v. ARC Am. Corp., 490 U.S. 93, 100 (1989)) (internal quotation marks omitted). When Congress does not intend to block state legislation so broadly as to permeate the subject matter, "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Id.*

415. *Crosby*, 530 at 373 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

preemption—actual conflict—is when federal and state laws directly conflict, and exists for citizens when, as a result of contradictory laws, it is "impossible for a private party to comply with both state and federal requirements."[416]

As with the administrative-law issue explored above, there are congruencies between severability doctrine and preemption doctrine. The first is that, just as with severability, the touchstone in preemption doctrine is ascertaining congressional intent.[417] Just as the Supreme Court has expounded on various methods for assessing congressional intent discussed in this Article, the Court has likewise prescribed the same approach for preemption. And just as the single greatest indicium of severability intent is an express severability clause, so too the strongest indicia of congressional preemptive intent are those found in the statute's text.[418]

The second parallel is closely related: Courts must assess Congress's intent in the statute as an integrated whole and determine the implications of the contemplated judicial action vis-à-vis the overall statutory scheme embodied in the enactment. This is central to *Free Enterprise* Step Two and was the core holding of *Alaska Airlines*.[419] Likewise in one modern preemption case, the Supreme Court found that the challenged statute "exert[s] an extraneous pull on the scheme established by Congress" to alter a carefully-balanced legislative bargain.[420] For each statutory provision, courts must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent."[421] The Court's language in these cases mirrors *Alaska Airlines*, where the Court held that judges must determine the "original legislative bargain" Congress struck in formulating a statute, and can only sever an invalid provision to retain the remaining statute if the general governing dynamics of the statute can still function in a manner consistent with Congress's intent.[422]

416. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (internal quotation marks omitted).

417. *See* cases cited *supra* note 414.

418. *See, e.g.*, *Wyeth*, 555 U.S. at 566–67.

419. *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987); *also supra* Parts II.B.1.b & IV.A.2.

420. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 353 (2001).

421. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993).

422. *Alaska Airlines*, 480 U.S. at 685.

Just as with administrative deference, courts should likewise be able to import interpretive methods from preemption case law into severability. It is a preemption "principle that it is Congress rather than the courts that pre-empts state law."[423] Likewise, it is Congress's intentions, not the preferences of the courts one way or the other, that controls whether an invalid provision can be severed from a statute without disrupting the legislative bargain that catalyzed the statute's creation. One of the greatest challenges in severability cases is correctly conceptualizing Congress's overall statutory scheme to determine whether the statute can still function in the manner Congress intended without the invalid provision. Being able to analogize to and distinguish from preemption cases engaging in the same inquiry would both help develop objective methods that produce reliable outcomes for this elusive aspect of severability inquiries, and also further harmonize severability doctrine with other interpretive doctrines.

VI. SEVERABILITY AS A DOCTRINE OF JUDICIAL RESTRAINT

Severability is fundamentally a doctrine of judicial restraint. In accordance with the principles and rules already explored in this Article, it proceeds from a judicial modesty that seeks to retain as much of a statute as practicable, stemming from a recognition that, to the extent that an enactment is invalidated, a court undoes the tangible product of the democratic process. "Judicial restraint counsels against striking down an entire piece of legislation on the basis of some constitutional infirmity in a minor provision."[424] As unelected officials in a system of government wherein officials are generally accountable to the electorate, judges rightly prefer to strike down unconstitutional enactments only insofar as necessary to reconcile such enactments with the Constitution.

Judicial restraint does not always mean severing an unconstitutional provision from the remainder of the statute. As shown below, sometimes proper restraint requires striking down a substantial part of a statute. And counterintuitive though it

423. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

424. Noah, *supra* note 26, at 236–37. By specifying this sentiment should apply to *minor* provisions, the author (by negative inference) suggests the contrapositive is true—that judicial restraint does not discourage severability when the invalid provision is a major provision in the statute.

may seem, still other times judicial focus on restraint and modesty requires a court to invalidate a statute in its entirety.

A. *Severability is Premised on Judicial Restraint*

The doctrine governing severability is a self-imposed concept to constrain judicial power. Discussing severability, the Supreme Court recently began by stating, "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem."[425] This expresses prudent reticence on the part of judges, and of courts recognizing both that their institutional competence is limited in policymaking, and also that propriety requires their governmental role be limited in a democratic society.[426]

When encountering an unconstitutional aspect of a statute in a constitutional challenge, courts must make a surgical determination. Like a surgeon discovering cancer in a patient on the operating table, the physician must assess how far the cancer reaches, taking care to remove the malignant tissue while saving as much healthy tissue as possible. This surgical metaphor aptly describes the judge's task, in that the judicial mandate is to respect and retain, to the extent possible, the product of the democratic process.[427]

Two longstanding judicial rules also sound in severability doctrine, first that courts are "never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[428] These rules reinforce the concept of judges using the power of judicial review sparingly and circumspectly. They also suggest that severability doctrine can be better understood by consulting the rationales underlying other doctrines of

425. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328 (2006).

426. This is analogous to the view that courts should be mindful of America's free-market economic system when interpreting regulatory statutes, and not assign to those statutes an unnecessarily broad sweep that unduly undermines the ability of private parties to form contracts and conduct business matters. *See* JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989); Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 544–51 (1983).

427. *See supra* Parts III.B (discussing *Ayotte*, 546 U.S. at 328–30).

428. United States v. Raines, 362 U.S. 17, 21 (1960). Although *Raines* was not a severability case, and thus the Court was reiterating these rules in another context, the Court also invoked these rules in a subsequent case that was considering severability. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985).

judicial restraint, harmonizing them to the extent possible so as to demonstrate that they arise from a common conceptual framework.

It is sometimes false humility when judges find an invalid provision severable. The reality is that sometimes judicial modesty requires totally severing invalid provisions. Other times judicial restraint requires partial severability.[429] Still, other times the most modest approach is to hold the statute completely nonseverable. Courts must be mindful of these various possibilities and reject a kneejerk tendency to strike down only the inherently flawed provision. Consider how those three outcomes—total severability, partial severability, and total nonseverability—can result from the three principles from *Ayotte* discussed in Part III when applied to different types of statutes.

This holds true regardless of whether a court is applying *Free Enterprise* Step One or Step Two.[430] This inquiry is not an overly-taxing exercise when a court is in *Free Enterprise* Step One, as the court must simply consider whether any parts of the statute malfunction or dysfunction without the excised provision. If the invalid provision is literally essential to part of the statute, then only that part must fall along with the invalid provision, while if the invalid provision is functionally vital to the entire statutory scheme then the entire statute must fall.

A court's work becomes considerably more complex if a court moves on to *Free Enterprise* Step Two. A court must ascertain the "original legislative bargain" embodied by the statute,[431] and then determine whether the statute can still function "in a *manner* consistent with the intent of Congress."[432] But on many occasions, a statute can be subdivided into different legislative bargains, similar (though not identical) to how a statute can be separated into self-contained functional units considered under Step One. The obvious difference is that Congress ultimately votes on a statute as one document in a take-it-or-leave-it proposition, complicating the task of determining whether Congress would have passed the part containing the invalid provision had it known the provision would later be stricken. Often indications of congressional intent come from statements

429. Partial severability was explained in Part IV.B.1, *supra*.
430. *See supra* Part IV.A.
431. Alaska Airlines, Inc., v. Brock, 480 U.S. 678, 685 (1987).
432. *Id.*

or actions pertaining to the entire statute, and such indications rarely draw the line of particular subdivisions of the statute when illuminating Congress's purposes.

These challenges notwithstanding, partial severability is sometimes the more restrained approach for a court to implement than either total severability or total nonseverability. Take, hypothetically, a statute that is both large and complex. It is organized into four chapters. One section of the statute that is found in Chapter 2 is held constitutionally infirm. That section is quite clearly indispensible to Chapter 2 in which it is located, as the central component in an interrelated scheme. But each of the four chapters is reasonably independent of the others. In such a situation, the correct result would likely be to hold the invalid section partially severable, requiring the invalidation of Chapter 2 but allowing Chapters 1, 3, and 4 to survive the challenge.

B. *Justices Rehnquist and White: Example of Judicial Restraint Requiring Complete Invalidation*

One relatively recent case is quite revealing on where the proper line should be drawn for severability among those who advocate for judicial restraint. The most recent example of Justices voting to strike down an entire statute as nonseverable is Justice William Rehnquist's dissent in *INS v. Chadha*.[433]

This dissent reveals the fallaciousness of the argument that judges who emphasize judicial restraint must vote for severability, especially when a severability clause is present. Justice Rehnquist was the most conservative member of the Supreme Court in 1983, and it is fair to characterize Justice Byron White, who joined Justice Rehnquist's dissent, as one of the more conservative members of the Court at that time, though they came from different legal generations, with different judicial philosophies.

The *Chadha* case was not particularly controversial. It merely involved the administrative procedures and governmental options associated with the deportation of noncitizens.[434] Also, the implications for the case were not widespread, as it only concerned legislative-veto provisions in a number of federal

433. 462 U.S. 919, 1013–16 (1983) (Rehnquist, J., joined by White, J., dissenting).
434. *See id.* at 923–24 (majority opinion).

statutes.[435] So there can be no credible accusation that any of the opinions in *Chadha* were driven by an *ad hoc* approach to reach some preordained result.

It is not surprising that Rehnquist's dissent in *Chadha* has received relatively little attention, his stature as one of the more intelligent and consequential members in the history of the Court notwithstanding. Whereas *Chadha* was a 6–3 decision, *Alaska Airlines* was a unanimous decision of the Court decided only four short years later, and elaborated on severability doctrine in much more detail. Thus, *Alaska Airlines* predictably eclipsed *Chadha*, and so much judicial and scholarly focus was directed at *Alaska Airlines* that it is unsurprising that a dissent from *Chadha* has been largely overlooked.

Justice William Rehnquist argued that the legislative veto was nonseverable from the remainder of the Immigration and Nationality Act of 1952, and thus that the entire statute should be struck down.[436] Rehnquist wrote that Congress likely did not intend to allow the Attorney General to suspend deportations if Congress lacked the power to override his decision.[437] Quoting from an earlier case, Rehnquist explained that severing the invalid provision creates the result that, "the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of [the challenged provision]."[438]

Rehnquist noted that the legislative-veto provision was an excepting clause, and went on to specifically add that the Court's reasoning concerning excepting clauses reinforced his conclusion.[439] As Rehnquist quoted from yet another case, "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which was intended to qualify or restrain."[440]

435. *But see id.* at 959–60 (Powell, J., concurring) (arguing the number of statutes being modified by the Court's holding was significant, and thus the Court's holding was broad and consequential); *id.* at 967 (White, J., dissenting) (same).

436. *Id.* at 1014 (Rehnquist, J., dissenting).

437. *Id.* at 1014.

438. *Id.* (quoting Spraigue v. Thompson, 118 U.S. 90, 95 (1886)).

439. *Chadha*, 462 U.S. at 1014–15 (Rehnquist, J., dissenting).

440. *Id.* at 1014 (quoting Davis v. Wallace, 257 U.S. 478, 484 (1922)).

But Rehnquist (and with him Byron White) then made a much broader statement that should apply in all severability cases. The future Chief Justice argued that courts must recognize legislative intent as derivable from all the provisions of the statute, and consider whether this intent is still being served by the abridged statute.[441] Rehnquist continued quoting from this case, which in turn adopted the rule from an Ohio severability case.[442] The Supreme Court incorporated the Ohio court's reasoning, writing of refusing to honor the intent of the invalid provision:

> This would . . . mutilate the section, and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act. The meaning of the legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law.[443]

Noting that the majority found Congress wanted the legislative-veto provision to be severable because Congress wanted to lessen its workload, Rehnquist and White rejected the majority's assessment, arguing to the contrary that legislative history showed that Congress wanted to deny the Executive Branch unilateral control of deportation suspensions.[444] Rehnquist went on to note that there were other legislative formulations by which Congress could advance the same goal (of restraining the Executive's suspension authority), but that Congress's declination to do so meant the Court should not presume to conclude Congress would prefer the remaining statute to continue in force.[445] This last point is quite interesting in that Rehnquist specifically added that it is not a federal judge's role to make such a determination unless there are affirmative

441. *Id.* at 1015.
442. *Id.* at 1014–15.
443. State *ex rel.* McNeal v. Dombaugh, 20 Ohio St. 167, 174 (1870), *quoted in Davis*, 257 U.S. at 484–85.
444. *Chadha*, 462 U.S. at 1015 (Rehnquist, J., dissenting).
445. *Id.* at 1016.

indications of congressional intent to advance the statute's policy objectives without the invalid provision.[446]

In other words, Rehnquist and White specifically argued that proper judicial restraint requires not only that a court inquire as to whether the statute's overall objective would be advanced without the invalid provision. Instead, a court must also not indulge in the presumption that Congress would be satisfied with a rebalanced statutory scheme absent some evidence of Congress's intent in that narrow regard. Unless the record contains evidence suggesting Congress would be willing to allow a reformulated operative scheme, a court should hold the provision nonseverable even if the remaining statute still moves in the direction of advancing the statutory purpose. Thus, Rehnquist concluded, by severing the legislative-veto provision and retaining the rest of the statute, the majority "ha[d] confounded Congress's intention . . . with their power to carry that intention into effect."[447] Indeed, at least two federal appeals courts evidently agree with Rehnquist as to where the line should be drawn, as they held two statutes with legislative-veto provisions nonseverable, invalidating them *in toto*.[448]

What makes this dissent particularly interesting is that—as already noted in this Article—the Immigration and Nationality Act at issue in *Chadha* contained a severability clause. Thus even with an express indication of congressional intent, Rehnquist and White both believed the legislative veto in the statute to be so significant to the statute as a whole that Congress would not have wanted the remaining statute to continue in effect without it—that the policy formulated by the statute should instead be returned to Congress to recalibrate the statute's provisions in light of the fact that Congress could not retain a veto-like power over the Attorney General on deportations. Such considerations become even more important after the Court decided *Alaska Airlines* four years later with the focus on a statute functioning in the manner Congress intended, and suggests the judicial thinking Rehnquist and White carried with them into *Alaska*

446. *See id.* 1015–16 (criticizing the majority for severing the Act despite having no indication that Congress wished for it to take effect in its severed form).

447. *Id.* at 1016 (quoting *Davis*, 257 U.S. at 484 (quoting *Dombaugh*, 20 Ohio St. at 174)) (internal quotation marks omitted).

448. *See* City of New Haven v. United States, 809 F.2d 900, 905–09 (D.C. Cir. 1987) (invalidating the Impoundment Control Act of 1974); EEOC v. CBS, Inc., 743 F.2d 969, 971–74 (2d Cir. 1984) (invalidating the Reorganization Act of 1977).

Airlines when they joined the Court's opinion in full in that later case.

VII. CONCLUSION

Courts sometimes misstate the framework for severability by quoting one major case, or only one relevant passage from a major case. Unadorned citations to *Champlin* or *Alaska Airlines* will readily lead to an incomplete analysis and a faulty conclusion. Correct application of severability doctrine is increasingly important as courts and scholars intensify their focus on statutory interpretation.[449] *Free Enterprise* synthesized over a century of precedent into a comprehensive framework. Whether this proves to be a useful framework remains to be seen.

One important point to remember is that the core of severability doctrine has not changed since its inception. The only aspect of the doctrine that has ever been overruled is the early presumption of nonseverability for statutes lacking a severability clause. While this presumption has been jettisoned, the Supreme Court has not decided whether to replace it with a presumption of implied severability, or with no presumption at all. Aside from that, the focus on whether a statute's provisions are still operable and whether Congress would still have enacted the abridged statute as fulfilling Congress's negotiated bargain without the invalid provision has endured from 1876 to the present. *Champlin* did not overrule the first five decades of severability decisions. *Alaska Airlines* did not overrule *Champlin*. *Ayotte* did not overrule *Alaska Airlines*. And *Free Enterprise* did not overrule *Ayotte*. To the contrary, each major case has built upon the last.

In the first major law review Article on this issue, Robert Stern discusses his "impression left by several [severability] cases . . . that the decision on separability may have been the result of a desire to avoid more serious constitutional questions upon which the Court was divided."[450] Whether or not it originated to avoid hard choices or unpopular cases, severability has proven

449. *See* John C. Nagle, *Newt Gingrich: Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2210–11 (1995) (reviewing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994)).

450. Stern, *supra* note 16, at 102.

invaluable in enabling courts to fulfill their constitutional role without overstepping their bounds.

Each judicial review case must be considered on its own merits to account for many variables, and individual considerations can lead to numerous permutations. For example, take a large and complex statute in which an additional chapter was added that concerns an entirely different subject matter. Some bills are considered "must-pass" legislation, such as bills funding United States military operations. Because machinations of political factions often create impediments to Congress passing legislation, congressional leadership will sometimes attach what was originally a stand-alone piece of legislation as an amendment to a "must-pass" bill. If the resulting bill is eventually enacted as a statute, it is perfectly reasonable to imagine a scenario where a court strikes down the entire part of the statute pertaining to the invalid provision, but retains the remaining part of the legislation that was originally a separate bill.

In other circumstances, a court might not be able to firmly conclude whether such partial severability is possible. The advantage of the democratic process is that Congress can always pass a new statute if its policy objectives enjoy widespread support. So when a court invalidates an unconstitutional provision that is of major significance to the overall statutory scheme, but cannot determine exactly which provisions must fall with the defective provision, a court should strike down the entire statute to return the issue to Congress to make new legislation. This is especially true if Congress declines to include a severability clause in the statute in question.

Supreme Court decisions can shape subsequent legislation as Congress attempts to draft bills consistent with the Court's requirements to pass constitutional muster.[451] Courts faithfully applying severability doctrine could improve the quality of legislation by encouraging Congress to take care in its work. It may also encourage Congress not to develop statutes that are too large and complex, as lawmakers will be mindful that such increased size and complexity compounds the risk that the deficiency of a critical component could invalidate the entire

451. *See* J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 66–67 (2004) (citing, *e.g.*, Roe v. Wade, 410 U.S. 113 (1973)); *accord* Jona, *supra* note 197, at 714 n.101.

statute, and thus that passing shorter, discrete works where each provision is fully understood is the safer route.

As stated in the Introduction, when a statutory provision is invalidated, the question of whether that provision can be severed from the remainder turns on the significance of the provision to the statute. It is unlikely courts will abuse severability doctrine by frequently or lightly declaring an invalid provision pivotal—and thus nonseverable—to a given piece of legislation. But faithfully applying severability doctrine, and when necessary returning issues to Congress through holding a provision nonseverable, will help preserve democratic accountability and ensure that statutes on the books both conform to the Supreme Law of the Land and also enjoy the legitimacy of support by the American people.