Severability, Inseverability, and the Rule of Law

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I. Introduction

The legislative bargain struck at the heart of the McCain-Feingold campaign finance reform bill was simple: In exchange for agreeing to a ban on so-called "soft-money" contributions, a majority of Congressmen successfully insisted upon increasing then-existing "hard-money" contribution limits.[1] This deal leads to a surprisingly difficult and important question of statutory interpretation: If the Supreme Court eventually strikes down McCain-Feingold's soft money ban on First Amendment grounds,[2]

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1. *See* Bipartisan Campaign Finance Reform Act (BCRA), Pub. L. No. 107-155, §§ 101-103 & 307, 116 Stat. 81 (2002).

2. Just as this Article was being submitted for publication, the special three-judge panel assigned to initially hear the constitutional challenge to McCain-Feingold rendered its long-awaited decision. With each judge issuing his or her own opinion (and two judges jointly submitting a fourth "per curiam" opinion and order), the deeply fractured panel upheld parts of the law's ban on raising and spending soft money but struck down others, and it retained the law's hard money increases without reaching their constitutionality. *See McConnell v. FEC*, No. 02-cv-582, *available at* http://www.dcd.uscourts.gov/mcconnell-2002-ruling.html (last visited May 7, 2003). Although it is difficult to discern the court's soft-money "holding" from the more than 1600 pages of opinions issued by the judges, the panel seems to have largely upheld the law's prohibitions against parties and federal candidates raising and spending soft money on "federal" activities (those which "promote," "support," "oppose," or "attack" federal candidates) as well as its prohibitions against federal candidates raising and spending soft money for "non-federal" or "mixed" purposes. However, the panel did invalidate McCain-Feingold's proscription against parties raising and spending soft money for "non-federal" or "mixed" purposes (such as voter registration). Post-decision, it is unclear whether party-linked organizations steered or headed by federal officeholders are allowed to raise and spend soft money for any purpose. For a more in-depth and wide-ranging analysis of these and other points, visit Rick Hasen's excellent Election Law Weblog (http://electionlaw.blogspot.com/2003_05_01_electionlaw_archive.html). Supreme Court review of the lower court's decision is assured, *see* BCRA § 403(a)(3)-(4) ("It shall be the

what should it do about the legislation's accompanying increase in allowable hard-money contributions?

One approach might be to ask whether Congress would have independently increased hard money limits if it had not also banned soft money. The answer is probably not, and therefore one might suggest that the Court should excise the contribution limit increase from McCain-Feingold at the same time that it strikes down the law's soft money ban. This line of reasoning seems to be what most influenced Judge Henderson at the lower court level.[3] Another approach might be to question whether the remaining statute—including its increase in hard money contribution limits—can function without a soft money ban. It surely can, and therefore, those aspects of the statute not dependent on the soft money ban, including the contribution limit increase, ought to be preserved.

A third approach—and perhaps the most obvious one—is to ask whether Congress itself addressed the possibility of partial unconstitutionality in crafting McCain-Feingold. Cognizant that courts routinely must decide whether to sever or strike down entirely a partially unconstitutional law, Congress frequently enacts a severability or inseverability clause designed to govern the reviewing court's severability determination should the court declare part of a statute constitutionally invalid. And that is exactly what Congress did in constructing McCain-Feingold. Section 401 of the legislation provides:

> If any provision of this Act or amendment made by this Act, or the application of a provision or amendment to any

duty of the . . . Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the . . . appeal."), and several interested parties lodged jurisdictional statements or notices of appeal at the high Court immediately after the release of the special panel's opinions. *See, e.g*., Jurisdictional Statement of Senator Mitch McConnell, available at http://www.goldsteinhowe.com/blog/files/McConnellJS.pdf (last visited May 7, 2003); Senator John McCain's Notice of Appeal to the United States Supreme Court, available at http://www.campaignlegalcenter.org/attachment.html/DNOA.CongressionalSponsors.pdf?id=589 (last visited May 7, 2003); Department of Justice's Notice of Appeal to the United States Supreme Court, available at http://www.campaignlegalcenter.org/attachment.html/DNOA.DoJ.pdf?id=590 (last visited May 7, 2003). The three-judge panel has since stayed its order pending Supreme Court review. *See* http://www.dcd.uscourts.gov/02cv582i.pdf (last visited May 27, 2003).

3. *See McConnell v. FEC*, No. 02-cv-582, opinion of Judge Henderson at n.5, *available at* http://www.dcd.uscourts.gov/mcconnell-2002-ruling.html (last visited May 7, 2003) ("I am convinced that no plaintiff has standing to challenge the increased contribution limits set out in BCRA sections 304, 307, 316 and 319. Therefore, I would not decide the constitutionality of those provisions even though upon examination of the record and *despite BCRA's severability provision, I doubt that the Congress, upon elimination of the numerous provisions I believe are invalid, would have been satisfied with the contribution limit increases*.") (citations and quotation omitted) (emphasis added); *see also id*. at 5 ("Further, the opinions are similarly flawed in their dissection of the statute's dense and interlocking provisions, upholding a portion here and striking down a fragment there until they have drafted legislation the Congress would never have enacted . . . .").

> person or circumstance, is held to be unconstitutional, the remainder of this Act and amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, shall not be affected by the holding.[4]

In fact, severability was a critical issue during the debate over McCain-Feingold. After two Republican Senators attempted to insert an inseverability clause into the legislation,[5] the bill's sponsors and the Democratic leadership strenuously and successfully campaigned for passage of the severability clause that became Section 401.[6] At the time, the Senate's debate over severability was considered so important to the legislation—which was certain to face a constitutional challenge—that the *New York Times* published excerpts of that debate the following day.[7] Congress thus purposefully directed reviewing courts to preserve all parts of the statute that are constitutional; if the Supreme Court eventually holds that McCain-Feingold's soft money ban violates the First Amendment, its duty is to preserve the law's increase in hard money limits in accord with Congress's clearly-expressed intent.

Not so fast, the Court's severability doctrine surprisingly teaches us. Despite the unambiguous command of severability and inseverability clauses, the Court has repeatedly held that they create only a rebuttable presumption that guides—but does not control—a reviewing court's severability determination. Instead of deferring to Congress's clearly-expressed preference either for or against severability, and thereby allowing the legislature to confidently control the form of the statutory schemes it creates, the Court has chosen instead to focus on extrinsic evidence of legislative intent and on the potential functionality of the post-severance statutory scheme in evaluating whether to sever an unconstitutional provision from the surrounding statute.[8] This appears to be how Judges

4. BCRA § 401.

5. *See* 147 CONG. REC. S3084, 3097 (Mar. 29, 2001) (statement of Sen. Frist)

6. *See, e.g.*, 147 CONG. REC. S3084, 3095 (Mar. 29, 2001) (statement of Sen. Feingold); *see also U.S. Senator Tom Daschle Holds News Briefing*, FDCH Political Transcripts, Mar. 28, 2001.

7. *See Excerpts From Senate Debate on Donations: Skirmishing and Predictions*, N.Y. TIMES, Mar. 30, 2001, at A16.

8. *See, e.g.*, Alaska Airlines v. Brock, 480 U.S. 678, 686 (1987) (holding that the presence of a severability clause merely creates a rebuttable presumption of severability); INS v. Chadha, 462 U.S. 919, 931-934 (1983) (acknowledging the presence of a severability clause but finding it necessary to examine the Act's legislative history before severing its unconstitutional legislative veto provision from the remainder of the Act); United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."); Biszko v. RIHT Financial Corp., 758 F.2d 769, 773 (1st Cir. 1985) ("[A] non-severability clause cannot ultimately bind a court.").

Leon and Kollar-Kotelly approached the issue of severability in their McCain-Feingold opinions.[9]

That this decidedly atextual approach remains unchallenged within the judiciary is particularly startling given the Court's increasing reliance on a more robust textualism in deciding statutory cases.[10] Likewise, the lack of a contemporary scholarly focus on severability is puzzling during a time in which statutory interpretation has emerged not only as a distinct field of academic inquiry, but as one with burgeoning prominence within the legal academy.[11] To this day, the leading article on severability doctrine and theory is Robert Stern's 1937 *Separability and Separability Clauses in the Supreme Court*,[12] though John Copeland Nagle's now decade-old *Severability*[13] follows close behind. Outside of these two articles, however, severability remains largely ignored as a subject of sustained theoretical inquiry[14] and has faded almost completely from the academy's radar (if it is fair to say that it was ever really on the academy's radar to begin with).[15]

9. *See McConnell v. FEC*, No. 02-cv-582, opinion of Judge Leon at 41, *available at* http://www.dcd.uscourts.gov/mcconnell-2002-ruling.html (last visited May 7, 2003) ("[A severability] clause only creates a presumption of severability. It does not relieve this Court of its obligation to determine if the [remaining statutory provisions] can stand alone, and if Congress would have enacted [them] knowing [other sections] would be held unconstitutional."); opinion of Judge Kollar-Kotelly at 11 ("The provisions I have found unconstitutional are all provisions of BCRA that are not central to its core mission and are entirely severable without doing injustice to the remainder of the law.").

10. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

11. *See* John Copeland Nagle, *Newt Gingrich: Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2210-11 (1995) (reviewing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994)) ("A long list of leading scholars have turned their attention to the theory and practice of statutory interpretation during the 1980s and 1990s, and three of the Justices now sitting on the Supreme Court have written academic works in the field.").

12. Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

13. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

14. An exception is Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997), which focuses more on the relationship between the Court's general presumption of severability and its use of the canon of constitutional avoidance than on the separation of powers issues at stake in the Court's treatment of severability clauses. The leading casebook on statutory interpretation devotes only about a single page to severability, *see* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 933-34 (2d ed. 1995), as does the leading casebook on federal jurisdiction, *see* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 198-99 (4th ed. 1996).

15. *INS v. Chadha*, 462 U.S. 919 (1983), which invalidated the single-house veto clause contained in the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982), did quickly prompt a number of student notes addressing severability, but occasioned no sustained scholarly discussion of severability theory. *See, e.g.*, Note, *The Aftermath of* Chadha: *The Impact of Severability Doctrine on the Management of Intergovernmental Relations*, 71 VA. L. REV. 1211 (1985); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182 (1984); Note, *The Severability of Legislative Veto Provisions: An Examination of the Congressional Budget and Impoundment Control Act of 1974*, 17 U. MICH. J.L. REF. 743 (1984).

This is a fundamentally troubling oversight. As I will show, severability doctrine is intimately connected to a number of critical issues at the heart of the Constitution's separation of powers. These include the debates over competing paradigms of statutory interpretation and interpretive practices (e.g., textualism, dynamic statutory interpretation, the use of legislative history); the appropriate scope of judicial review; non-delegation; and key elements of the Article III jurisdictional requirements. My aim in this essay is to draw out these thematic connections by highlighting crucial deficiencies in the Supreme Court's approach to severability, and to develop an alternative theory of severability—one more firmly rooted in our constitutional tradition and which more faithfully reflects the principle of separated powers.

I proceed as follows. Part II outlines the awkward judicial development of the current severability and inseverability doctrines, tracing the early federal preference for holding statutes severable through the development of severability clauses (and corresponding doctrinal upheaval of the early twentieth century) and into the modern day formulation. Part III then critiques the courts' disregard for severability clauses, arguing that because those clauses have been through the Article I, § 7 process, they are authoritative laws that bind judges confronting a partially unconstitutional statute. In doing so, I address a number of challenges to this textualist approach to severability, including claims that severability clauses violate the separation of powers and prudential arguments for evaluating severability in light of changed circumstances. Part IV focuses on the even greater dangers inherent in modeling an approach to inseverability clauses on the Supreme Court's current approach to severability. Doing so, I argue, would offend the separation of powers not only because inseverability clauses have been through the Article I, § 7 process, but also because disregarding them risks leaving in force a statutory scheme that neither the enacting Congress nor the President would have supported, with no way for those lawmakers to reverse the results. Part V moves beyond the textualist case for addressing severability and inseverability, and argues that, in the absence of clear congressional statement against severability, courts should hold statutes severable. Part VI concludes.

II. Severability: A Doctrinal History

A. Early Cases Addressing Severability in the Absence of Legislative Direction

No early federal statutes contained severability clauses, and in its first cases exercising judicial review, the Supreme Court simply seems to have

assumed that a constitutionally offensive provision could be severed from an otherwise enforceable statute. In *Marbury v. Madison*, for instance, Chief Justice Marshall referred only to a portion of § 13 of the Judiciary Act of 1789, and the remainder of the Act stayed in force after the Court's decision.[16] In support of this early assumption that partially unconstitutional statutes were to be severed, the Court explicitly declared in 1829 that "If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States."[17]

It did not take long for an eventually vexing exception to emerge. As Professor Stern first noted,[18] the 1854 Massachusetts case *Warren v. Mayor & Aldermen of Charlestown*[19] is particularly important to the development of the modern severability doctrine. After holding that part of a state statute annexing Charlestown to Boston violated the federal Constitution by (among other things) effectively denying federal representation to the citizens of Charlestown, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts argued that the presumption of severability

> must be taken with this limitation, that the [statute's] parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. [For] if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for 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.[20]

Shaw then concluded that, because the "various provisions of the act, all providing for the consequences of . . . annexation, are connected and dependent[,] look to one object and its incidents, and are so connected with

16. 5 U.S. (1 Cranch) 137, 173 (1803) ("The act to establish the judicial courts of the United States authorizes the supreme court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'").

17. Bank of Hamilton v. Lessee of Dudley, 27 U.S. 492, 526 (1829).

18. Stern, *supra* note 12, at 79-80; *see also* Nagle, *supra* note 13, at 212-13.

19. 68 Mass. (2 Gray) 84 (1854).

20. *Id*. at 99.

each other," the legislature could not have intended the dysfunctional but constitutionally-valid statutory remnants to stay in force.[21]

Within a quarter century, the U.S. Supreme Court had adopted this reasoning, referencing *Warren* for the basic proposition that "[t]he point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."[22] Thus, by 1880, the federal inquiry into statutory severability required a court to consider extrinsic sources in order to gauge legislative intent—specifically, whether the constitutional provisions of a partially-invalid statute could function independently of their unconstitutional counterparts such that Congress could have intended them to stand alone.

B. Early Caselaw Addressing Severability Clauses

Just as the Court appeared to be finalizing its approach to severability, it had to begin dealing with a related and novel development: severability clauses. These clauses first appeared during the late nineteenth century and had become fairly common by 1910,[23] probably in response to the courts' search for legislative intent in extrinsic sources and their increasing tendency to declare partially unconstitutional statutes inseverable.[24] Most of these clauses, like the one at issue in the *Ohio Tax Cases*, stated simply that:

> The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to

21. *Id*. at 100. Elsewhere, citing *Warren*, Chief Justice Shaw would write:

> It is undoubtedly a correct rule of construing a statute in reference to its constitutionality, to consider only such part void as is plainly repugnant to the Constitution; and therefore, where there are different provisions in the same statute, so distinct and independent, that the one may not have been the motive or inducement to the other, one may be held valid and the other void. . . [But where] one may have been the motive, inducement or consideration on which the other was founded,. . . they must stand or fall together.

Jones v. Robbins, 74 Mass. 329, 338-39 (1857) (citations omitted).

22. Allen v. Louisiana, 103 U.S. 80, 84 (1880).

23. Nagle, *supra* note 12, at 222.

24. Alfred Hayes, Jr., *Partial Unconstitutionality with Special Reference to the Corporation Tax*, 11 COLUM. L. REV. 120, 124-25 n. 8 (1911) (collecting late 19th and early 20th century cases declaring statutes partially unconstitutional and indicating the court's decision with regard to severability); Stern, *supra* note 12, at 107-08 n. 138 (same).

> be void or ineffective shall not affect any other section or part thereof.[25]

And when challenges first arose to the validity of these clauses, both state and federal courts enforced them without hesitation.[26]

In the 1924 case *Hill v. Wallace*, however, the Supreme Court limited the enforceability of severability clauses for the first time.[27] Although the Court seemed to recognize a severability clause "undoubtedly . . . furnishes assurance 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,"[28] it nonetheless concluded: "Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those [unconstitutional] regulations that they can not be separated. None of them can stand."[29]

At first glance, it might appear that the *Hill* Court merely transplanted *Warren*'s then-familiar functionality test into the context of severability clauses. On closer examination, however, it becomes clear that *Hill* worked a critical shift in the *Warren* formulation. In *Warren*, statutes lacking a severability clause were deemed presumptively severable unless the remaining statutory structure could not function, because the residual statute's inability to operate constituted extrinsic evidence that the legislature would not have wanted the statute to remain only partially in force. In *Hill*, by contrast, there was no need to search for legislative intent in extrinsic sources—after all, the legislature had enacted a severability clause explicitly conveying its intent, and the Court had recognized that the

25. 232 U.S. 576, 594 (1914).

26. *Id*. ("Finally, it is contended that the act is unconstitutional because of the severity of the penalties imposed for withholding the tax. But these actions do not involve any present attempt to enforce the penalties; and the act contains a [severability clause]. The penalty clauses, if themselves unconstitutional, are severable, and there is therefore no present occasion to pass upon their validity."). *See also* State ex *rel*. Clarke v. Carter, 56 So. 974, 977 (Ala. 1911) ("[T]he court is relieved of any doubt as to [severability] by section 18 of the act in question, which expressly provides that, if any provision of the act shall be held void, it shall not affect any other section or provision of the act."); In re Questions of the Governor, 123 P. 660 (Colo. 1912) ("[T]he act of 1911 [is severable] by legislative command. Section 42 thereof expressly declares that, 'each section of this act, and every part of each section is hereby declared to be independent sections and parts of sections and the holding of any section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof.'"); State v. Clausen, 117 P. 1101, 1114 (Wash. 1911) ("[S]ection 27 . . . expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the legislature intended the act to be enforced as far as it may be, even though it might not be valid in its entirety. It was competent for the legislature so to provide.").

27. 259 U.S. 44 (1922) (invalidating various regulations and penalties contained in the Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187 (1921)).

28. *Id*. at 71.

29. *Id*. at 70 (citations omitted).

severability clause conclusively evidenced that intent. With their decision in *Hill*, then, the Justices seemed to go from looking for legislative intent to defying it. Why did the Court retain a stand-alone inquiry into the functionality of the remaining statutory scheme? While I will soon suggest that politics may have played a role,[30] the Court failed to provide a thorough explanation of its own.

Indeed, *Hill* signaled the beginning of an era characterized by judicial eagerness to look beyond severability clauses. In *Dorchy v. Kansas*,[31] decided shortly after *Hill*, the Court emphasized that a severability clause "provides a rule of construction which may sometimes aid in determining [legislative] intent. But it is an aid merely; not an inexorable command."[32]

And in *Williams v. Standard Oil Co.*,[33] in which the Court addressed a constitutional challenge mounted by the oil industry against several state price-fixing regimes containing severability clauses, the Justices combined the *Warren* and *Hill* tests to further undercut the force of severability clauses. After declaring parts of the statutes at issue unconstitutional, the *Williams* Court began its discussion of severability by citing the above-quoted language from *Dorchy*.[34] Then, pointing to a single 1903 opinion of the New Jersey Court of Errors and Appeals, the Court declared that "[i]n the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety,"[35] and held that a severability clause merely reverses this presumption:

> That is to say, we begin, in the light of the [severability] declaration, with the presumption that the Legislature intended the act to be divisible, and this presumption must be overcome by considerations which make evident the inseparability of its provisions *or* the clear probability that[,] the invalid part being eliminated[,] the Legislature would not have been satisfied with what remains.[36]

Williams had far-reaching consequences. Not only did it jettison the Court's longstanding presumption of severability; it limited the effect of statutory severability clauses to a greater degree than before. Under *Williams*, courts could disregard severability clauses not only if the remaining statutory structure could not function (as under *Hill*), but also if

30. *See infra* test accompanying notes 44-48.
31. 264 U.S. 286 (1924).
32. *Dorchy*, 264 U.S. at 290.
33. 278 U.S. 235 (1928).
34. *Id*. at 241.
35. *Id.* (quoting Riccio v. Mayor of Hoboken, 55 A. 1109 (N.J. 1903)).
36. *Id*. (emphasis added).

there was strong evidence that Congress would have been dissatisfied with the remaining statute. This latter proposition appears to have been based on *Warren*'s general notion that legislative intent controlled the severability determination—but under *Warren*, of course, a search for legislative intent was necessary only in the absence of a severability clause. Once the *Hill* Court held that the presence of a severability clause conclusively demonstrates the legislature's preference for severability, why did the *Williams* Court find necessary a *Warren*-like search for legislative intent beyond *Hill*'s stand-alone inquiry into post-severance statutory operability? And where would litigants find evidence of legislative intent sufficient to contravene an explicit severability clause? Again, the Court offered no answers to the questions raised by its doctrinal innovation.

Over the next decade, the Court put the final touches on its early severability jurisprudence—at least partially reversing its course twice more. In *Champlin Refining Company v. Corporation Commission*,[37] the Court held that:

> 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*.[38]

Contrary to *Williams*, partially invalid statutes would once again be presumed severable, but only (1) in the absence of evidence that the legislature would not have enacted the remaining provisions on their own and (2) if the remaining statutory provisions could function independently. Of special note here is the fact that the *Champlin* Court imported the bifurcated *Warren* test it had created in *Hill* and *Williams* back into the original *Warren* context: Under *Champlin*, *either* contrary legislative intent *or* the inability of the remaining statutory scheme to function could defeat the general presumption of severability accorded statutes lacking a severability clause. But once again, where were litigants supposed to find evidence of legislative intent apart from the ability of the remaining statutory scheme to function, which now constituted an independent test divorced from any inquiry into legislative intent?

Then, in *Carter v. Carter Coal Co.*,[39] the Court again flipped the reigning presumption on its head by restoring *Williams*'s general

37. 286 U.S. 210 (1932).
38. *Id*. at 234 (emphasis added).
39. 298 U.S. 238 (1936).

presumption of inseverability.[40] Critically, the Court also began to show litigants how to seek out independent evidence of legislative intent contrary to an explicit severability clause (aside from the ability of the remaining statute to function). In the Court's words, the severability

> determination, in the end, is reached by [asking] What was the intent of the law-makers? [When Congress has included a severability clause,] the presumption [created in its favor can] be overcome by considerations which establish clear probability that. . . the legislature would not have been satisfied. . . unless it had included the invalid part. 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 [severability clause] becomes an aid. But it is an aid merely; not an inexorable command. The presumption in favor of se[ve]rability does not authorize the court to give the statute an effect altogether different from that sought by the measure viewed as a whole.
>
> The [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. 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 labor provisions had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, not-withstanding, probably would not have passed the price-fixing provisions of the code. [41]

Leave aside that these two paragraphs are internally inconsistent, first linking the operability of the remaining statutory scheme to legislative intent, as in *Warren*, but then reiterating the stand-alone functionality test from *Hill*. What matters most is the Court's vision of "imaginative

40. *Id*. at 312 ("In the absence of [a severability clause], 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.").

41. *Id*. (citations omitted).

reconstruction,"[42] which practically invited litigants to comb through a statute's legislative history looking for "considerations" that could rebut the plain language of a severability clause.

The Court's severability jurisprudence was now almost fully formed. As a general rule, statutes were presumed to be inseverable absent legislative intent to the contrary. But even when the legislature enacted an explicit severability clause, its unambiguous, intrinsic statement of legislative preference would give rise only to a presumption in favor of severability, rebuttable by evidence of contrary extrinsic legislative intent (derived from imaginative reconstruction based upon the statute's legislative history), or by showing that the remaining statutory scheme could not function. Summarizing the Court's jurisprudence in 1937, Professor Stern wryly observed: "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."[43]

As suggested above, these decisions largely failed to grapple with any of the critical questions raised by their approaches to severability – so much so that one begins to wonder whether something was going on behind the scenes between 1914 (when the Court decided the *Ohio Tax Cases*) and 1936 (when it handed down *Carter Coal*). While it is only possible to speculate about any unacknowledged motivations that could have prompted the Court's marked reluctance to sever partially unconstitutional statutes—even when the legislature explicitly declared its intent—it bears mention that the Court's New Deal era severability cases fit nicely into the "Lochnerism" that characterized its substantive jurisprudence during this period. Many of the Court's leading severability opinions seem to track the various Justices' constitutional philosophies and their beliefs about the underlying substance of the statutes at issue.[44]

In *Lemke v. Farmers Grain Co.*,[45] for instance, the Court's six-member majority (Day, McKenna, McReynolds, Pitney, Sutherland, and Van

42. I borrow this term from Judge Posner, though the idea belonged originally to Professor (and later Dean) Roscoe Pound. *Compare* Richard A. Posner, *Statutory Interpretation – in the Classroom and the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("The task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."), *with* Roscoe Pound, *Spurious Interpretation,* 7 COLUM. L. REV. 379, 381 (1907) ("[The Judge must endeavor to discover] what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.").

43. Stern, *supra* note 12, at 122 (1937).

44. *Id*. at 113-14.

45. 258 U.S. 50 (1922).

Devanter) invalidated certain provisions of a North Dakota grain regulation statute and declared those provisions inseverable from price-fixing regulations contained in another section of the same statute. The dissenting Justices (Holmes, Brandeis, and Clarke) argued that the challenged provisions were constitutional, and, in any event, severable from the statute's price-fixing provisions. *Williams* mirrored this divide: Justice Van Devanter delivered the opinion of the Court; Holmes dissented without an opinion, and Brandeis and Stone concurred in the result without joining the Court's opinion or issuing one of their own. Likewise, in *Railroad Retirement Board v. Alton Railroad*,[46] decided the year before *Carter Coal*, the Court's five Justice majority (Butler, McReynolds, Roberts, Sutherland, and Van Devanter) held the Act at issue unconstitutional and inseverable; the dissenters (Brandeis, Cardozo, Hughes, and Stone) would have held it constitutional and severable. And in *Carter Coal*, the same five Justice majority declared the Bituminous Coal Conservation Act of 1935 partially unconstitutional and inseverable while the same four dissenters again contended that the challenged provisions were constitutional—or at least severable from the remaining statutory scheme. (It bears noting here that the fractured lower-court opinions in the McCain-Feingold case uncomfortably replicate this age-old pattern: Judge Kollar-Kotelly, who voted to uphold all but three provisions of BCRA, found the Act severable; Judge Leon, who voted to uphold some provisions and applications of the Act but also to strike down a roughly equivalent number, found the Act severable; and Judge Henderson, who had trouble finding even a single provision of BCRA she could support, declared emphatically that she would invalidate the statute in its entirety.[47])

Finally, it is critical to note that the early New Deal Court's newly-minted severability tests themselves pointed increasingly toward declaring statutes inseverable. *Hill* introduced a stand-alone functionality test for statutes containing a severability clause, giving litigants an opportunity to defeat completely only partially-invalid statutes—even when the legislature had declared its preference for severance. *Williams* not only enunciated a general presumption of inseverability, but encouraged litigants to seek evidence of legislative intent contrary to a severability clause. And *Carter Coal*—the era's last great severability case—solidified rules that could allow a conservative Court to fully strike down state and federal regulatory legislation only partially unconstitutional in substance. In the final analysis, the Court's pre-1937 severability jurisprudence seems to have either (at best) developed so clumsily that no conscious design can be attributed to

46. 295 U.S. 330 (1935).
47. *See supra* notes 3 and 9.

the Court, or (at worst) resulted from deliberate manipulation by the Court's conservative core in order to enable it to strike down otherwise constitutional regulatory legislation that conflicted with its libertarian political preferences.

C. The *Alaska Airlines* Formulation

Despite the Supreme Court's machinations and its peculiar rules governing severability, things progressed rather smoothly after *Carter Coal*. Since 1936, the Court has not struck down in its an entirety a statute only partially-invalid and containing a severability clause,[48] and while it had some opportunities in the wake of *Carter Coal* to sort out its jurisprudence, severability questions seem to have mostly faded into the background—perhaps as a consequence of the Court's willingness to accept the constitutionality of most New Deal-style regulatory legislation.[49] Over the course of the next fifty years, the Court decided only two notable severability cases: *United States v. Jackson*,[50] in which it noted that "the ultimate determination of severability will rarely turn on the presence or absence of . . . a [severability] clause,"[51] and *Regan v. Time*,[52] where a four-member plurality invited the full Court to resurrect the general presumption of severability articulated earlier in its history:

48. Relying on legislative history, however, lower courts have done so. *See, e.g.*, Western States Med. Ctr. v. Shalala, 238 F.3d 1090, 1097 (9th Cir. 2001) ("The existence of a severability clause at § 1391 of the FDCA does not change our interpretation of the legislative history."); United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1299 & 1302 (9th Cir. 1998) ("[The Indian Gaming Regulatory Act] does contain a severability clause. . . [But w]e [could be] left . . . with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that allegedly hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now. Under the circumstances, IGRA's provisions governing class III gaming may not be enforced against the Tribe."); Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *rev'd sub nom.* Leavitt v. Jane L., 518 U.S. 137 (1996) ("Defendants argue that the [statute's severability clause], stating that the legislature would have passed each section independent of the unconstitutional part, demands that we sever [the statute's unconstitutional provisions]. We disagree."); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 139 (9th Cir. 1980), *aff'd mem.* 454 U.S. 1022 (1981) ("To eliminate these enforcement provisions . . . would create a program quite different from the one the people actually adopted. This we decline to do. That the statute contains a severability clause does not authorize us to indulge in major revisions to salvage the statute.") (citations and quotations omitted). The *Spokane Tribe* court did not totally invalidate the Indian Gaming Regulatory Act, but did hold, against the statute's severability clause, that certain applications of the statute were invalid. *Id*. at 1301. For a discussion of the issues raised by *Spokane Tribe*, see *infra* Section III.E.

49. For an illuminating discussion of the Court's historic transformation from Lochnerism to non-interventionism, see generally Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

50. 390 U.S. 570 (1968).

51. *Id*. at 586.

52. 468 U.S. 641 (1984).

> In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this Court has observed, 'whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.' Thus, this Court has upheld the constitutionality of some provisions of a statute even though other provisions of the same statute were unconstitutional.[53]

Three years after *Regan*, the Court issued its leading contemporary opinion on severability. *Alaska Airlines v. Brock*[54] arose out of an airline industry challenge to the constitutionality of § 43 of the Airline Deregulation Act of 1978.[55] As enacted, § 43 contained both an "Employee Protection Program" (EPP), designed to shield long-term employees from the potentially adverse economic effects of deregulation, and a legislative veto provision that allowed either house of Congress to override Labor Department regulations implementing the program. Airline industry lawyers argued that the legislative veto provision was unconstitutional under *INS v. Chadha*,[56] and that the entire section should be invalidated because the EPP and legislative veto provisions were inextricably intertwined. The District Court granted summary judgment to the airlines and struck down § 43 in its entirety.[57] Union members appealed the finding of nonseverability and prevailed before the D.C. Circuit, which restored the EPP without its accompanying legislative veto.[58]

On further appeal, the Supreme Court seized the opportunity—created by doubt over whether a severability clause applied to the Act[59]—to

53. *Id*. at 652-53 (quoting El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87, 96 (1909)).

54. 480 U.S. 678 (1987).

55. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C. 1301 *et. seq*.).

56. 462 U.S. 919 (1983).

57. Alaska Airlines v. Donovan, 594 F. Supp. 92 (1984).

58. Alaska Airlines v. Donovan, 766 F.2d 1550 (1985).

59. While the Airline Deregulation Act itself did not contain such a clause, it amended the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, which did. *See Alaska Airlines*, 480 U.S. at 687 n.8. Rather than resolve the question of whether severability clauses attach to amending legislation, the Court simply enunciated the broad standards herein discussed and held the statute severable under a general presumption of severability.

rearticulate its severability standards both for statutes that contain a severability clause and those that do not:

> [W]hen Congress has explicitly provided for severance by including a severability clause in the statute, . . . 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.[60]

When Congress has not included a severability clause, however, "Congress' silence is just that—silence—and does not raise a presumption against severability."[61] Instead, quoting *Champlin*, the Court held that

> 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. . . . Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently. [When the unconstitutional provision is completely separate from the functional aspects of a statute, as with a legislative veto, t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. 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.[62]

60. *Alaska Airlines*, 480 U.S. 678, 686 (1987) (citing *Champlin*) (emphasis added).

61. *Id*. at 686 (citations omitted).

62. *Id*. at 684-85 (quotations omitted) (emphasis in original). Although the *Alaska Airlines* regime appears to recognize that severing an unconstitutional provision from a statute may leave in force a statutory scheme that Congress would not have adopted, the Court's articulated test is terribly misleading. As the Court noted in footnote 7 of its opinion, the Court of Appeals's "statement that an invalid portion of a statute may be severed unless . . . it is proved 'that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision' [is] completely consistent with the established severability standard." *Id*. at 685 n.7 (citations omitted). Thus, what appears to matter to the Court is whether Congress "would have enacted *some* [legislation on the subject at issue], rather than whether

After extensively reviewing the statute's legislative history, the Court concluded that Congress would have "enact[ed] the Airline Deregulation Act, including the EPP's first-hire program, [even] if the legislative veto had not been included,"[63] and therefore affirmed the Court of Appeals's judgment against the airlines.

As was typical of its prior jurisprudence in the area, the Court spent little time justifying the severability tests it enunciated. Failing even to mention *Carter Coal*, *Williams*, or its recent division in *Regan*, the Court conclusively rejected a general presumption of inseverability. After *Alaska Airlines*, statutes are presumed to be severable unless, following *Champlin*'s bifurcated *Warren* test, (1) Congress "intended otherwise"—that is, in the Court's words, that Congress would have preferred no legislation at all to the enacted legislation without its unconstitutional provision(s)—or (2) the remaining statutory structure cannot function independent of its unconstitutional parts. And, as the Court had held in its various prior severability formulations, Congress's inclusion of a severability clause does not settle the issue. Instead, such a clause only preserves the general presumption of severability, which remains rebuttable by evidence of contrary legislative intent.

Neatly hidden in this articulation of the severability clause test is the old *Hill* functionality requirement. Although the Court did not mention *Hill* in its discussion of severability clauses, it noted in the course of establishing its general presumption of severability that "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."[64] Taken as a whole, then, *Alaska Airlines* largely formalized what may well have been the peculiar results of the New Deal Court's struggle over the constitutionality of the growing regulatory state.

D. Recent Caselaw Addressing Inseverability Clauses

Interestingly enough, *in*severability clauses have not featured as prominently in the development of the current doctrine. This can probably be attributed to the related facts that Congress only occasionally enacts such

Congress would have enacted the same protections currently found in the Act [without the unconstitutional provision(s)]." *Id*.

63. *Id*. at 697.

64. *Id*. at 684.

clausex,[65] and that the Supreme Court has never addressed a federal inseverability clause.[66] However, lower federal courts have sometimes considered inseverability clauses, and for the most part, their approach mirrors *Alaska Airlines*.[67] Representative is *Biszko v. RIHT Financial Corporation*.[68] At issue there was a challenge to a Rhode Island statute restricting the ability of non-New England companies to acquire shares in Rhode Island financial institutions. Plaintiffs alleged that the restrictions were unconstitutional, and that they had artificially constrained the value of their stock by limiting the pool of potential purchasers.[69]

Rebuffing their challenge, the district court first held that plaintiffs had not suffered a legally-cognizable injury-in-fact because Rhode Island had no constitutional obligation to allow interstate banking at all. The state's decision to allow some interstate banking—even though it simultaneously placed restrictions on the activities of non-New England banks—had therefore raised the value of the plaintiffs' stock to a level above what it would have been had the state altogether refused to authorize interstate

65. *See, e.g.*, The Mobile Telecommunications Sourcing Act of 2000, Pub. L. No. 106-252, § 125, 114 Stat. 626 (2000) ("If a court of competent jurisdiction enters a final judgment on the merits that is based on Federal law[,] is no longer subject to appeal[,] and substantially limits or impairs the essential elements of sections 116 through 126 of this title, then sections 116 through 126 of this title are invalid and have no legal effect as of the date of entry of such judgment."); The 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)) ("If any provision of section 4(a), 5, or 6 of this Act is rendered invalid by the final action of a court, then all of this Act is invalid."); The Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 322, 103 Stat. 2106 (1989) ("Except as provided [below,] if any provision of title XXI of the Public Health Service Act, as added by section 311(a), or the application of such a provision to any person or circumstance is held invalid by reason of a violation of the Constitution, such title XXI shall be considered invalid.").

66. In *Zobel v. Williams*, the Supreme Court did note the presence of an inseverability clause in a partially-unconstitutional state statute. Though its treatment of the clause appears to have been more deferential than its traditional approach to severability clauses, the Court ultimately left the issue to the state courts to determine as a matter of state law. 457 U.S. 55, 65 (1982) ("Here, we need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid. . . However, it is of course for the Alaska courts to pass on the severability clause of the statute."). To the extent that the Court indicated that inseverability clauses merit greater deference than severability clauses, it never explained why; and, as we shall see, lower courts have not followed through on *Zobel*'s suggestion.

67. *See, e.g.*, Biszko v. RIHT Fin. Corp., 758 F.2d 769, 773 (1st Cir. 1985) (holding that "a non-severability clause cannot ultimately bind a court."). In addition, at least one state supreme court has invalidated an entire statute notwithstanding its inseverability clause. *See* Stiens v. Fire & Police Pension Ass'n, 684 P.2d 180 (Colo. 1984). For a brief synopsis of *Stiens*, see Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 907-08 (1997).

68. 102 F.R.D. 538 (D.R.I. 1984), *aff'd* 758 F.2d 769 (1st Cir. 1985). I focus here on the District Court opinion because it more fully analyzes the validity of the statute's inseverability clause and because the First Circuit's analysis of the issue essentially adopts the lower court's reasoning and opinion.

69. *Id*. at 541-42.

banking. The court then argued that plaintiffs had also failed to prove that their asserted injuries were redressable.

Anticipating this objection, plaintiffs had argued that their injuries were remediable because the court could strike down the regional banking restrictions but leave the remainder of the statute in force—allowing institutions outside of New England to acquire stock in Rhode Island banks and increasing the value plaintiffs' shares by expanding the pool of potential purchasers.[70] This, the court responded, it simply could not do: The Rhode Island statute contained an inseverability clause declaring that if any parts of the law were declared unconstitutional, the whole law (except a single provision applicable only to credit unions and therefore irrelevant to the challenge at hand) should be struck down. And because valid federal law requires states to authorize interstate bank acquisition before any out-of-state institution can acquire ownership of in-state banks, the value of the plaintiffs' stock would plummet if the court obeyed the inseverability clause and struck down the entire statute: No out-of-state institutions—not even those in New England—could purchase the plaintiffs' shares.[71]

Yet in suggesting that it would enforce the state legislature's inseverability clause, the court did not indicate that it was doing so because it was obliged to obey the legislature's unambiguous command. Instead, it repeated the *Dorchy* maxim that "[a] severability or, in this case non-severability, clause is a guideline for statutory interpretation but not a mandate to the court" and concluded that a partially unconstitutional statute "can be extended only if the portion remaining would be operative law and follow legislative intent."[72] Looking beyond the inseverability clause to the history and structure of the Rhode Island banking bill, the court then determined that the state legislature would not have adopted an interstate banking statute without regional restrictions.[73]

Here, at least in preliminary form, was the *Alaska Airlines* approach to severability clauses applied to an inseverability clause. But beyond arguably applicable precedent borrowed from the Court's severability clause jurisprudence, why did the court feel compelled to look beyond an explicit legislative command for extrinsic evidence of legislative intent? Like the Supreme Court in its severability cases, neither the district court nor the First Circuit fully explained their reasoning.

70. *Id*. at 543.
71. *Id*. at 543-44.
72. *Id*. at 543.
73. *Id*. at 544.

III. *Alaska Airlines*'s Unjustified Approach To Severability Clauses

In what follows, I begin to make the case for a textualist approach to severability and inseverability clauses. I start with the notion that severability clauses are binding legislation due judicial recognition under Article I, § 7 of the Constitution. From there, I address a number of concerns: that severability clauses usurp the Article III judicial power, that they violate principles of non-delegation, that they may leave in place a dysfunctional statutory scheme if enforced, and that they ought to be interpreted in light of changed circumstances. None of these objections, I conclude, justifies disregarding the clear command of severability clauses.

A. Article I, § 7 as a Binding Rule of Recognition

The Court's severability jurisprudence—and particularly its notion that a severability clause creates only a presumption of severability rebuttable by extrinsic evidence of legislative intent—raises troubling separation of powers problems. After all, severability clauses have been through the Article I, § 7 process[74] and therefore are valid legislation that bind judicial decisionmaking. It is difficult to evaluate the Court's treatment of this concern, however, as the Justices have never fully justified their willingness to overlook severability clauses.

Over the course of the past century, scholars and other commentators have attempted to fill in the gaps created by the Court's cavalier treatment of severability directives. Most often, they justify judicial disregard for severability clauses on grounds that such clauses are merely "boilerplate" provisions inserted into statutes without substantive deliberation by the legislature.[75] In many cases, this is true: Even legislators have occasionally acknowledged that little debate is necessary before adding a severability clause to pending legislation.[76] But as the debate over McCain-Feingold's

74. *See* U.S. CONST. art. I, § 7, cl. 2 (bicameralism and presentment).

75. 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 44.08 (5th ed. 1992) ("[T]o say that a saving clause is 'indisputable evidence' of legislative intent to pass part of a statute irrespective of void provisions is to put too great an emphasis on the mechanical inclusion of such provisions."); Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 419 (1942) ("Are we really to imagine that the legislature had, as it says it had, weighed each paragraph literally and come to the conclusion that it would have enacted that paragraph if all the rest of the statute were invalid?"); Stern, *supra* note 12, at 122 ("When legislatures declared that 'The invalidity of any part of this statute shall not affect the remainder,' they did not mean it.").

76. *See, e.g.*, 140 CONG. REC. H3117 (May 5, 1994) (statement of Rep. Slaughter) ("This is a standard 'boilerplate' severability clause; similar language has been included in a wide variety of laws including the Emergency Unemployment Compensation Amendments of 1993, the Americans with Disabilities Act, the Civil Rights Restoration Act, the Fair Labor Standards Act, the Education for Economic Security Act, and the Comprehensive Drug Abuse Prevention and

severability clause suggests, this is not always the case,[77] and the fact that Congress sometimes chooses *not* to enact a severability clause[78] (or to include an *inseverability* clause in legislation likely to face a constitutional challenge[79]) suggests that, despite the frequency with which it opts for severability, Congress's decisions to do so are purposeful.[80] It is well-settled that "[a]bsent clear congressional intent to the contrary, [courts should] assume the legislature did not intend to pass vain or meaningless legislation,"[81] and the fact that Congress almost always prefers statutes to be severable—and usually chooses to explicitly reveal that preference to the courts—does nothing to show that Congress does not really mean what it says it does.

But even if Congress devoted little thought to including a severability provision in legislation, and it did so all the time, such clauses would still be valid legislation requiring judicial enforcement. Article I, Section 7, Clause 2 of the Constitution sets forth the exclusive *procedural* requirements for legislation to bind.[82] Under this framework, a bill—and each of its subsidiary provisions—becomes law once it is passed by majority votes in both the House and Senate and is signed by the President (or, if the President refuses to sign it, after a two-thirds majority of each chamber votes to pass the bill over the President's veto).[83] Once a bill goes through this process, it becomes a legally binding statutory enactment subject only to *substantive* constitutional constraints; "Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system."[84]

Control Act."); 134 CONG. REC. H3645 (May 25, 1988) (statement of Rep. Frank) ("This is just boilerplate severability.").

77. *See supra* text accompanying notes 1-7.

78. *See, e.g.*, Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1760 (codified in scattered sections of 5 U.S.C.) (partially invalidated in United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995)); Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021 *et. seq.*) (partially invalidated in New York v. United States, 505 U.S. 144 (1992)); Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2017 (codified as amended at 18 U.S.C. § 3551 *et seq.* and 28 U.S.C.S. §§ 991-998) (challenged repeatedly until upheld in Mistretta v. United States, 488 U.S. 361 (1989)).

79. *See supra* note 65.

80. *See also* Nagle, *supra* note 13, at 243-45 (arguing that the diversity of severability clauses undermines the boilerplate justification for disregarding them).

81. Coyne & Delany Co. v. Blue Cross & Blue Shield of Virginia, 102 F.3d 712, 715 (4th Cir. 1996).

82. Although I focus here on the U.S. Constitution's structure for lawmaking, every state constitution except Nebraska's contains bicameralism and presentment requirements. As a result, the concerns articulated here apply with equal force when state courts are called upon to address state law severability questions. Federal courts are, of course, bound by the constraints of federalism to defer to state law severability doctrine—even if that doctrine may appear to violate a state's own system of separated powers.

83. U.S. CONST. art. I, § 7, cl. 2.

84. Sorrells v. United States, 287 U.S. 435, 450 (1932); Laker Airways v. Sabena, 731 F.2d 909, 949 (D.C. Cir. 1984) (American courts "cannot refuse to enforce a [constitutionally valid]

Bicameralism and presentment thus do more than undercut the usual justification for disregarding severability clauses: They condemn the Court's practice of turning to legislative history in order to determine whether "Congress really intended" unconstitutional statutory provisions to be severable when the bill at issue contains an unambiguous severability clause.[85] In Judge Easterbrook's words, it "demean[s] the constitutionally

law [that the] political branches have already determined is desirable and necessary."). In addition, the judicial creation of standards for legislative decisionmaking—no matter how desirable that may seem—seems to violate Article I, § 5, which provides that "Each House may determine the rules of its proceedings. . . ." U.S. CONST. art. I, § 5. It also seems to put the courts squarely in the middle of purely "political questions" that they are compelled to avoid. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962) ("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. . . .") (emphasis added).

85. The search for "legislative intent" has long been recognized as futile. More than seventy years ago, Max Radin put it this way: "The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given [statutory issue] are infinitesimally small." Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930); *see also* Rancho Viejo v. Norton, slip op. at 18-19 (D.C. Cir, April 1, 2003) (available at http://pacer.cadc.uscourts.gov/docs/common/opinions/200304/01-5373a.pdf) (last visited April 15, 2003) ("[Attempting to discern the legislature's intent] is difficult because distilling the true or primary legislative purpose out of the motivations of 435 representatives and 100 senators is inherently problematic. And it is that difficulty that makes the project a dangerous one—dangerous because the indeterminacy of outcome leaves courts open to the charge that they have manipulated the determination of purpose in order to achieve their own policy preferences. . . ."). This is especially true because legislators' individual (and collective) policymaking decisions depend so strongly on non-policy factors, like the order in which they consider various alternatives and the logrolling opportunities available to each of them in a given statutory debate at a particular moment in time. *See generally* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); *see also* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 38-39 (1991).

Legislative history is, in any event, often a bad place to look legislative intent. Professors Frickey and Eskridge—nonetheless staunch defenders of using legislative history—observe:

> Lobbyists and lawyers maneuver endlessly to persuade staff members (who write committee reports) or their legislative bosses to throw in helpful language in the reports when insertion of similar language would be inappropriate or infeasible for the statute itself. "Smuggling in" helpful language through legislative history is a time-tested practice.
>
> WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 744 (2d ed. 1995). It helps that, among other things, these reports are: rarely read by committee members; never voted upon by the committees that issue them (much less by the full House or Senate); and not amendable. *See* Hirschey v. FERC, 777 F.2d 1, 7-8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (quoting an exchange on the Senate floor between Senators Armstrong and Dole). Consequently,
>
> legislative history can be cited to support almost any proposition, and frequently is. The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great. . . .
>
> Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring). This critique is doubly damning when applied to hearings and floor debates, as opposed to committee reports. *See* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11

prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some *evidence* about the law, while the *real* source of legal rules is in the mental processes of legislators."[86] Only the severability clause itself is law under our Constitution's framework for lawmaking, and the judiciary is constitutionally bound to honor it without regard to what the surrounding statute's legislative history might be read to suggest.[87]

B. Do Severability Clauses Usurp the Judicial Power?

The preceding discussion presumes, of course, that Congress has the constitutional authority to direct courts to sever unconstitutional statutory provisions. Although no court has held that severability clauses are unconstitutional *per se*,[88] some commentators have argued that severability clauses unconstitutionally usurp the Article III "judicial Power"[89] by directing courts to exercise judicial review under legislatively mandated standards.[90] While the argument is tempting—after all, judicial review *is* a quintessentially judicial power—it is ultimately unconvincing.

HOFSTRA L. REV. 1125, 1131-32 (1983). For contrasting views on the use of legislative history, cf. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365 (1990); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

86. In re Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (emphasis in original).

87. *See* Wisconsin R.R. Comm'n v. Chicago, Burlington, and Quincy R.R. Co., 257 U.S. 563, 589 (1922) ("[Legislative history is] only admissible to solve doubt and not to create it."); *see also* HUD v. Rucker, 535 U.S. 125, 132 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous."); West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991) ("The best evidence of [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.").

88. This may merely reflect the fact that courts have never really considered severability clauses to be absolutely binding.

89. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

90. *See, e.g.*, SUTHERLAND, *supra* note 75, at § 44.08 ("[I]t should be kept in mind that the authority of a court to eliminate invalid elements of an act and yet sustain the valid elements is not derived from the legislature, but rather flows from powers inherent in the judiciary."); Note, *Constitutional Law – Partial Unconstitutionality of Statutes – Effect of Saving Clause on General Rules of Construction*, 25 MICH. L. REV. 523, 527 (1927) (concluding that courts will not allow the presence of a severability clause to take away their power to independently determine questions of severability). One federal court has found a severability clause unconstitutional in its particular circumstances, and on similar grounds. In *Mathews v. Schweiker*, plaintiffs challenged certain provisions of the Social Security Act requiring that they must have received more than half of their financial support from their wives in order to be eligible for certain benefits. After concluding that the statute violated plaintiffs' equal protection rights by senselessly denying them benefits they would have been eligible to receive if they were women, the district court addressed

To begin with, the Supreme Court has recognized that Congress enjoys plenary control over the creation of statutory rights, and that in exercising that control, Congress has broad authority to condition the exercise of judicial power. In *Northern Pipeline*, where the Court addressed the constitutionality of Congress's decision to vest Article III judicial power in "adjunct" bankruptcy courts staffed by judges lacking Article III protections, a four Justice plurality explained:

> The constitutional system of checks and balances is designed to guard against encroachment or aggrandizement by Congress at the expense of the other branches of government. *But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies*; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. *Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created.*[91]

Although severability clauses do not necessarily arise in the context of congressional "rights creation," the principle enunciated by the *Northern Pipeline* plurality (and its implications for severability) holds true across statutory types: The fact that Congress passes a statute that "*affect[s]* the

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the constitutionality of the statute's peculiar severability clause. Because its effect would have been to deny everyone spousal benefits, the court held that it represented

> an unconstitutional usurpation of judicial power by the legislative branch of the government [insofar as it] attempted to mandate the outcome of any challenge to the validity of the [law] by making such a challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision. . . .

1982 U.S. Dist. LEXIS 18124, *11-12 (N.D. Ala.). The Supreme Court later reversed the decision, but found it unnecessary to address the constitutionality of the statute's severability clause. Instead, the Court held that the plaintiffs' asserted injury (sex discrimination) would be redressed—even if it enforced the severability clause—since men and women would be treated equally under the law: Neither men nor women would get a penny in spousal benefits. *See* Heckler v. Mathews, 465 U.S. 728, 737-40 (1984).

91. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982) (plurality opinion) (emphasis added). Of special note, the dissenting opinion in *Northern Pipeline* favorably cites an analogous claim. *See id*. at 104 ("In fact, the plurality [acknowledges that the exceptions to Article III's reach are broad in] announc[ing] that 'when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated.') (White, J., dissenting) (quoting plurality opinion at 80).

exercise of judicial power"[92] does little to render such legislation unconstitutional on grounds that it *usurps* the judicial power. (Akhil Amar once bluntly put the point this way: "Congress tells the courts how to decide cases all the time: It's called passing laws.")

Two examples help illustrate this conclusion. First, the Supreme Court has held that legislative "fallback" provisions, largely analogous to severability clauses, bind courts. In *Bowsher v. Synar*,[93] where the Court was forced to determine how to remedy constitutional defects in the Balanced Budget and Emergency Deficit Control Act of 1985,[94] a majority explained:

> The language of the [Act] itself settles the issue. In § 274(f), Congress has explicitly provided 'fallback' provisions in the Act that take effect '[in] the event . . . any of the reporting procedures described in section 251 are invalidated.' The[se] fallback provisions are fully operative as a law [and were intended] to be given effect in this situation.[95]

The fallback provisions at issue in *Bowsher* closely resemble severability clauses. When Congress includes a severability clause, the enacted statutory scheme operates until the courts strike down any of its provisions, at which point the clause acts (as a kind of statutory shorthand) to repeal the partially invalid scheme and replace it with one that contains all of the original scheme's provisions except for those declared unconstitutional.[96] No aspect of the *judicial power* precludes Congress from providing this kind of statutory remedy for unconstitutionality – at least not according to the Court.[97]

Second, courts have always (at least implicitly) recognized Congress's authority to bind judicial interpretation by legislating definitions for the terms it uses in the statutory schemes it creates.[98] As Nick Rosenkranz observes:

92. *Id*. (emphasis added).
93. 478 U.S. 714 (1986).
94. 2 U.S.C. § 901 *et. seq*.
95. 478 U.S. at 735 (citations omitted).
96. *See* Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1208 n.87 (1984).
97. However, this conceptualization helps to highlight possible non-delegation problems inherent in severability clauses. I address this potential pitfall *infra* at Section III.C.
98. *See, e.g*., United States v. Hodge, slip op. at 12 n.5 (3d Cir. March 11, 2003) ("Absent an absurd departure from conventional English, Congress of course is free to define terms in statutes differently than any particular dictionary does.") (available at http://www.ca3.uscourts.gov/recentop/week/012198.pdf) (last visited March 13, 2003); United

> [W]hen Congress inserts a definitional section, courts resort not to their usual grab-bags of interpretive tools, but to the statutory definition alone. Congress in effect replaces a complicated and fuzzy algorithm with a simple cut-and-paste function. "Where one sees *X*, one is to read *Y*." No guesswork is necessary (and no litigation likely) to determine whether [*X* is *Y*]. It is; Congress said so. Cut and paste.[99]

Interpreting statutory terms is arguably just as judicial a power as judicial review. In fact, courts construe statutes more frequently than they invalidate them (and they frequently interpret statutes so as to avoid having to invalidate them[100]). Could courts interpret a statutorily-defined term within a much broader range if Congress had chosen not to define it? Of course. But the fact that "courts would have an additional power absent a particular statutory provision hardly suffices to show that the provision violates Article III."[101] Likewise, the fact that courts might otherwise be able to strike down in its entirety a statute that is only unconstitutional in part, and which does not contain a severability clause, fails to show how the enactment of a binding severability clause impinges upon the federal courts' inherent Article III powers.[102]

States v. Harkey, 709 F. Supp. 977, 984 (E.D. Wash. 1989) ("Clearly, if Congress desires to include burglaries with elements other than those of common law burglary, it is free to so legislate."). As an example of a typical definitional clause, consider this excerpt from the Junior Duck Stamp Conservation and Design Program Act Reauthorization: "For the purposes of this Act, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands, and any other territory or possession of the United States." Pub. L. No. 106-316, 114 Stat. 1276 (2000) (codified at 16 U.S.C. § 719b-1 (2002)).

99. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2104 (2002). Of course, as Rosenkranz notes, "there is no guarantee that definition *Y* will be less ambiguous than defined term *X*, and a court may require all its interpretive ingenuity to give content to *Y*. The point, though, is that no interpretive work will be necessary *as to term X* except a simple cut and paste." *Id*. at 2104 n.71.

100. This is the traditional avoidance canon: "[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979).

101. Rosenkranz, *supra* note 99, at 2105.

102. Rosenkranz goes on to note that definitional enactments need not be statute-specific in order obtain constitutional validity. Consider, as he does, the Defense of Marriage Act: "In determining the meaning of any Act of Congress, . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2000). Whatever its arguable constitutional defects, see, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (arguing that DOMA violates the Full Faith and Credit Clause and Equal Protection principles); Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States*?, 26 HASTINGS

More broadly understood, this conclusion flows from the fundamental structure of American law. As Professors Eskridge and Ferejohn explain, the

> Constitution committed the national government to lawmaking by elected representatives deliberating for the public good. Article I's vesting legislative authority in Congress and Article III's vesting the Supreme Court and inferior federal courts with jurisdiction to interpret federal statutes (and only implicit jurisdiction to hear federal common law claims) suggest the principle that the primary source of law at the federal level would be statutes—a striking contrast to England and the states, where Blackstonian common law precedents remained the main source of law.[103]

Given these background norms, it is beyond question that constitutional requirements trump any contrary statutory enactments, and that valid statutory enactments, in turn, trump judicially-crafted common law.[104] To the extent that the Court's current tests for severability are not constitutional rules—and there has never been any suggestion that they are anything but prudential—Congress may effectively reverse them by statute without impinging upon the federal judiciary's inherent Article III powers.

C. Do Severability Clauses Violate Non-Delegation Principles?

A second constitutional critique of severability clauses takes the opposite tack, suggesting that these clauses grant too *much* power to courts. Suggested by Max Radin as early as 1942,[105] this critique argues that severability clauses represent an unconstitutional delegation of lawmaking authority to the courts because Congress could not have considered every

CONST. L.Q. 419 (1999) (arguing that DOMA infringes upon the Tenth Amendment), the fact that its definition of marriage binds judicial interpretation of all federal statutes using the term "marriage" is not one of them. Similarly, a general severability clause passed by Congress – stating, for example, that "Unless otherwise indicated by a clear statutory statement, all statutes passed after the effective date of this Act shall be severable" – violates Article III no more than the statute-specific severability clauses contained in most contemporary federal legislation (which is, of course, to say not at all).

103. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1221 (2001).

104. *See also* Rosenkranz, *supra* note 99, at 2107.

105. Radin, *supra* note 75, at 419 ("Are we really to imagine that the legislature had, as it says it had, weighed each paragraph literally and come to the conclusion that it would have enacted that paragraph if all the rest of the statute were invalid?").

possible statutory permutation that might result from a court's post-enactment decision to sever a subset of unconstitutional statutory provisions that cannot predictably be identified in advance.[106]

The objection proves too much. Congress often leaves critical statutory issues unresolved,[107] thereby inviting the judiciary to develop a federal common law to supplement the statutory scheme, and effectively delegating significant policymaking authority to the courts. This practice is well-accepted. Consider the Sherman Act,[108] which represents a classically broad grant of policymaking authority to the judiciary.[109] Although it outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," the Sherman Act fails to define even one specific practice that constitutes a "conspiracy . . . in restraint of trade." Its legislative history (assuming that it is an appropriate source of interpretive advice in the face of such genuine statutory ambiguity) offers virtually no guidance. As a result, the Court has declined to adopt a static approach to interpreting the Act,[110] and it long ago rejected non-delegation challenges.[111] Other landmark statutes contain similarly sweeping delegations of policymaking authority to the courts without raising constitutional doubts.[112]

In contrast to these broad delegations, severability clauses are restrained. When a court enforces a severability clause, it may not add provisions or limitations to legislation, but can only enjoin enforcement of

106. *Cf.* Ohio Oil Co. v. Wright, 53 N.E.2d 966, 974 (Ohio 1944) ("Literally interpreted [the severability clause] would result in a new statute going into effect as a result of the judgment of this court deciding that either some classes were improperly included, or other classes improperly excluded. The new law would be created by this court and not by the General Assembly, because it enacted a different one. This would amount to a delegation of legislative powers to the courts, which is contrary to article III of the constitution, as well as numerous decisions of this court.").

107. *See e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983) ("Almost all statutes are compromises, and the cornerstone of many a compromise is the decision . . . to leave certain issues unresolved.").

108. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-2 (1994)).

109. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421 (1989).

110. *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.")

111. Standard Oil Co. v. United States, 221 U.S. 1, 59-63 (1911).

112. In enacting the Employee Retirement Income Security Act of 1974 (ERISA), for instance, Congress delegated policymaking authority to the judiciary "to develop a federal common law of rights and obligations under ERISA-regulated plans." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989) (citations omitted). Similarly, the Court has interpreted §301(a) of the Labor Management Relations Act as an authorization for the courts to develop a federal common law of labor-management relations (subject to jurisdictional limits). *See* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

constitutionally offensive provisions—as directed by the statute itself.[113] If this limited grant of authority offends non-delegation principles, then the practice of crafting of federal common law—and any statutes that confer such broad authority on the courts—are likewise unconstitutional. Even the most serious "new textualists"[114] would likely reject this result.[115]

In any event, the objection is exaggerated. Although courts could conceivably declare any provision of a statute unconstitutional, there are, in fact likely to be only a few provisions of any single statute that raise constitutional questions, and even fewer that are likely to be declared unconstitutional.[116] The possible number of post-severance statutory permutations is accordingly limited. If three statutory provisions (A, B, and C) raise serious constitutional problems, there are seven possible post-severance permutations: all provisions except A, all provisions except B, all provisions except C, all provisions except A and B, all provisions except B and C, all provisions except A and C, and all provisions except A, B, and C. Given that Congress evaluates hundreds of statutory permutations during the lawmaking process, considering seven, twenty, or even fifty possible post-severance permutations is certainly within its institutional capacity.[117]

113. *See* Hill v. Wallace, 259 U.S. at 70 ("[The severability clause] 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.");.

114. For an introduction to, and critique of, the "new textualist" philosophy, see Eskridge, *supra* note 10.

115. As John Manning has noted,

> Textualist judges allow that statutory indeterminacy, and the resulting need for norm-specification, may at times involve judges in the exercise of substantial policymaking discretion. For example, Justice Scalia acknowledges that "policy evaluation is . . . part of the traditional judicial tool-kit." Although he often finds that a statute's meaning "is apparent from its text and from its relationship with other laws," he recognizes that judicial, like agency, elaboration of an ambiguous statutory text may entail some exercise of delegated policymaking authority.

John F. Manning, *Textualism As A Non-Delegation Doctrine*, 97 COLUM. L. REV. 673, 701 (1997); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

116. Between 1995 and 2001, the Supreme Court partially invalidated 27 federal laws. Neal Devins, *Congress As Culprit: How Lawmakers Spurred On The Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001). Although this is a large number of invalidations when gauged against historical standards, the total nonetheless represents only a miniscule fraction of the total number of laws Congress enacted during this period.

117. *See also* Stern, supra note 12, at 126, 128 ("Although all problems of severability cannot be recognized in advance, the most important of them can be. Particularly in the case of new statutes regulating new subjects can a preliminary examination by a person familiar with constitutional authorities reveal the principle points of danger. . . [T]he basic problems of separability raised by most important statutes can be discovered and cared for when the statute is being drafted.").

D. What if the Post-Severance Statutory Scheme Cannot Function?

The oldest rationale for disregarding severability clauses was first articulated in *Warren*, reiterated by the Supreme Court in *Carter Coal*, and is implicit in the *Alaska Airlines* test: A statutory scheme that cannot function independently from its unconstitutional subsections should be struck down in its entirety, notwithstanding Congress's inclusion of a severability clause. As explained earlier, this "functionality standard" seems out of place in the severability clause context because it was designed as an extrinsic mechanism for gauging legislative intent in an era before legislatures developed an intrinsic statutory mechanism to explicitly express their preference for severability (a development, in fact, that was apparently spurred by the courts' very use of the standard). Once legislatures began including severability clauses in constitutionally questionable legislation, however, their intent with regard to severability was clear—even if the post-severance statutory scheme envisioned by a reviewing court appeared odd or incapable of precisely serving its intended purpose. What justification for the functionality standard remains?

Before going further, it is important to distinguish between two different contexts in which courts have purported to apply the standard. The first is the scenario at issue in *Hill v. Wallace*.[118] Recall that there, the Supreme Court invalidated regulations contained in the 1921 Future Trading Act,[119] and then limited the scope of the statute's broad severability clause by explaining that "Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those [unconstitutional] regulations that they can not be separated. None of them can stand."[120]

The *Hill* Court's decision to invalidate the statutory penalties was right—but not for any reason related to severability. The real problem with enforcing penalties designed to secure compliance with unconstitutional regulations is that doing so is unconstitutional, not that the underlying regulations and their enforcement mechanisms are too "interwoven" to be separated without leaving behind a dysfunctional statute. Once it is determined that Congress is constitutionally proscribed from *prohibiting* or *requiring* certain conduct, it follows that Congress is constitutionally precluded from *punishing* someone for engaging in (or failing to engage in) that conduct. In cases like *Hill*, the issue of whether to invalidate penalties has nothing to do with severability, and everything to do with "substantive" constitutional law.

118. 259 U.S. 44 (1922).
119. Pub. L. No. 67-66, 42 Stat. 187 (1921)).
120. 259 U.S. at 70 (citations omitted).

The second context in which courts have applied the functionality standard to limit severability clauses is arguably a more appropriate one, and is illustrated by *Warren*. There, in wholly invalidating a state statute annexing Charlestown into Boston, the Supreme Judicial Court of Massachusetts explained that the "various provisions of the act, all providing for the consequences of [the impermissible] annexation, are connected and dependent[,] look to one object and its incidents, and are so connected with each other" that the dysfunctional but constitutionally-valid statutory remnants could not be permitted to remain in force.[121]

Despite the fact that the *Warren* court's stated rationale for the standard—that a dysfunctional post-severance scheme cannot comport with legislative intent—is misplaced in the severability clause context, the standard itself continues to hold purchase in the modern era. I suspect that this is largely due to the fact that the standard seems to recognize something *constitutionally* troubling about a residual statutory scheme that cannot function. As Professor Mashaw has observed, "some form of reasonableness check on legislative activity is embedded in our general commitment to the protection of individual liberty and the idea of a government of limited powers."[122] And although the Due Process Clauses[123] speak in broad procedural terms, they seem to embody the quasi-substantive principle that both federal and state legislation must at least employ means reasonably calculated to achieve a legitimate legislative purpose.[124] When a post-severance statutory scheme truly "cannot function," it cannot serve any purpose. Indeed, there is a risk that its inability to function will lead to arbitrary state action.[125]

121. 68 Mass. (2 Gray) at 100 (1854).

122. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 52 (1997).

123. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."); U.S. CONST. amend. XIV ("No State shall. . . deprive any person of life, liberty, or property, without due process of law. . .").

124. *See id*. During an earlier era, the Due Process Clauses were read to require much more than this from legislation. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). Since the New Deal, however, the Court has swung to the other extreme – retaining a rationality requirement in name, but rendering it almost toothless unless some sort a fundamental right is implicated by state action. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *see also* United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938) (announcing a strong presumption of constitutionality and reserving heightened scrutiny only for situations in which legislation "appears on its face to be within a specific prohibition of the Constitution[,] restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation[, or is] directed at . . . discrete and insular minorities.").

125. Professor Nagle has also attempted to re-rationalize this strand of the Court's severability jurisprudence. In place of a Due Process formulation, he suggests that courts should strike down the remaining statutory scheme only when it leads to an "absurd result." Nagle, *supra*

But this re-rationalization of the stand-alone functionality standard—the idea that a post-severance statutory scheme might raise constitutional concerns *independent* of those giving rise to the underlying lawsuit—suggests a doctrinal problem that merits consideration without regard to how the standard is formulated. Although a plaintiff challenging a regulatory scheme unquestionably has *standing* to both bring her challenge and be heard regarding the form that a remedy for the scheme's constitutional infirmities should take (in this context, whether the statute at issue should be severed or invalidated entirely),[126] the issue of whether a post-severance statutory scheme can function in practice (upon which the severability determination allegedly pivots under this justification for disregarding a severability clause) is almost surely not *ripe* for review at the time that a litigant asserts her claim.

Consider *Abbott Laboratories v. Gardner*,[127] the Supreme Court's leading case on ripeness (both inside and outside of the administrative law context[128]). Addressing a pre-enforcement challenge seeking injunctive and

note 13, at 235-36. There are two difficulties with his suggestion, each illustrated by Justice Kennedy's admonition that the absurd results canon is to be applied only when a "result . . . would be, in a genuine sense, absurd, *i.e.,* where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone," Public Citizen v. United States, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring) (internal reference omitted). First, the absurd results formulation fails to remedy the key conceptual difficulty with the stand-alone functionality test: Resort to the absurd results canon depends on the same underlying justification—legislative intent—even in the face of severability clauses designed by legislatures to unambiguously convey their intent. Second, courts apply the canon far too frequently – often when results are not obviously absurd. *See, e.g.*, *id*. at 440, 454 & 465 (opinion of the Court) (invoking the absurd results canon to construe a statute, but concluding only that "on the whole we are fairly confident" in the decision reached). In recent years, Nagle appears to have changed his position on the absurd results canon. *See* John C. Nagle, *Textualism's Exceptions*, ISSUES IN LEGAL SCHOLARSHIP: DYNAMIC STATUTORY INTERPRETATION #15 (2002) (available at http://www.bepress.com/ils/iss3/art15) (last visited March 12, 2003) (arguing that the absurd results canon is unprincipled and unnecessary, decreases the likelihood of remedial legislative action, and encourages frivolous claims that squander the legal system's limited resources).

126. Indeed, asserting that a particular remedy for an alleged constitutional violation exists is a critical component of the Court's standing jurisprudence. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly trace[able] to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court. *Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision*.") (citations and quotations omitted) (emphasis added).

127. 387 U.S. 136 (1947).

128. *See* FALLON ET AL., *supra* note 14, at 249 ("Abbott Laboratories is invariably cited as the leading case on the ripeness of challenges to federal administrative regulations, and its two-part test is often applied in cases involving constitutional attacks on state and federal statutes."); *see also* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987) (criticizing the constitutionalization of ripeness doctrine and illustrating its broad application outside of the administrative law context).

declaratory relief against regulatory prescription drug labeling requirements, the Court explained:

> [Ripeness doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.[129]

Applying the two-part test, Justice Harlan concluded that the issues raised by the manufacturers' challenge to the labeling requirements were fit for judicial review (because the primary issue tendered for adjudication was interpretive—not fact-dependent—and because the regulation was "final" for purposes of the APA[130]), and that present resolution of the issue was required (because the provision would have "a direct effect on the day-to-day business of all prescription drug companies"[131] and because "to require [plaintiffs] to challenge these regulations only as a defense to an action brought by the government might harm them severely and unnecessarily"[132]).

At the point in time when a litigant claims that a post-severance statutory scheme *may* function so poorly *in practice* that it *could* raise Due Process concerns *if* applied, it is difficult to see how that issue is ripe for

129. 387 U.S. at 148-49 (emphasis added). A more recent elaboration of the principles at stake teaches:

> Ripeness doctrine . . . mixes various mutually reinforcing constitutional and prudential considerations. One such consideration is the need to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. Another is to avoid unnecessary constitutional decisions. A third is the recognition that, by waiting until a case is fully developed before deciding it, courts benefit from a focus on particular facts. . . . These rationales spring, in part, from the recognition that the scope of judicial power is bounded by the Constitution. It is a principle of first importance that the federal courts are courts of limited jurisdiction. Article III of the Constitution limits jurisdiction to "cases" and "controversies," and prudential doctrines may counsel additional restraint.

Doe v. Bush, slip op. at 11-12 (1st Cir. March 13, 2003) (available at http://www.ca1.uscourts.gov/pdf.opinions/03-1266-01A.pdf) (last visited March 13, 2003) (citations and quotations omitted).

130. *Id*. at 149.

131. *Id*. at 152.

132. *Id*. at 153.

adjudication under *Abbott Labs*. Regarding the fitness of the issues presented for adjudication, the question of whether a post-severance statutory scheme can function rationally in practice is assuredly fact-dependent. At least, it is not a purely legal determination akin to interpreting the meaning of statutory words. In addition, given that Congress generally reviews judicial decisions invalidating federal laws, it is not beyond contemplation that the legislature will take action on the post-severance statute before the scheme can work to harm anyone (assuming *arguendo* that a statute which cannot function can still be used to harm someone). And in any event, a reviewing court would benefit from seeing the operation of a post-severance statutory scheme in practice before it holds the scheme utterly irrational under the Due Process Clause.

If these claims fail to convince a court that the constitutional issues they must adjudicate in applying the functionality standard are not yet ripe for review, the question still remains: How will delaying a decision on the constitutional acceptability of the remaining statutory scheme harm any party to the lawsuit? It is unlikely that a truly dysfunctional post-severance statutory scheme would have far-reaching effects on private conduct that demand immediate adjudication on its constitutional merits. To use the language of *Toilet Goods Association v. Gardner*, a companion case to *Abbott Labs*, it is hard to see how the presence of a non-operational post-severance statutory scheme would "be felt immediately by those subject to it in conducting their day-to-day affairs."[133] And there are not likely to be any "irremediable adverse consequences . . . from requiring a later challenge"[134] to the remaining statutory scheme in the (unlikely) event that some sort of (obviously) arbitrary action is taken against a putative plaintiff.

To sum up: The functionality standard has outlived its original justification. In many cases, it is applied unnecessarily; in others, its application raises important jurisdictional concerns. In short, wholesale invalidation of a partially unconstitutional statute is best left for another day—not handled at the end of an opinion whose bulk is devoted to determining whether a statutory scheme is, to begin with, partially unconstitutional.

E. What if Circumstances Have Changed?

A final justification for disregarding severability clauses is less sweeping and more compelling—when circumstances have changed between the enactment of a statute containing a severability clause and a

133. 387 U.S. 158, 164 (1967).
134. *Id*. at 164.

judicial decision to invalidate a subsection of the statutory scheme.[135] Consider *United States v. Spokane Tribe of Indians*.[136] For some time, the Spokane Tribe had operated a bingo hall and card tables on its Washington State reservation. Wishing to expand its gambling operations, the Tribe attempted to negotiate a required compact with the state pursuant to procedures set forth in the Indian Gaming Regulatory Act (IGRA), which, importantly, also contained a severability clause. After two years, negotiations broke down and the Tribe filed a federal lawsuit against the state—pursuant to another IGRA provision—alleging that state officials had refused to bargain in good faith. While the lawsuit was pending, the Tribe began to expand its gaming operations.[137]

In the meantime, the Supreme Court held in *Seminole Tribe of Florida v. Florida* that "[t]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[138] The State of Washington quickly invoked sovereign immunity, thereby terminating the Tribe's lawsuit,[139] and federal authorities filed suit against the Tribe in U.S. district court alleging that the Tribe's expanded gambling activities were illegal in the absence of the tribal-state gambling compact required by IGRA. The court granted a preliminary injunction preventing the Tribe from operating most of its gambling activities, and the Tribe filed an interlocutory appeal.[140]

At the heart of its defense, the Tribe claimed that Congress would not have passed IGRA—with its requirement that Indian Tribes and State governments reach an accord before the Tribes could operate certain games of chance on their reservations—if it could not also authorize Indian tribes to sue states that refused to negotiate with them in good faith.[141] On this view, Congress had passed IGRA in response to the Court's decision in *California v. Cabazon Band of Mission Indians*, which held that the states lack authority to regulate gambling on Indian reservations.[142] IGRA authorized state governments to regulate Indian gaming for the first time, but in crafting the law, Congress deliberately chose not to leave the states

135. For an illustrative discussion of the various situations in which courts might be justified in "accommodating" statutory directives to new factual circumstances, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION ch. 2 (1994). A synopsis of this discussion can be found in WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 604-06 (2d ed. 1995).

136. 139 F.3d 1297 (9th Cir. 2001).

137. *Id*. at 1298.

138. 517 U.S. 44, 72 (1996).

139. *Spokane Tribe*, 139 F.3d at 1298.

140. *Id*.

141. *Id*. at 1299.

142. 480 U.S. 202 (1987).

"hold[ing] all the cards."[143] Instead, it struck a careful balance between state and tribal interests by enabling the Tribes to force states to bargain with them fairly under threat of a federal lawsuit.[144] Congress thus could not have meant what it said when it enacted IGRA's severability clause: It simply had not imagined that the Court would interpret the Eleventh Amendment to bar suits by Indian Tribes against state governments, and it would not have left the states with such disparate bargaining power over the Tribes if it had known in advance how the Court would decide *Seminole Tribe*.[145] *Spokane Tribe* thus presents a compelling example of a case in which changed circumstances might prompt a court to look beyond an explicit severability clause.[146]

How should the courts deal with such situations? Doubtless many, including the Ninth Circuit in *Spokane Tribe*,[147] would argue that crafting exceptions to (or otherwise overlooking) a severability clause is justified in these circumstances.[148] Professor Eskridge, for instance, has suggested that, in applying statutes, judges ought to consider "not only what the statute means abstractly . . . but also what it ought to mean in terms of the needs and goals of our present day society."[149] On this view, "[e]ven when one can figure out the legislature's specific intent as to an issue when it enacted the statute, there may be considerable doubt that the legislature 'would have' specifically intended that the issue be resolved in that way if it could

143. *Spokane Tribe*, 139 F.3d at 1301.

144. *Id*.

145. *See id*. (quoting IGRA sponsor Sen. Daniel Inouye, who, after it became clear that the Eleventh Amendment might be interpreted to bar IGRA suits, stated that "[I]f we had known that this proposal of tribal state compacts that came from the States and was strongly supported by the States, would later be rendered virtually meaningless by the action of those states which have sought to avoid entering into compacts by asserting the Tenth and Eleventh Amendments to defeat federal court jurisdiction, we would not have gone down this path.").

146. *INS v. Chadha*, of course, is another case which suggests how changed circumstances – there, the Court's invalidation of legislative veto provisions – might prompt courts to look beyond an explicit severability clause. *See* 462 U.S. 919 (1983).

147. *Spokane Tribe*, 139 F.3d at 1299 & 1302 (9th Cir. 1998) ("[W]e [could be] left . . . with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that allegedly hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now. Under the circumstances, IGRA's provisions governing class III gaming may not be enforced against the Tribe.")

148. Given longstanding interpretive norms favoring Native Americans, this may be especially true on the facts of *Spokane Tribe*. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 767 (1985) ("[S]tatutes are to be construed liberally in favor of . . . Indians, with ambiguous provisions interpreted to their benefit."). *See also* Choate v. Trapp, 224 U.S. 665, 675 (1912) ("[I]n the Government's dealings with the Indians . . . construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years. . .").

149. ESKRIDGE, *supra* note 135, at 50 (quotation omitted).

have predicted future circumstances."[150] When legal rules and social norms have shifted, therefore, judges may read statutes in ways that "contradict as well as transcend the legislature's original expectations."[151]

In defense of this kind of "critical pragmatism,"[152] Eskridge deconstructs the textualist vision of legislative supremacy.[153] On that view, courts are bound to act as 'faithful agents' of the legislature by adhering to the legislature's explicit commands. Otherwise they impinge upon powers reserved to the legislature (and ultimately the people) in our system of separated powers.[154] Eskridge turns this analysis on its head. If courts are supposed to act as faithful agents of the legislature, he asks, shouldn't they interpret statutes to do what the legislature would have wanted the legislation to do? And, having imagined the circumstances which brought the case at hand before the court, might the legislature have voted *against* including a severability clause? Article III judges, he concludes, are "both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of 'We the People.'"[155] Professor Eskridge has impressively traced this view of the judicial role to Founding era practice, though his interpretation of the evidence is disputed.[156]

There is much to admire—but more to disagree with—in the theory of dynamic statutory interpretation. Rather than fully rehash the debate, I employ public choice theory to expose two central tensions between dynamic statutory interpretation and our constitutional structure,[157] and to provide insights to the proper resolution of severability determinations in the face of changed circumstances.

On the public choice view, politicians are rational actors who provide legislation to those interest groups and other constituencies most willing to deliver them votes, contributions, and other "payments" designed to

150. *Id*. at 121.

151. *Id*. at 120-21.

152. *Id*. at 200.

153. *See generally* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO L.J. 319 (1989).

154. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997) ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."). For a detailed elaboration of the 'faithful agent' theory, see John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15-21 (2001).

155. William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1706-1806*, 101 COLUM. L. REV. 990, 992 (2001).

156. *Compare id*., *with* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001) [hereinafter Manning, *Deriving Rules*]; and Manning, *supra* note 154.

157. For another public choice-inspired analysis of dynamic statutory interpretation, see Manning, *supra* note 154, at 70-78.

prolong their political careers.[158] Though this vision could be criticized as cynical, it should not be surprising: It was the conscious design of the Framers. As James Madison explained in *Federalist* 57, Congress was

> so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their election can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.[159]

Merely subjecting legislators to popular elections was considered insufficient to safeguard liberty from legislative encroachment. In addition, prospective legislation would have to obtain majority support in both the House and Senate and be signed by the President before becoming law,[160] with intra- and interbranch divisions secured by the expanse of the Republic and the branches' varied electoral procedures.[161] For legislation to survive this procedural gamut, sponsors must assemble a supporting coalition that

158. *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); *see also* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 877 (1975) ("[L]egislation is supplied to groups . . . that outbid rival seekers of favorable legislation [with payment taking] the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes."); Terry Sullivan, *Presidential Leadership in Congress: Securing Commitments*, *in* CONGRESS: STRUCTURE AND POLICY 287 (Mathew D. McCubbins & Terry Sullivan eds., 1987) ("[Members of Congress] are guided by a desire to maximize their expected electoral return. . .").

159. THE FEDERALIST No. 57, at 352 (James Madison) (Clinton Rossiter, ed. 1961). Madison was addressing the House of Representatives, but his words are generally applicable to the Senate (in the wake of the Seventeenth Amendment) and to the President as well (despite the Electoral College).

160. *See* U.S. CONST. art. I, § 7 (bicameralism and presentment). If the President vetoes legislation, his rejection can, of course, be overridden by a two-thirds vote of both legislative chambers. *Id*.

161. In THE FEDERALIST No. 10, for instance, Madison argued:

> Extend the [republic] and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). *See also* U.S. Const. art. I, §§ 2, 3 (Representatives elected for two-year terms from relatively small legislative districts); U.S. Const. art. I, § 3 and amend. XVII (Senators elected for six years by statewide popular vote); U.S. Const. Art. II, §§ 1-3 (President elected to serve a four year term by the Electoral College).

reaches across party, ideological, and other interest group lines[162]—a hurdle raised even higher by the proliferation of internal legislative checkpoints designed to allow small numbers of Congressmen to impede a proposed statute's progress towards passage and enactment.[163]

Article I, § 7 thus impedes factional domination of Congress and limits the strength of legislation. It also makes federal legislation exceedingly difficult to enact and to amend. Legislating under these requirements necessarily involves high transaction costs, and laws must therefore endure over the long-run. Otherwise "the enacting Congress and the [interests seeking legislation] may [incur] substantial costs that would not prove worthwhile."[164] And so Article I, § 7 also helps stabilize the legislative process by ensuring that laws do not change willy-nilly in response to only modest shifts in the prevailing political consensus. This, too, was intended by the Framers.[165]

This portrait raises two objections to dynamic statutory interpretation.

- First: Given the Constitution's concern with abuse of the lawmaking power—evinced most notably by its subjection of Congressmen and the President to electoral control—why would it insulate courts from the same political pressures to which it subjects the other branches if it also expects them to exercise the same powers?

- Second: Why does the Constitution make legislation so difficult for Congress and the President to enact if it also expects the courts to unilaterally amend those laws in order to better address the needs of our present-day society?

162. *See* M. Douglass Bellis, *Drafting in the U.S. Congress*, 22 STATUTE L. REV. 38, 40 (2001) (In the American legislative process, "all the various interest groups in the country . . . must forge a compromise. Rarely does one party have enough of a majority to ignore everyone else and override a Presidential veto, so the compromise must have a very large consensus, usually not limited to one political party, even the majority party, to succeed. Even where the majority is strong, the existence of debate, however futile it often seems, gives the minority a chance to persuade or at least embarrass the majority. In the typical case, the majority feels to compelled to make some sort of compromise with the minority. Ours is not the winner takes all until the next election system that prevails in some parliamentary democracies.")

163. Article I, Section 5 gives each House of Congress the power to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2. This includes plenary control over both committee structure (and membership) and more immediately procedural matters like how to manage its day to day business (including voting-related matters, like the Senate's filibuster).

164. Landes & Posner, *supra* note 158, at 877.

165. *See generally* THE FEDERALIST Nos. 63 (James Madison), 70 (Alexander Hamilton), 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Understanding exactly how dynamic theorists respond to these objections is critical to resolving whether courts can legitimately disregard severability clauses in the face of changed circumstances.

In response to the first objection, Eskridge observes that "our system tolerates electoral schemes that permit candidates and parties receiving a minority of votes to win elections."[166] He then makes two claims: that the power to interpret statutory enactments against congressional expectations is vested in courts as part of the separation of powers (which he argues is designed to prevent a single branch of the federal government from "creating law and controlling policy"),[167] and that Congress can ultimately overrule a statutory decision with which it disagrees (thus minimizing any arguable judicial encroachment into the legislative domain).[168]

These arguments fail to persuade. That the Electoral College is not fully majoritarian does little to explain why the Framers felt it necessary to subject legislators *but not* judges to electoral control (however imperfect) if they also expected both legislators *and* judges to exercise effectively co-equal control over enacted federal statutory policies. And Eskridge's appeal to the separation of powers succumbs to the same objection it represents. A judiciary vested with power to interpret statutes in ways that contradict legislative choices wields the authority to both "create law and control policy,"[169] and thus violates the same conception of the separation of powers relied upon to justify granting courts this power.

Ultimately, then, the analytical trump must be Congress's ability to override judicial decisions. But given that the theory under consideration posits that courts can deliberately contradict legislative enactments, endless cycling could result. If Congress enacts a statute, the Supreme Court rejects Congress's choice, and Congress then overrules the Court's decision, could the Court then overrule Congress's override? Doing so seems plainly out of place in our constitutional order (though Eskridge has come surprisingly close to suggesting that such repeated overrides are possible[170]). In any event, absent a limiting principle which—and here's the rub—the Constitution fails to supply because its structure does not contemplate the courts' exercise of such authority, this game could go on forever. That policy choices must ultimately be left to Congress undermines any claim

166. ESKRIDGE, *supra* note 135, at 156.
167. *Id*. at 113.
168. *Id*. at 151.
169. *Id*. at 113.
170. *See* William N. Eskridge, Jr. and Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) ("In statutory interpretation cases, *absent a strong substantive justification*, the Court *should be unwilling* to disturb a stable equilibrium, especially one that was recently reinstated by Congress in response to a temporary displacement of that equilibrium.") (emphases added).

that courts have the inherent authority to contradict unambiguous, constitutionally-valid statutory directives in the first place.

Addressing the second objection, Eskridge acknowledges that legislation is purposefully difficult to enact and amend[171] and that "the assumption in both 1789 and today is that statutes will have an indefinite life—well beyond that of the enacting Congress."[172] He responds by asserting first that "An important reason for having an independent judiciary is to reassure Congress that the statutes it enacts will remain efficacious over time and not run wild or expire because of the inattention to subsequent Congresses,"[173] and second, with crucial implications for severability, that it is "unrealistic to expect Congress to monitor every nook and cranny of statutory policy from year to year, for that is the reason why Congress delegates policy-making authority to agencies and courts."[174] Neither of these claims justifies rejecting a severability clause (or otherwise "interpreting" an unambiguous statute contrary to its plain meaning).

The first response presumes precisely what it is intended to justify: Judicial independence can work to reassure the legislature that its statutes will function indefinitely without constant Congressional attention only if, as part of instilling that independence, the Constitution also grants courts the power to update statutes. More important, Professor Eskridge's second response definitively undercuts the claim that changed circumstances justify refusal to enforce severability clauses. Aside from the fact that his own research shows that Congress can and does monitor interpretive decisions,[175] severability clauses are self-consciously *not* a delegation of policymaking authority to the courts. Indeed, they are designed specifically to *remove* the severability determination from judicial control by clearly communicating congressional intent. Thus, even if Congress often delegates policymaking authority to the courts because it does not want to oversee every application of existing laws to new conditions, its passage of a severability clause tells judges: "Not this time."

171. *Id*. at 20 ("The constitutional goal of [the Article I, § 7] procedural requirements is to protect against hasty, faction-driven changes in the status quo.").

172. *Id*. at 130-31.

173. *Id*. at 131.

174. *Id*.

175. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338-43 (1991). Eskridge's data indicates that between 1967 and 1990, Congress overruled by statute 344 court decisions, including 124 Supreme Court opinions and 220 lower court opinions, with the number of overrides increasing over time. In addition, the House and Senate Judiciary Committees held hearings addressing 30-50 percent (depending on the year) of Supreme Court statutory interpretation decisions touching on matters within those committees' jurisdiction between 1977 and 1983—a finding, he notes, "not unusual when compared with that of other committees." These are remarkable figures—especially considering how utterly unworthy of attention the majority of interpretive decisions actually are.

None of this is to deny Eskridge's argument its due. When Congress deliberately delegates policymaking authority to the courts, or where statutory language is genuinely ambiguous, dynamic interpretation with an eye to changed or unanticipated circumstances may be appropriate. But to the extent that we can glean insight from the structural design of the Constitution—and in particular from Article I, § 7—judges are powerless to *amend* Congress's statutes. Judicial rewriting of a statute under the guise of interpretation—which, in the severability context, involves construing a statute to mean exactly the opposite of what it say—is simply out of place in our constitutional order. In the end, it is "the prerogative of each [current] Congress to allow those laws which change has rendered nugatory to die an unobserved death if it no longer thinks their purposes worthwhile"[176] or to itself amend them to address changed circumstances.

IV. Special Problems with Non-Enforcement of Inseverability Clauses

A. The Inseverability Clause as Structural Enforcement Mechanism

Like severability clauses, inseverability clauses have been through Article I's exacting legislative process, and thus are valid laws due judicial enforcement. Moreover, none of the arguments for disregarding severability clauses apply in the inseverability context: Such clauses are far from boilerplate, suggesting that Congress really does know what it is doing when it includes such a directive. They pose no non-delegation threat because they deny courts any opportunity to manipulate the remaining statutory scheme in ways unimagined by the legislature. They raise no Due Process problem because they leave no remaining statutory scheme that could fail to function. And federal courts have no inherent power to leave in place a statutory scheme that Congress expressly declared it did not want.

But judicial refusal to enforce inseverability clauses raises additional concerns that are not necessarily present when courts decline to enforce severability clauses. Most legislation, as I argued earlier, is the culmination of myriad deals made among competing interests. The complexities and calculations of the logrolling process, and the limits it imposes on the strength of statutes, thus mandate heightened attention to the specifics of the legislative deal. Judge Easterbrook explains:

> [Because] legislation grows out of compromises among special interests, . . . a court cannot add enforcement to get more of what Congress wanted. What Congress wanted

176. K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part).

> was the compromise, not the objectives of the contending interests. The statute has no purpose. It is designed to do what it does in fact. *The stopping points are as important as the other provisions.* If the statute gave Group *X* twenty-five percent of what it wanted, it probably meant contending groups to keep the rest. A court cannot observe that the statute gives Group *X* more than it had before and then keep moving in the same direction. The compromise was that Group *X* would get some benefits but not more. When a court observes that Congress propelled Group *X* part way to its desired end, it cannot assist Group *X* farther along the journey without undoing the structure of the deal.[177]

When Congress includes an inseverability clause in constitutionally-questionable legislation, it does so in order to insulate a key legislative deal from judicial interference. Such clauses are iron-clad guarantees—clear statements by Congress that it would not have enacted one part of a statute without the others. Legislation containing an inseverability clause can thus be conceived of as a contract among competing political interests containing a structural enforcement mechanism[178] designed to alleviate the concerns of those legislators who were willing to vote for, or a President who was willing to sign into law, a particular statutory scheme *only* if credibly assured that certain limiting provisions would be secure in the enacted legislation. As a result, when courts disregard an inseverability clause, there is great risk that the resulting statutory scheme will be one that could not have been enacted—and, as we shall see, that cannot be repealed. The courts' nascent approach to inseverability clauses therefore has potential to amplify the countermajoritarian difficulty inherent in judicial review, where unelected judges undo the will of the people.[179] In most cases, disregarding an inseverability clause will contort that will.

177. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984) (emphasis added).

178. *Cf.* Friedman, *supra* note 67, at 914 (proposing a similar interpretation of the function of inseverability clauses).

179. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (2d ed. 1968) (coining the phrase "countermajoritarian difficulty" and describing the apparent tension between judicial review and the democratic process).

B. The Countermajoritarian Consequences of Ignoring Inseverability Clauses

Consider the following example.[180] Following a national crisis involving the travel industry, Congress and the President rapidly move to design comprehensive legislation designed to improve airport security. Although the Democrat-controlled Senate supports nationalizing airport security, the Republican House and President wish to leave airport security in private hands. After extensive negotiations, the competing legislative interests and the President agree to nationalize airport security, but, as a key compromise designed to alleviate the Republicans' fears, they also bar the new federal airport security employees from appealing or arbitrating termination decisions. In order to ensure that the judiciary cannot abrogate this compromise, Congress includes, and the President insists upon, an inseverability clause that would render the entire legislative scheme void if any part of it is declared unconstitutional.

After working for several weeks as a federal airport security agent, John Doe is fired without cause. Doe's initial attempt to appeal the decision is rebuffed on grounds that Congress has explicitly precluded him from doing so. However, he successfully argues on appeal that the "no appeals" provision relied upon by the trial court violates the Due Process Clause by denying him the right to a hearing before depriving him of his property interest in continued federal employment. At that point, the appeals court must determine whether to honor the statute's inseverability clause. Despite the clause's unmistakable clarity, the court holds that, because Congress would have enacted *some* form of airport security reform legislation even without the no appeals clause, and because national security could be compromised by invalidating certain aspects of the new legislative regime for providing airport safety, the provision should be severed and the remaining statutory scheme left in place. Following the court's decision, airport security remains nationalized and federal airport security workers are able to fully litigate termination decisions—a result that neither House Republicans nor the President would have allowed to become law.

C. Couldn't Congress Repeal The Remaining Statutory Structure?

Those tempted to favor an atextual approach to inseverability clauses might argue that a judicial decision to disregard an inseverability clause

180. As will quickly become clear, this hypothetical is based loosely on the debate surrounding the structure and enactment of the Airport Security Act crafted in the wake of September 11. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

threatens to inflict little long-term harm because Congress can effectively override the judgment by repealing the remaining statutory scheme.[181] After all, Congress pays careful attention to judicial decisionmaking and it overrules statutory precedents with some frequency.[182] Considering the critical eye it casts upon ordinary statutory decisions, Congress would be quick to overrule a precedent that abrogates an important legislative compromise. And legislative inaction in the wake of a court's decision to disregard an inseverability clause could therefore be interpreted as acquiescence in the decision, representing a new, majoritarian consensus supporting the remaining statutory structure.[183] Any countermajoritarian consequences of disregarding an inseverability clause would be short-lived and non-threatening.

This argument has no more than surface appeal. To begin with, the Court has (in other interpretive cases) generally rejected the idea that legislative silence should shape judicial treatment of a statute,[184] and it did so explicitly in *Alaska Airlines*.[185] The fact that Congress "hasn't barked"

181. *See, e.g.*, Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 3, 92 (1984) ("[I]f the court misconstrues the legislature's intent [with regard to the severability determination], Congress is free to enact new legislation to broaden or to narrow the scope of the [decision]."); *see also* Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1196 (1984) ("If Congress decides that the [severed] statute should not survive . . . Congress is free to repeal the statute.").

182. *See generally* Eskridge, *supra* note 175.

183. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1402 n.202 (collecting statutory interpretation opinions in which the Court has proffered a legislative acquiescence rationale for its decisions).

184. *See* Harrison v. PPG Indus., 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.") (referencing Arthur Conan Doyle, *The Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES (1938)). *But cf.* Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark."). There are two accepted exceptions to the Court's approach to legislative silence. First, the Court has held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983). Similarly, because "Congress is presumed to be aware of both the language and the judicial interpretation of pertinent, existing law when it passes legislation[, w]here Congress knows how to say something but chooses not to, its silence is controlling." Haas v. IRS (in re Haas), 48 F.3d 1153, 1156 (11th Cir. 1995) (applying the *Russello* rule to language in two provisions that were "neither part of the same title, nor the same statute."). The second exception is the traditional canon of statutory interpretation *expressio unius est exclusio alterius* – the expression of one thing is the exclusion of another. *See, e.g.*, Leatherman v. Tarrant Cty. Narcotics Intel. & Coord. Unit, 507 U.S. 163 (1993) ("The Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*.").

185. *Alaska Airlines*, 480 U.S. at 686 ("Congress' silence is just that – silence. . .").

simply does not signify legislative acquiescence in the Court's decisions.[186] But far more important, Article I's bicameralism and presentment requirements erect high barriers before an attempt to overcome the abrogation of a legislative deal rendered by a judicial decision refusing to enforce an inseverability clause. Our hypothetical airport security bill again illustrates how.

In the wake of the appeals court's decision to disregard the bill's inseverability clause (which resulted in a nationalized airport security regime that allows employees to appeal termination decisions), disappointed House Republicans (backed by the President), initiate an attempt to repeal the remaining statutory structure and restore a privatized airport security regime. After their legislation passes the House, it stalls in the Senate, where Democrats refuse to repeal nationalization—which, of course, was precisely what they had set out to achieve in the first place (having only reluctantly accepted the no appeals provision along the way). Thus, even though airport security could never have been nationalized in the absence of a no appeals provision, Article I, § 7 prevents repeal of the remaining statutory structure.[187]

Although this unfortunate outcome is most likely to occur when control of the House, Senate, and Presidency is divided, it is important to recognize that—even in the increasingly rare case in which those branches are controlled by the same party[188]—the distribution of policy preferences between the political parties, and within the lawmaking branches, can render it impossible to overturn a judicial decision to disregard an

186. *See* Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) ("[E]ven more troubling, the 'preemption-by-silence' rationale virtually amounts to legislation by default, in apparent violation of the constitutional requirements of bi-cameralism and presentment. Thus, even were we wrongly to assume that congressional silence evidenced a desire to pre-empt some undefined category of state laws, and an intent to delegate such policy-laden categorization to the courts, treating unenacted congressional intent as if it were law would be constitutionally dubious.")

187. In a certain sense, this outcome is indistinguishable from a one-house veto: one house of Congress has effectively made law (with the Court's encouragement) to the exclusion of the other lawmaking branches.

188. The same party that controlled the White House controlled 42 of the 60 Congresses elected between 1832 and 1952. By contrast, just 8 of the 25 Congresses elected between 1952 and 2002 (and only 4 elected since 1972) were controlled by the same party that controlled the Presidency. Author's calculations based on MORRIS FIORINA, DIVIDED GOVERNMENT 7 (2d ed. 1996) and BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000 at 281 (2000). Although both houses of the 107th Congress (elected in November of 2000) were initially controlled by the same party that won the Presidency, James Jeffords's decision to leave the Republican Party during the summer of 2001 put the Senate under Democratic control and divided control of the federal government. For that reason, I treat it as part of one of the 17 divided governments since 1952. For more on the increasingly common phenomenon of divided government, see DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990 (1991); DIVIDED GOVERNMENT: CHANGE, UNCERTAINTY, AND THE CONSTITUTIONAL ORDER (Peter F. Galderisi, ed., 1996); THE POLITICS OF DIVIDED GOVERNMENT (Gary W. Cox & Samuel Kernell, eds., 1991).

inseverability clause.[189] And while it is also true that a court's inquiry into legislative history *might* reveal the compromise reached by the parties in crafting this hypothetical legislation—thereby leading the court to honor the statute's inseverability clause—there is no reason to risk that it won't. There simply is no need to resort to legislative history to confirm what is readily apparent on the face of a statute containing an inseverability clause: The remaining statutory scheme could not have been adopted in the absence of a key provision later declared unconstitutional. It is hard to justify a presumptive approach to inseverability clauses that, at the very least, contains room for such irreversible countermajoritarian errors.[190] As with severability clauses, courts are duty-bound to enforce unambiguous inseverability directives.

V. Severability in the Absence of Explicit Legislative Guidance

To this point, I have focused exclusively on how courts should treat unambiguous legislative instructions regarding severability. In a single word, my answer is: dispositively. But Congress does not always tell the courts what to do. Even when it knows that legislation is likely to face a constitutional challenge, it sometimes fails to enact a severability or inseverability clause.[191] The remaining question, then, is how courts should approach severability in the absence of explicit statutory guidance.

Here, I advocate the establishment of a clear statement rule favoring severability: "Statutes are severable unless the legislature clearly states otherwise." Although commentators have criticized the Court's increasing reliance on clear statement rules, their concerns have generally focused on the norm-based nature and application of such rules.[192] Because a clear statement rule in the severability context does not implicate a norm-based inquiry, such concerns are largely inapposite here—and a clear statement

189. Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AM. POL. SCI. REV. 519 (1999) (arguing that legislative gridlock is predicated on the distribution of policy preferences within political parties and across Congress, and not just upon party control itself).

190. Such errors are not only irreversible because Article I, § 7 can paralyze Congress's corrective attempts, but because the extra robust form of stare decisis for statutory precedents makes it highly unlikely that the Supreme Court will eventually reverse its initial decision. For an illuminating discussion of the "super strong" stare decisis accorded to statutory precedents, see generally Eskridge, *supra* note 183.

191. *See, e.g.*, Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1760 (codified in scattered sections of 5 U.S.C.) (partially invalidated in United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995)); Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021 *et. seq.*) (partially invalidated in New York v. United States, 505 U.S. 144 (1992)); Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2017 (codified as amended at 18 U.S.C. § 3551 *et seq.* and 28 U.S.C.S. §§ 991-998) (challenged repeatedly until upheld in Mistretta v. United States, 488 U.S. 361 (1989)).

192. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

rule for severability offers the same advantages used to support the implementation of similar rules in the quasi-constitutional context (most notably, that such rules establish a clear interpretive background against which future Congresses can legislate).

A. Toward a Clear Statement Rule Favoring Severability

As a preliminary matter, a rule favoring severability in the absence of contrary legislative guidance is well-supported by precedent. As noted earlier, the Court's earliest severability cases readily assumed that partially unconstitutional statutes should be severed.[193] In the intervening two hundred years, only a handful of cases have explicitly held otherwise, and each was decided between 1928 and 1938.[194] To the extent that early practice and precedent shed light on the original understanding, they certainly suggest the propriety of a rule favoring severability.

Some might respond that the nature of statutes has changed too much to justify continued adherence to this approach. Although early federal statutes, like that confronted by the Justices in *Marbury*, were largely *enabling* (e.g., establishing a federal judicial structure pursuant to a specific constitutional authorization), more recent statutes, and particularly those rooted in the New Deal, are increasingly *regulatory* (e.g., fixing prices for a good and controlling the conditions under which it is produced).[195] As a

193. *See supra* Section II.A.

194. *See* Electric Bond & Share Co. v. SEC, 303 U.S. 419, 435 (1938) ("[A severability clause] reverses the presumption of inseparability – that the legislature intended the Act to be effective as an entirety or not at all."); Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936) ("[T]he rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it."); Railroad Retirement Bd. v. Alton Railroad Co., 295 U.S. 330, 362 (1935) ("[U]nless the act operates as an entirety it shall be wholly ineffective."); Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184 (1932) ("[T]he common law presumption [is] that the legislature intends an act to be effective as an entirety."); Williams v. Standard Oil Co., 278 U.S. 235, 241 (1928) ("In the absence of [a severability clause], the presumption is that the legislature intends an act to be effective as an entirety.").

195. As Professors Eskridge and Ferejohn have observed, "[m]ost of the laws adopted in the first Washington administration were short measures addressing particular issues of maritime regulation, taxation and licensing, federal-state relations, and the mechanics of the new federal government." William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1223 (2001). Even the "super-statutes" of the early federal Congresses—like the Federal Judiciary Act of 1789, ch. 20, 1 Stat. 73, and the Act establishing the first Bank of the United States, Act of Feb. 25, 1791, ch. 10, 1 Stat. 191—bear little resemblance to the complex regulatory laws so common today. When the first great regulatory statutes emerged in the late nineteenth century, they were quite limited in scope. John Noyes explains:

Although principles of administrative law had developed before 1916 and a significant bureaucracy was [then] in place. . ., most early agencies performed only routine tasks. The creation of the Interstate Commerce Commission in 1887 signaled the development of administrative agencies with broad regulatory powers. Yet although the ICC came to assume great adjudicatory and rule-making powers affecting the railroad industry, its abilities and desire to

result, scholars often point to the inescapable tension between "the eighteenth-century Madisonian constitutional engine of limited, internally checked government and the realities of our sprawling contemporary structures."[196] Professor Strauss elaborates:

> Laissez faire and minimal government have been replaced by welfare economics and pervasive government; the implicit assumption that the common law provides a prepolitical baseline of individual relations has been replaced by a disposition to regard all law, common and statutory, in terms of both the social ends it seeks and those it achieves. These recent developments . . . have moved government even more profoundly into the lives of citizens, regulating not only activity in the economic marketplace but also what might seem to be more private preferences for such tastes as risk, beauty, recreation, and social milieu.[197]

Indeed, the kinds of deals that Congress makes in crafting this kind of legislation are likely to differ substantially from those it made prior to the modern era of greater federal intervention into the national economy (and private decisionmaking). Not only are modern regulatory statutes more likely than non-regulatory statutes to include interdependent provisions; the invalidation of one of those provisions is likely to more profoundly unbalance a comprehensive modern regulatory scheme than it would the kind of non-regulatory scheme generally passed before the turn of the twentieth century. Congressmen willing to vote for a statutory provision that imposes regulatory burdens on one constituency, for instance, would likely reconsider their support for that provision if they knew that the courts

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regulate the railroad industry developed gradually. The Act creating the Interstate Commerce Commission initially provided only weak powers, designed to combat discriminatory trade practices. Furthermore, the courts limited ICC abilities to act forcefully until the mid-1890s. [Only a]fter that did the Congress beg[i]n to bolster the Commission through new delegations of powers and duties.

John E. Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U. CIN. L. REV. 145, 182 n. 176. (1987) (citations omitted). Other examples of early regulatory legislation include the Sherman Antitrust Act, Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-2 (1994)), and the Pure Food and Drugs Act of 1906, Pub. L. No. 384, 34 Stat. 768, but even these rested largely on delegations of quasi-legislative authority to administrative agencies, rather than upon complex, statutorily-intrinsic mechanisms.

196. Peter L. Strauss, *Sunstein, Statutes, and the Common Law: Reconciling Markets, the Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907 (1991) (reviewing CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990)).

197. *Id*. at 908.

would hold unconstitutional another provision imposing similar burdens on other constituencies.[198] In the regulatory state, perhaps, the rule favoring severability laid down by the Court's early severability precedents—even as modified by more recent cases like *Alaska Airlines*—may no longer be desirable.

But while the contours of federal "statutorification" may have changed over time, the core constitutional principle of judicial deference to legislative supremacy has not. In our system of separated powers, judicial respect for the legislature spurs numerous constitutional restraints upon the judiciary's ability to act. Article III limits the reach of judicial pronouncements to "cases and controversies"[199] and precludes courts from issuing advisory opinions.[200] Several traditional canons of statutory interpretation—each with arguable constitutional pedigree—similarly suggest judicial restraint: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score"[201] and "Statutes are presumed constitutional"[202] are but two examples.[203] And as Alexander Bickel famously observed, a court's

198. *See, e.g.*, 149 CONG. REC. S2096, S2152 (March 20, 2002) (statement of Sen. Nelson) ("I am pleased with the Snowe-Jeffords provision in [McCain-Feingold], which addresses some of the problems created by so-called issue ads funded by special interest groups and corporations. This provision will hold these groups more accountable for their ads by imposing strict broadcasting regulations and increasing disclosure requirements, effectively putting light where the sun doesn't shine in issue advocacy. Unfortunately, as many of my colleagues have pointed out, this provision is arguably the most susceptible to being struck down as unconstitutional by the Supreme Court. *If the Shays-Meehan bill had a non-severab[ility] clause that would protect it from selective dissection by the Supreme Court – which we unsuccessfully tried to include in the McCain-Feingold bill last year – I would be much more inclined to support this bill. It now seems likely that parts of this bill will be struck down in court, creating, in effect, an off-balance piece of legislation that will penalize some groups – the political parties – while giving 'issue advocacy' groups more influence.* This will alter the very basis of our political system and give disproportionate power to the least accountable groups around. I cannot support any legislation that will not only not fix our current problems but will create new ones by putting candidates of all parties at the mercy of these shadow groups, while at the same time taking away much of their ability to respond.") (emphasis added).

199. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

200. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

201. United States v. Jin Fuey Moy, 241 U.S. 394 (1916). *See also* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). For criticism of the avoidance canon, see Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.").

202. Bush v. Vera, 517 U.S. 952, 991 (1996); *see also* Fairbank v. United States, 181 U.S. 283, 285 (1901) ("The presumptions are in favor of [a statute's] constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear.").

203. Adrian Vermeule perceptively notes several tensions between the canon of constitutional avoidance and the traditional presumption in favor severability, most important among them the

pronouncement that certain laws are constitutional (against a backdrop where it has the power to invalidate unconstitutional laws) serves an important legitimating function in our constitutional democracy.[204]

Each of these notions supports holding statutes severable—toward preserving all provisions of a statute except for those that are truly unconstitutional, and toward avoiding more searching inquiry than necessary to decide the particular case in front of the court. These are reasons why, as Justice Hughes famously declared, "The cardinal principle of statutory construction is to save and not to destroy."[205] And they are why the most appropriate rule for severability would be a simple clear statement rule[206]: "Statutes are severable unless the legislature clearly states otherwise." It rests the decision with regard to severability with the people, respecting both their desires and the process that enacted them. If we are unsatisfied with the substantive statutory outcome, our remedy is at the ballot-box; severability, as a general matter, does not implicate the kinds of underenforced constitutional norms that might otherwise solicit more aggressive review.[207]

B. Cautions Against a Clear Statement Rule Favoring Severability

Nevertheless, several prudential considerations may be thought to point toward a clear statement rule *against* severability: "Statutes are *in*severable unless the legislature clearly states otherwise." Just as the insights of public choice theory into the complexities of legislative dealmaking demonstrate how a court's refusal to heed an inseverability clause is likely to leave in place legislation that never could have been adopted, so these insights show

fact that applying the avoidance canon *frustrates* congressional attempts to exercise its powers as desired, while presuming severability *allows* Congress to exercise its maximal constitutional authority. *See* Vermeule, *supra* note 14, at 1961-64. My argument here is not that severability should be presumed *because* of the avoidance canon—an argument that Vermeule is right to reject—but simply to note that the perception of judicial restraint (mistakenly) underlying the Court's use of the avoidance canon supports a presumption of severability, which really does reflect judicial respect for legislative supremacy.

204. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 29-33 (1962).

205. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

206. John Copeland Nagle advocates a similar clear statement rule, but expresses doubts I do not share. *See* Nagle, *supra* note 13, at 254-57.

207. *See* United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938). In the equal protection context, or where constitutionally-troubling underinclusiveness is at issue, the choice confronted by a court is not whether to *retain* or invalidate the remaining statute, but whether to *extend* or remove the benefit or penalty improperly distributed by the law. In such cases, the constitutional harm which prompted the court's decision may be thought to support a particular outcome to the court's inquiry. *See generally* Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185 (1984). Courts may legitimately take into account these quasi-constitutional considerations so long as Congress has not made its preferred outcome clear in the statutory text or structure.

how a strong rule favoring severability might frustrate legislative intent. In some cases, a legislative deal may not have been concrete enough to warrant an inseverability clause, yet its absence may still have cost the whole measure its passage.[208] A court that blindly adheres to a preference for severability might thereby miss the less readily-apparent deals that make a statute what it is.

Even so, I suspect that this will occur with only the greatest infrequency. As noted, Congress almost always considers severability, and it usually includes a severability clause in constitutionally-questionable legislation. In very rare instances, Congress includes an inseverability clause. This suggests that in the vast majority of cases, Congress intends its statutes to be severable—and that when it does not, it says so. Against a backdrop where Congress almost always favors severability, this miniscule level of risk is hard-pressed to justify a rule favoring inseverability in the face of the constitutional considerations outlined above.

Ironically, Congress's preference for severability could also be used to justify a general rule *against* severability. On this theory, a clear statement rule disfavoring severability would make severability clauses more popular in Congress, which would in turn limit judicial discretion to decide future cases. The surest way to ensure that Congress addresses severability is to discipline it into doing so: If the courts, for lack of a severability clause, wholly invalidate a statute Congress clearly intended to be severable and announce that they will continue to do so in the future, Congress will learn its lesson—it will tell the courts what to do. This, after all, is the moral of *Warren* and its progeny. Fed up with the courts' invalidation of partially-unconstitutional statutes under a qualified presumption of severability, legislatures *began* including severability clauses in constitutionally-questionable legislation. Now, they will *always* do so.

This notion, of course, presumes that the courts will respect unambiguous severability directives—a dangerous presumption given their current disposition (and particularly because Congress's ever-increasing passage of severability clauses has given rise to the argument that such clauses are somehow meaningless). But even if one was willing to overlook this problem, a clear statement rule *favoring* severability would accomplish the same thing. When Congress actually intends a statute to be inseverable, against a legal background where severability is the default rule in the absence of a clear statement to the contrary, it will include an inseverability clause: Congress is presumed to know the rules of statutory interpretation

208. Professor Eskridge's case study of the Civil Rights Act of 1964 and the Supreme Court's decision in *United Steelworkers v. Weber* helps illustrate how difficult it is to reconstruct how legislators would have voted on legislation lacking a key provision—and just how close these reconstructed "votes" can be. *See* ESKRIDGE, *supra* note 135, at 14-31 (1994).

and can be expected to legislate accordingly.[209] The gain in certainty produced by a clear statement rule disfavoring severability—in a world where the courts treat unambiguous severability and inseverability directives dispositively—would therefore be minimal at best.

One final argument merits attention. Partially as a consequence of the increasingly "activist"[210] approach taken by the Supreme Court (both over the long-run, as evidenced by the transformation of the Court's role under Chief Justice Warren,[211] and the recent short-run, as evidenced by the Rehnquist Court's willingness to invalidate federal legislation[212]), but also due to features which inhere in the institution of judicial review, the executive and legislative branches of the federal government are too often willing to stretch (or compromise) constitutional principles. Congress occasionally passes legislation that even its supporters acknowledge to pose serious constitutional concerns, and Presidents sometimes support legislation they believe to be constitutionally dubious, because they sense that the courts are available as the ultimate arbiter of constitutional disputes.[213]

This ever-increasing willingness of the lawmaking branches to leave constitutional inquiry to the courts raises a serious concern: It not only tends to undermine the democratic process, [214] but it diminishes the security

209. McNary v. Haitian Refugee Ctr., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.")

210. I use the term "activist" here *solely* to denote the practice of invalidating legislation on constitutional grounds, *not* to imply improper judicial lawmaking (which is how the term is most appropriately employed). For a consideration of the difference between these distinct judicial practices and a historical analysis of twentieth century "judicial activism," see Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 889-898 (4th Cir. 1999) (Wilkinson, C.J., concurring).

211. *See generally* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1998).

212. *See* Neal Devins, *Congress As Culprit: How Lawmakers Spurred On The Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001) (noting that the Rehnquist Court invalidated 27 laws between 1995 and 2001).

213. *See* Joel Mowbray, *The Bush Way of Compromise*, WASH. TIMES, Apr. 12, 2002, at A23 (noting that President Bush's statement accompanying his signing of the McCain-Feingold campaign finance reform bill expressed "grave concerns" about the legislation's constitutionality); s*ee also* 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297-98 (1938) (letter to Rep. Samuel B. Hill, July 6, 1935) ("Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests, for the simple fact that you can get not ten but a thousand differing legal opinions on the subject. But the situation is so urgent and the benefits of the legislation so evident that *all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality*.") (emphasis added).

214. *See* JAMES BRADLEY THAYER, JOHN MARSHALL 103-04, 106-07 (1901), *quoted in* BICKEL, *supra* note 179, at 22 ("The exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral

with which citizens' rights are protected. Part of the genius of the Constitution's separation of powers is its subjugation of governmental power to multiple centers of authority that can prevent liberty-infringing legislation from becoming law.[215] If two branches of government abdicate that responsibility to the third, the Constitution's conscientious design to create multiple layers of protection from state authority is weakened dramatically.[216]

Though it is not obvious, some might argue that a rule disfavoring severability would promote these inherently libertarian constitutional values. If Congress were faced with real consequences for including unconstitutional provisions in legislation—if its entire statutory scheme would be invalidated—it might more carefully hew to constitutional norms, and rather than pushing against constitutional strictures for political gain, the costs (in wasted time and effort) might spur both Congress and the President to more fully respect constitutional limitations. I certainly share these concerns, but a rule disfavoring severability would do little to assuage them. So long as the legislature can enact severability clauses, and so long as courts enforce them under a clear statement rule favoring severability, Congress will be fully able to avoid any consequences from a rule favoring wholesale invalidation of partially-unconstitutional legislation.

In the final analysis, then, Congress's overwhelming preference for severability and the long-recognized need for courts to exercise restraint in judicial review militate strongly in favor of a clear statement rule supporting severability.[217]

responsibility. It is no light thing to do that."); *see also* BICKEL, *supra* note 179, at 21 (arguing that judicial review may "have a tendency over time to seriously weaken the democratic process").

215. *See supra* text accompanying notes 158-165.

216. Indeed, it bears noting that our constitutional design anticipates that the primary source of protection against governmental abuse will be political—not judicial, as we too often assume in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954). For a discussion of the constitutional design and the Framers' primary emphasis on non-judicial political/structural constraints, see generally Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001), and especially pages 71-73.

217. Of course, it would also be possible for courts to adopt a rule neither favoring nor disfavoring severability in the absence of a clear congressional statement. Courts would presumably then resort to their usual interpretive tools to address the issue. This would be the worst of all possible worlds. As Justice Scalia has noted, for the Court "to display uncertainty regarding the current background rule makes all unspecifying new legislation a roll of the dice." TRW, Inc. v. Andrews, 534 U.S. 19, 35 (2001) (Scalia, J., concurring in the judgment). In deciding statutory cases, the Supreme Court's most important function (aside from resolution of the narrow statutory issue before it) is to provide Congress with a clear background of interpretive norms against which it can legislate with predictability: It should not introduce further uncertainty into an already tangled legislative process by "eschewing clear rules that might [also] avoid litigation." U.S. Airways v. Barnett, 122 S.Ct. 1516, 1529 (2002) (Scalia, J. dissenting); *see also* Kansas v. Crane, 534 U.S. 407, 424 (2002) ("It is irresponsible to leave the law in such a state of utter indeterminacy.") (Scalia, J., dissenting).

VI. Conclusion

The Court's current severability jurisprudence is largely outdated, and it fails to account for the constitutional requirements within which it must be crafted and the more prudential concerns that ought to animate it. I have argued here that, when confronted with an unambiguous directive either to sever or entirely invalidate a statute, federal courts are bound by constitutional norms (supported by pragmatic considerations) to give full effect to these statutory provisions. When Congress fails to address severability, principles of judicial restraint point toward holding statutes severable in the absence of a countervailing clear statement. With McCain-Feingold poised to arrive shortly at the Supreme Court—and with a sharp division over severability among the special panel's judges—the Justices now have a golden opportunity to correct eighty years of fundamentally misguided doctrinal development.

I also hope that the preceding discussion has helped demonstrate precisely why severability matters so much—not only in practice, but at the core of constitutional theory. In the modern debate over interpretive practice, severability is the single issue that most starkly pits the opposing theoretical camps against each other. Textualists have in severability and inseverability clauses prototypically unambiguous statutory directives which solicit no difficult interpretation. Indeed, they solicit no "interpretation" at all: Unlike the overwhelming majority of statutes, severability and inseverability clauses leave no gaps to be filled by a court exercising otherwise traditional interpretive powers; and they contain no ambiguous terms susceptible to competing understandings among which a court can, and indeed must, choose. If the legislature's plain textual statement cannot trump judicial lawmaking here, as opponents of textualism insist it should not, then legislative action cannot trump judicial supremacy at all. Given these stakes, scholars and judges have paid far too little attention to severability doctrine and theory.